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WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, September 11, 2007
9:00 a.m.–Noon

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

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Rules and Regulations

Federal Register
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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28842; Directorate Identifier 2007–CE–064–AD; Amendment 39–15162; AD 2007–17–04]

RIN 2120–AA64

Airworthiness Directives; Aquila Technische Entwicklungen GmbH (AQUILA) Model AT01 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued by the aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

> Deformations of cross sections of the rear exhaust pipes were stated on several serial numbers having logged varying operating hours. One strongly deformed exhaust pipe showed additional cracks near the welding.

This AD requires actions that are intended to address the unsafe condition described in the MCAI.

DATES: This AD becomes effective September 25, 2007.

As of September 25, 2007 the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

We must receive comments on this AD by September 20, 2007.

ADDRESSES: You may send comments by any of the following methods:

- *DOT Docket Web Site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Karl Schletzbaum, Aerospace Engineer, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD No.: 2006–0151, dated May 30, 2006 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Deformations of cross sections of the rear exhaust pipes were stated on several serial numbers having logged varying operating hours. One strongly deformed exhaust pipe showed additional cracks near the welding.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Aquila Technische Entwicklungen GmbH has issued Aquila GmbH Service Bulletin SB–AT01–008, Issue 2, dated April 28, 2006. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all information provided by the State of Design Authority and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

There are no products of this type currently registered in the United States. However, this rule is necessary to ensure that the described unsafe condition is addressed if any of these products are placed on the U.S. Register in the future.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the AD.

Comments Invited

Since there are currently no domestic operators of this product, notice and opportunity for public comment before issuing this AD are unnecessary.

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–28842;

Directorate Identifier 2007–CE–064–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2007–17–04 Aquila Technische Entwicklungen GmbH: Amendment 39–15162; Docket No. FAA–2007–28842; Directorate Identifier 2007–CE–064–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective September 25, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model AQUILA AT01 airplanes, all serial numbers, certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 05: Maintenance Checks.

Unsafe Condition

(e) The mandatory continuing airworthiness information (MCAI) states:

Deformations of cross sections of the rear exhaust pipes were stated on several serial numbers having logged varying operating hours. One strongly deformed exhaust pipe showed additional cracks near the welding.

Actions and Compliance

(f) Unless already done, within the next 10 hours time-in-service (TIS) after the effective date of this AD and thereafter at intervals not to exceed 50 hours TIS inspect the exhaust system for cracks and deformations and, if necessary, replace the defective parts following Aquila GmbH Service Bulletin and supplement SB–AT01–008, Issue 2, dated April 28, 2006.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Staff, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Karl Schletzbaum, Aerospace Engineer, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; fax: (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2006–0151, dated May 30, 2006; and Aquila GmbH Service Bulletin and supplement SB–AT01–008, Issue 2, dated April 28, 2006, for related information.

Material Incorporated by Reference

(i) You must use Aquila GmbH Service Bulletin and supplement SB–AT01–008, Issue 2, dated April 28, 2006, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact AQUILA GmbH, Flugplatz, D–14959 Schoenhagen, Germany; telephone: ++49 (0) 33731–707–0; fax: ++49 (0) 33731–707–11.

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri on August 6, 2007.

Kim Smith,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–15913 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–27864 Directorate Identifier 2007–CE–038–AD; Amendment 39–15161; AD 2007–17–03]

RIN 2120–AA64

Airworthiness Directives; Pacific Aerospace Corporation, Ltd. Model 750XL Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

To prevent damage to the rear spar due to working and failing rivets between the rear spar and the inboard rib * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective September 25, 2007.

On September 25, 2007, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on June 15, 2007 (72 FR 33166). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

To prevent damage to the rear spar due to working and failing rivets between the rear spar and the inboard rib * * *

The MCAI requires inspecting the inboard end of the rear spar for security of the blind rivets, inspecting the radii of the rear spar upper and lower flanges for cracking, inspecting the aft flange of the inboard rib for cracking, replacing the rear spar if cracks are found in any of the inspections, and replacing rear spar blind rivets with bolts or rivets.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the AD.

Costs of Compliance

We estimate that this AD will affect 7 products of U.S. registry. We also estimate that it will take about 40 work-hours per product to comply with basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $200 per product.

Based on these figures, we estimate the cost of this AD to the U.S. operators to be $23,800 or $3,400 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD Docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2007–17–03 Pacific Aerospace Corporation, Ltd.: Amendment 39–15161; Docket No. FAA–2007–27864; Directorate Identifier 2007–CE–038–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective September 25, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model 750XL airplanes, serial numbers 101, 102, and 104 through 128, certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 57: Wings.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

To prevent damage to the rear spar due to working and failing rivets between the rear spar and the inboard rib * * *

The MCAI requires inspecting the inboard end of the rear spar for security of the blind rivets, inspecting the radii of the rear spar upper and lower flanges for cracking, inspecting the aft flange of the inboard rib for cracking, replacing the rear spar if cracks are found in any of the inspections, and replacing the rear spar blind rivets with bolts or rivets.

Actions and Compliance

(f) Unless already done, do the following actions in accordance with Pacific Aerospace Limited Mandatory Service Bulletin PACSB/XL/022, dated February 14, 2007:

(1) Within 50 hours time-in-service (TIS) after September 25, 2007 (the effective date of this AD), and thereafter at intervals not to exceed 150 hours TIS until the blind rivets have been replaced by bolts or rivets as required in paragraph (f)(3) of this AD, inspect the inboard end of the rear spar for security of the blind rivets, which attach the fuselage attach fitting to the rear spar and inboard rib; inspect the radii of the rear spar upper and lower flanges for cracking; and inspect the aft flange of the inboard rib for cracking.

(2) Before further flight, after any inspection where cracking is found, repair the aft flange of the inboard rib and/or replace the rear spar.

(3) Within the next 12 months after September 25, 2007 (the effective date of this AD) or within the next 300 hours TIS after September 25, 2007 (the effective date of this AD), whichever occurs first, replace the blind rivets (part number NAS1738E–6–6) that join the rear spar and the aft end of the inboard rib with bolts or rivets.

(4) After the modification required in paragraph (f)(3) of this AD, repetitively inspect the main wing aft attachment area at intervals not to exceed 12 months or 300 hours TIS, whichever occurs first. If any cracks are found, prior to further flight, repair the main wing aft attachment area.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Staff, FAA, ATTN: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; fax: (816) 329–4090, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to the Civil Aviation Authority (CAA), which is the airworthiness authority for New Zealand AD DCA/750XL/9, dated March 29, 2007; and Pacific Aerospace Limited Mandatory Service Bulletin PACSB/XL/022, dated February 14, 2007, for related information.

Material Incorporated by Reference

You must use Pacific Aerospace Limited Mandatory Service Bulletin PACSB/XL/022, dated February 14, 2007, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Pacific Aerospace Limited, Hamilton Airport, Private Bag, 3027 Hamilton, New Zealand; telephone: +64 7–843–6144; facsimile: +64 7–843–6134.

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Kansas City, Missouri, on August 8, 2007.

John R. Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–15978 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–27191; Directorate Identifier 2007–CE–007–AD; Amendment 39–15167; AD 2007–17–09]

RIN 2120–AA64

Airworthiness Directives; Mitsubishi Heavy Industries MU–2B Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) to supersede 93–07–11 and AD 94–04–16, which apply to certain Mitsubishi Heavy Industries MU–2B series airplanes. AD 93–07–11 and AD 94–04–16 currently require you to reduce the maximum deflection of the elevator nose-down trim to a 1-degree to 3-degree range. When the above AD actions were issued, there was no associated elevator trim indicator change. Without such change, the trim reaches the maximum nose-down limit and the indicator still shows additional nose-down trim available. In attempting to force additional nose-down trim, pilots have manually jammed the trim system preventing subsequent electric trim changes until the pilot manually freed the trim wheel. Consequently, this AD retains the actions from AD 93–07–11 and AD 94–04–16 and adds the action of modifying the elevator trim indicator scale dial to be consistent with the reduced elevator trim capability. We are issuing this AD to prevent the above scenarios from occurring with consequent loss of control.

DATES: This AD becomes effective on September 25, 2007.

On September 25, 2007, the Director of the Federal Register approved the incorporation by reference of Mitsubishi

Heavy Industries, Ltd., Service Bulletin No. 091/27–011, dated August 6, 1998; and Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 228, dated July 13, 1998 listed in this AD.

As of June 1, 1993, the Director of the Federal Register approved the incorporation by reference of Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 079/27–010, dated August 28, 1992, listed in this AD.

As of April 11, 1994, the Director of the Federal Register approved the incorporation by reference of Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 216, dated September 11, 1992, listed in this AD.

ADDRESSES: For service information identified in this AD, contact Mitsubishi Heavy Industries America, Inc., 4951 Airport Parkway, Suite 800, Addison, Texas 75001; telephone: 972–934–5480; fax: 972–934–5488.

To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://dms.dot.gov.* The docket number is FAA–2007–27191; Directorate Identifier 2007–CE–007–AD.

FOR FURTHER INFORMATION CONTACT: Werner G. Koch, Aerospace Engineer, Fort Worth Airplane Certification Office, ASW–150, Rotorcraft Directorate, FAA, 2601 Meacham Boulevard, Fort Worth, Texas 76137–4298; telephone: (817) 222–5133; fax: (817) 222–5960.

SUPPLEMENTARY INFORMATION:

Discussion

On March 27, 2007, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Mitsubishi Heavy Industries MU–2B series airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on April 3, 2007 (72 FR 15850). The NPRM proposed to supersede AD 93–07–11 and AD 94–04–16, retain the actions of reducing the maximum deflection of the elevator nose-down trim to a 1-degree to 3-degree range from AD 93–07–11 and AD 94–04–16, and add the action of modifying the elevator trim indicator scale dial to be consistent with the reduced elevator trim capability.

Comments

We provided the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal and FAA's response to each comment:

Comment Issue No. 1: Increased Trim Down Limit

Salomon R. Dionicio suggests increasing the trim down limit, because under certain conditions some pilots may need more down trim. The commenter is also concerned about the needle bending or jumping and the cable stretching every time the wheel is forced against the stop.

MU–2B series airplanes, both the long and short body, for all affected weights and center-of-gravity conditions, require very little nose-down trim. A review of FAA data revealed incidents that occurred before issuance of AD 93–07–11 and AD 94–04–16 where pilots attempted to override the autopilot and inadvertently ran the nose-down trim to the down stop. This resulted in excessive control wheel force that could only be removed by either manually or electrically trimming the nose-down trim back into a normal (or positive) range. AD 93–07–11 and AD 94–04–16 reduced the nose-down trim from a range of −10 degrees to a −1 degree to −3 degree range. Since the issuance of those ADs, FAA data shows no incident involving excessive nose-down trim forces; therefore, the FAA disagrees with increasing the trim limit in the nose-down direction.

A stopper limits the travel nut in the trim system preventing any cable from stretching. The FAA has not received any reports of any needles bending or cables failing.

We are not changing the AD as a result of this comment.

Comment Issue No. 2: Revised Compliance Time

Mitsubishi Heavy Industries America, Inc. suggests revising the compliance time in paragraph (e)(1)(i) of the AD to add a 6-month calendar date limitation in addition to the 100-hour flight time limitation since some airplanes fly infrequently. The addition of a 6-month compliance time would more closely match the compliance time of the Japan Civil Aviation Bureau (JCAB) technical circular directive No. TCD–3740A–98 and avoid possible confusion for operators.

We disagree with the commenter. The 100-hour compliance time in paragraph (e)(1)(i) is the compliance time for the actions we are retaining from AD 94–04–16 and refers to within 100 hours from April 11, 1994, the effective date of that AD.

We are not changing this final rule AD action as a result of this comment.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. In the NPRM we inadvertently omitted Model MU–2B–36 from the Applicability section for TCDS A10SW. Since that model appears on TCDS A10SW, we are adding it to the applicability in case the manufacturer produces serial numbers for this model in the future. However, since no serial numbers currently exist for this model on TCDS A10SW, adding the model to the applicability does not add to the burden of this AD. We have determined that these minor corrections:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Costs of Compliance

We estimate that this AD affects 400 airplanes in the U.S. registry.

Costs Retained From AD 93–07–11 and AD 94–04–16

We estimate the following costs to do the modification of the elevator nose-down trim:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
6 work-hours × $80 per hour = $480	$300	$780	$312,000

Additional Costs for This AD

We estimate the following costs to do the modification of the elevator trim indicator scale dial:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 work-hour × $80 per hour = $80	N/A	$80	$32,000

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this AD.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include ''Docket No. FAA–2007–27191; Directorate Identifier 2007–CE–007–AD'' in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 93–07–11, Amendment 39–8543 and AD 94–04–16, Amendment 39–8836 (59 FR 8520, February 23, 1994), and adding the following new AD:

2007–17–09 Mitsubishi Heavy Industries: Amendment 39–15167; Docket No. FAA–2007–27191; Directorate Identifier 2007–CE–007–AD.

Effective Date

(a) This AD becomes effective on September 25, 2007.

Affected ADs

(b) This AD supersedes AD 93–07–11, Amendment 39–8543; and AD 94–04–16, Amendment 39–8836.

Applicability

(c) This AD applies to the following airplane models and serial numbers that are certificated in any category:

(1) Category 1 Airplanes (TCDS A2PC):

Model	Serial Nos.
(i) MU–2B, MU–2B–10, MU–2B–15, MU–2B–20, MU–2B–25, and MU–2B–26.	008 through 347 (except 313 and 321).
(ii) MU–2B–30, MU–2B–35, and MU–2B–36	501 through 696 (except 652 and 661).

(2) Category 2 Airplanes (TCDS A10SW):

Model	Serial Nos.
(i) MU–2B–25, MU–2B–26, MU–2B–26A, and MU–2B–40	313SA, 321SA, 348SA through 459SA.
(ii) MU–2B–35, MU–2B–36, MU–2B–36A, and MU–2B–60	652SA, 661SA and 697SA through 1569SA.

Unsafe Condition

(d) This AD results from several incidents caused by excessive control wheel force. We are issuing this AD to retain the actions of reducing the maximum deflection of the elevator nose-down trim to a 1-degree to 3-degree range from AD 93–07–11 and AD 94–04–16 to prevent excessive control wheel force caused by extreme elevator nose-down trim deflection. We are also issuing this AD to modify the elevator trim indicator scale dial to be consistent with the reduced elevator trim capability. Inconsistencies between the elevator indicator scale dial and the elevator trim mechanical stop may result in the pilot thinking that more nose-down trim is available beyond the mechanical stop. Attempting to force additional nose-down trim beyond the mechanical stop may jam the trim system, preventing subsequent electric trim changes until the pilot manually frees the trim wheel. These conditions may result in loss of control.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Reduce the maximum deflection of the elevator nose-down trim to a 1-degree to 3-degree range.	(i) *For Category 1 airplanes:* Within the next 100 hours time-in-service (TIS) after April 11, 1994 (the effective date of AD 94–04–16). (ii) *For Category 2 airplanes:* Within the next 100 hours TIS after June 1, 1993 (the effective date of AD 93–07–11).	(A) *For Category 1 airplanes:* Follow Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 216, dated September 11, 1992. (B) *For Category 2 airplanes:* Follow Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 079/27–010, dated August 28, 1992.
(2) Modify the elevator trim indicator scale dial	Within the next 100 hours TIS after September 25, 2007 (the effective date of this AD).	(i) *For Category 1 airplanes:* Follow Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 228, dated July 13, 1998. (ii) *For Category 2 airplanes:* Follow Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 091/27–011, dated August 6, 1998.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Fort Worth Airplane Certification Office (ACO), FAA, ATTN: Werner G. Koch, Aerospace Engineer, Fort Worth ACO, ASW–150, Rotorcraft Directorate, FAA, 2601 Meacham Boulevard, Fort Worth, Texas 76137–4298; telephone: (817) 222–5133; fax: (817) 222–5960, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(g) AMOCs approved for AD 93–07–11, Amendment 39–8543 and AD 94–04–16, Amendment 39–8836 are approved for this AD.

Material Incorporated by Reference

(h) You must use Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 216, dated September 11, 1992; Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 079/27–010, dated August 28, 1992; Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 228, dated July 13, 1998; and Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 091/27–011, dated August 6, 1998; to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 228, dated July 13, 1998; and Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 091/27–011, dated August 6, 1998; under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) On June 1, 1993, the Director of the Federal Register approved the incorporation by reference of Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 079/27–010, dated August 28, 1992, listed in this AD.

(3) On April 11, 1994, the Director of the Federal Register approved the incorporation by reference of Mitsubishi Heavy Industries, Ltd., Service Bulletin No. 216, dated September 11, 1992, listed in this AD.

(4) For service information identified in this AD, contact Mitsubishi Heavy Industries America, Inc., 4951 Airport Parkway, Suite 800, Addison, Texas 75001; telephone: 972–934–5480; facsimile: 972–934–5488.

(5) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri, on August 14, 2007.

Terry L. Chasteen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–16288 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–24952; Directorate Identifier 2006–NM–107–AD; Amendment 39–15157; AD 2007–16–18]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 767 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Boeing Model 767 airplanes. This AD requires repetitive detailed inspections of the wire bundles, power drive unit (PDU) wiring, and wire attaching hardware, supports, and sleeving located in the forward and aft lower lobe cargo compartments, and corrective actions as necessary. This AD results from a fire in the forward lower lobe cargo compartment found shortly after airplane arrival. We are issuing this AD to detect and correct damage to wires in the forward and aft lower lobe cargo compartments, which could result in a potential short circuit and consequent fire in the forward and aft lower lobe cargo compartments.

DATES: This AD becomes effective September 25, 2007.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of September 25, 2007.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Elias Natsiopoulos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6478; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Examining the Docket

You may examine the airworthiness directive (AD) docket on the Internet at *http://dms.dot.gov* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Operations office (telephone (800) 647–5527) is located on the ground floor of the West Building at the street address stated in the **ADDRESSES** section.

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to all Boeing Model 767 airplanes.

That NPRM was published in the **Federal Register** on June 6, 2006 (71 FR 32489). That NPRM proposed to require repetitive detailed inspections of the wire bundles, power drive unit (PDU) wiring, and wire attaching hardware, supports, and sleeving located in the forward and aft lower lobe cargo compartments, and corrective actions as necessary.

Actions Since NPRM Was Issued

Since we issued the NPRM, Boeing has published Service Bulletin 767–25–0376, Revision 1, dated February 9, 2007, for Model 767–200, –300, and –300F series airplanes; and Service Bulletin 767–25–0377, Revision 1, dated February 9, 2007, for Model 767–400ER series airplanes. In the NPRM, we referred to the original issue of Boeing Service Bulletin 767–25–0376 and Boeing Service Bulletin 767–25–0377, both dated November 17, 2005, as appropriate sources of service information for accomplishing the repetitive inspections and corrective actions. The procedures in Revision 1 of the service bulletins are essentially the same as the procedures in the original issue of the service bulletins, except that the revised service bulletins replace all references to Task 25–52–00, ''Cargo Compartment—Cleaning/Painting,'' of the Boeing 767 Airplane Maintenance Manual (AMM) with references to Task 20–60–02, ''Cleaning to Remove Combustible Material Around Wiring.'' Therefore, we have revised paragraph (f) of this AD to refer to Revision 1 of the service bulletins as appropriate sources of service information for accomplishing the actions required by this AD. We have also added a new paragraph (g) to this AD allowing credit for actions accomplished before the effective date of this AD in accordance with the original issue of the service bulletins.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments received.

Support for the NPRM

Air Transport Association (ATA), American Airlines, and United Airlines agree with the intent of the NPRM.

Request To Clarify the Cleaning Procedure

ATA, on behalf of its member United Airlines, states that Boeing Service Bulletin 767–25–0376, dated November 17, 2005, specifies cleaning the cargo compartments using Task 25–52–00–701 of the Boeing 767 AMM. United Airlines further states that Task 25–52–00–701 specifies cleaning the entire compartment using solvents while removing insulation. United Airlines, therefore, requests the AMM task be clarified, since it believes that this task does not address the intent of the NPRM.

We agree, since the intent of the NPRM was to propose cleaning only wiring, wiring components, and the small area contacting the wiring in order to detect and correct damage that could be concealed by debris. As we mentioned previously, Boeing has issued Revision 1 to Service Bulletin 767–25–0376, which refers instead to Task 20–60–02, ''Cleaning to Remove Combustible Material Around Wiring,'' of the Boeing 767 AMM. Paragraph (f) of this AD refers to Revision 1 of the service bulletin as the appropriate source of service information for Model 767–200, –300, and –300F series airplanes. No additional change to this AD is necessary in this regard.

Request To Revise Summary

Boeing requests that we revise the Summary section of the NPRM to specify that PDU stands for ''power drive unit.'' Boeing states that PDU was incorrectly defined as ''power display unit'' in the NPRM. We agree and have revised this AD as requested.

Request To Increase the Estimated Work Hours

Boeing requests that we increase the estimated work hours from 6 hours to 20 hours for an airplane with a partial cargo compartment floor and to 22 hours for an airplane with a full cargo compartment floor. Boeing states that these numbers were provided in Boeing Service Bulletins 767–25–0376 and 767–25–0377, both dated November 17, 2005.

Although we agree with revising the estimated work hours found in the Costs of Compliance section of this AD, we disagree with using the estimate provided by the commenter. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up. The original issue and Revision 1 of Boeing Service Bulletins 767–25–0376 and 767–25–0377 state that the examination of the forward lower lobe cargo compartment takes 3 hours and the examination of the aft lower lobe cargo compartment takes 3 hours. The service bulletins also state that cleaning the forward and aft lobe cargo compartments takes 2 hours each. However, the NPRM did not include time to accomplish the cleaning. Therefore, we have updated the estimated work hours to 10 hours per airplane in this AD and have updated the estimated costs accordingly.

Request To Clarify the Unsafe Condition

Boeing requests we revise the Discussion section of the NPRM to clarify that crushed and chafed PDU power supply cables ''along with other wire and wire support damage,'' if not corrected, could result in a potential short circuit and consequent fire in the forward and aft lower lobe cargo compartments. Boeing states that the statements in the Discussion section of the NPRM could lead a reader to believe that the fire occurred at the location of the crushed and chafed PDU power supply cables. Boeing further states that the fire occurred in the bilge approximately two feet below the PDUs, at a location where the airplane wiring is installed in close proximity to the insulation blankets.

We agree that the statement as written in the NPRM could lead a reader to believe that inspection and corrective actions should only be limited to the PDU power supply cables. The intent of the NPRM was to propose inspecting all wiring in the forward and aft lower lobe cargo compartment, not just the wiring associated with the PDU. Any wire or wiring components found to be damaged must be repaired to adequately address the unsafe condition of this AD. However, we have not revised this AD since the Discussion section of the NPRM is not carried over into a final rule.

Request To Reduce Compliance Time and Add Terminating Action

ATA, on behalf of its member United Airlines, requests that the FAA and Boeing pursue a more conclusive method of resolving the damage to wires in the cargo compartments. United Airlines states that the actions proposed in the NPRM are of limited value and do not address the root cause of the problem; the service bulletins provide procedures for cleaning and routinely inspecting the subject wire bundles, but do not provide any preventive or terminating action. United Airlines further states that even though it implemented the requirements of this AD into its maintenance program two years ago, it has found three additional occurrences on airplanes that have been cleaned and inspected. United Airlines states that the industry would benefit if the airplane manufacturer could lead a collaborative effort to (1) implement a

way to prevent cargo debris from falling onto and into the high-voltage wiring runs and (2) address failures that have occurred under the clamps where debris was not the issue, including those failures that have occurred soon after cleaning and inspection. United Airlines, therefore, requests that we revise the NPRM to reduce the inspection and cleaning interval to 18 months, and that Boeing develop a terminating action.

We appreciate the commenter's concern to have the inspection and cleaning done more frequently. In developing an appropriate compliance time for this action, we considered the urgency associated with the subject unsafe condition, the practical aspect of accomplishing the required inspections within a period of time that corresponds to the normal scheduled maintenance for most affected operators, and the recommendations of the manufacturer. In light of these items, we have determined that the compliance time proposed in the NPRM is appropriate. Operators are always permitted to accomplish the requirements of an AD earlier than the specified compliance time. We have not changed this AD in this regard.

We agree with United Airline's suggestion for a collaborative effort to investigate the feasibility and implementation of preventive actions because preventive actions will more effectively address the root cause of the wiring damage. The FAA and Boeing have considered the following actions, and their feasibility, in preventing debris from falling onto wiring:

- Installing the full complement of floor panels.
- Installing conduit or sleeving over wire bundles.
- Rerouting the wire bundles to locations that are less exposed to debris.
- Performing good maintenance practices.

The full complement of floor panels is currently available as an option to operators, if they choose to have them installed. However, even if the full complement of floor panels is installed, the wiring is still susceptible to damage when the panels are removed for maintenance or other actions.

Conduit or sleeving over wire bundles is not a viable option, since the conduit/sleeving would be exposed to step-ons and dropped tools, which may crush the conduit/sleeving and damage the wires inside. Further, the conduit/sleeving would conceal any damage, making it less likely for the maintenance crew to detect the damage.

Rerouting the wire bundles to locations that are less exposed to debris is not feasible or recommended because it would be a major change. The modification would require structural changes to provide bundle supports, as well as require lengthening the wire bundles.

Good maintenance practices would substantially reduce the exposure of wiring to falling debris and minimize the occurrence of wire damage.

At this time, we have determined that repetitive inspections and cleaning will adequately address the unsafe condition. To delay this action would be inappropriate, since we have determined that an unsafe condition exists and that inspections must be conducted to ensure continued safety. We might consider additional rulemaking, however, if a preventive modification is developed by the airplane manufacturer. Operators may also request, under the provisions of paragraph (h) of this AD, an alternative method of compliance (AMOC) if sufficient data are submitted to substantiate that such a design change would provide an acceptable level of safety. Therefore, we have not revised this AD in this regard.

We also agree that the cable clamps should be inspected, since history has shown that the wires under the cable clamps can be damaged not only by falling debris but also by other conditions. The commenter's statement regarding clamp failures implies that the NPRM and service bulletins only address wiring damage caused by falling debris. However, the procedures in the service bulletins, which are mandated by this AD, specify to inspect all wiring components to detect and correct damage caused by any environmental condition, not just falling debris. The inspection applies to all wire cable clamps, regardless of location. Further, experience has shown that wiring damage is often caused by poor maintenance practices. The corrective actions for the cable clamps are part of routine maintenance per the Boeing 767 Standard Wiring Practices Manual, which is referenced in the applicable service bulletin. We have not revised this AD in this regard.

Request To Revise Discussion

Boeing requests that we revise the Discussion section of the NPRM to state that the source of the fire was near the bottom of the bilge below the 13L and 14L PDUs. As justification, Boeing states that this is the location where the airplane wiring for the suspect PDUs is installed. Boeing also requests that we revise the Discussion section of the NPRM to state that investigation revealed that the flammable debris had accumulated ''(in the bilge)'' below the 13L and 14L PDUs.

Although we agree that a portion of the suspect PDU wiring is routed near the bottom of the bilge, none of the reports specified the exact point of initiation of the fires. Further, the Boeing service bulletins state that: ''It was found that flammable debris collected below the 13L and 14L PDUs; but the source of ignition was not positively identified.'' The NPRM correctly identified the location of the accumulated debris as being in the area below the 13L and 14L PDUs, which includes the bilge. Therefore, no change to this AD is necessary in this regard.

Request To Revise the Applicability

ABX Air states that the PDUs and associated wiring have been removed on 24 of its airplanes in accordance with a supplemental type certificate. ABX Air asserts these airplanes are not susceptible to the unsafe condition identified in the NPRM. Therefore, ABX Air requests that we revise the applicability to as follows:

> This AD applies to all Boeing Model 767–200, –300, –300F, and –400ER series airplanes equipped with a powered cargo handling system in the forward or aft lower lobe compartment, certificated in any category.

We disagree with limiting the applicability of the AD as proposed by the commenter. To adequately address the unsafe condition, this AD requires an inspection of all wires and wiring components in the forward and aft lower cargo compartments, not just the PDU and associated wiring. If the PDU, associated wiring, and all other wires and wiring components have also been removed on the commenter's airplanes, then no further action is required by this AD. However, the operator must still apply for an AMOC for relief from the requirements of this AD. Under the provisions of paragraph (h) of this AD, we may consider requests for approval of an AMOC if sufficient data are submitted to substantiate that such a design change would provide an acceptable level of safety. We have not changed this AD in this regard.

Request To Extend Compliance Time

ATA, on behalf of its member American Airlines, requests that we extend the compliance time for the repetitive inspection to 74 months or 30,000 flight hours, whichever occurs first. In the NPRM, we proposed a repetitive interval of 72 months or 24,000 flight hours, whichever occurs first. American Airlines states that it schedules main base visits (MBVs) every 18 months for Model 767 airplanes. It

also uses flex scheduling, which allows for scheduling an extra 10 percent calendar time depending on the history of the airplane. American Airlines states the NPRM proposes the repetitive inspection every fourth MBV, and that it accomplishes the fourth MBV at a maximum of 4 times 18 plus 10 percent, which is equal to 73.8 months. American Airlines further states that it can fly an airplane almost 27,800 flight hours between fourth MBVs, which includes the extra 10 percent due to flex scheduling. American Airlines asserts that the compliance time it proposes will keep airplanes safe for the flying public. American Airlines states that the FAA can avoid the cost of processing a request for an AMOC if the compliance time is extended as it proposes.

We disagree with extending the compliance time. In developing an appropriate compliance time for this action, we considered the urgency associated with the subject unsafe condition, the practical aspect of accomplishing the required inspections within a period of time that corresponds to the normal scheduled maintenance for most affected operators, and the recommendations of the manufacturer. In light of these items, we have determined that the compliance time proposed in the NPRM is appropriate. However, according to the provisions of paragraph (h) of this AD, we might approve requests to adjust the compliance time if the request includes data that prove that the new compliance time would provide an acceptable level of safety. We have not changed this AD in this regard.

Request To Revise Costs of Compliance

American Airlines estimates that the cost of complying with the NPRM will require approximately 6 work hours per airplane at a cost of $563, every six years. We infer the commenter would like us to revise the estimated costs in this AD.

We disagree with revising the estimated costs for this AD. In determining those costs we used the estimated work hours provided in the Boeing service bulletins. As stated previously, we have updated the estimated work hours in this AD to reflect a higher cost for accomplishing the cleaning and inspections required by this AD. Therefore, we have not changed this AD in this regard.

Clarification of AMOC Paragraph

We have revised this action to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Conclusion

We have carefully reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

There are about 857 airplanes of the affected design in the worldwide fleet. This AD affects about 374 airplanes of U.S. registry. The required inspections take about 10 work hours per airplane, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of the AD for U.S. operators is $299,200, or $800 per airplane, per inspection cycle.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2007–16–18 Boeing: Amendment 39–15157. Docket No. FAA–2006–24952; Directorate Identifier 2006–NM–107–AD.

Effective Date

(a) This AD becomes effective September 25, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Model 767–200, –300, –300F, and –400ER series airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from a fire in the forward lower lobe cargo compartment found shortly after airplane arrival. We are issuing this AD to detect and correct damage to wires in the forward and aft lower lobe cargo compartments, which could result in a potential short circuit and consequent fire in the forward and aft lower lobe cargo compartments.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Repetitive Inspections and Corrective Actions if Applicable

(f) Within 36 months after the effective date of this AD, do detailed inspections for damage to the wire bundles, power drive unit wiring, and wire attaching hardware, supports, and sleeving located in the forward and aft lower lobe cargo compartments; and do all applicable corrective actions before

further flight after the inspections; by accomplishing all of the actions specified in the Accomplishment Instructions of Boeing Service Bulletin 767–25–0376, Revision 1, dated February 9, 2007 (for Model 767–200, –300, and –300F series airplanes); or Boeing Service Bulletin 767–25–0377, Revision 1, dated February 9, 2007 (for Model 767–400ER series airplanes); as applicable. Repeat the inspections thereafter at intervals not to exceed 24,000 flight hours or 72 months, whichever occurs first.

Credit for Actions Accomplished According to Previous Issues of Service Bulletins

(g) Actions accomplished before the effective date of this AD in accordance with Boeing Service Bulletin 767–25–0376, dated November 17, 2005 (for Model 767–200, –300, and –300F series airplanes); or Boeing Service Bulletin 767–25–0377, dated November 17, 2005 (for Model 767–400ER series airplanes); are considered acceptable for compliance with the corresponding actions specified in paragraph (f) of this AD.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Seattle Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Material Incorporated by Reference

(i) You must use Boeing Service Bulletin 767–25–0376, Revision 1, dated February 9, 2007; or Boeing Service Bulletin 767–25–0377, Revision 1, dated February 9, 2007; as applicable; to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for a copy of this service information. You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on August 2, 2007.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–16106 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–27974 Directorate Identifier 2007–CE–040–AD; Amendment 39–15164; AD 2007–17–06]

RIN 2120–AA64

Airworthiness Directives; Diamond Aircraft Industries GmbH Model DA 40 and DA 40F Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final Rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

A nose landing gear leg failed in area of the nose gear leg pivot axle. This airplane was mostly operated on grass runways and training operations. This failure was based on a fatigue crack developed in the pivot axle. Material inspections figured out that this cracks may also develop on other serial No. pending the type of operation.

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective September 25, 2007.

On September 25, 2007, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Sarjapur Nagarajan, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4145; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on May 17, 2007 (72 FR 27768). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

A nose landing gear leg failed in area of the nose gear leg pivot axle. This airplane was mostly operated on grass runways and training operations. This failure was based on a fatigue crack developed in the pivot axle. Material inspections figured out that this cracks may also develop on other serial No. pending the type of operation.

The MCAI requires repetitively inspecting the nose landing gear leg for cracks and replacing the nose landing gear leg if cracks are found.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received.

Comment Issue No. 1: Change the Compliance Time for the Initial and Repetitive Inspections

Colin Summers, Dan Montgomery, Michael A. Rigg, and Van A. Lupo state that the NPRM is based on a single incident where the airplane was used for training on a grass strip, and Diamond Aircraft issued a mandatory service bulletin requiring inspection of the nosewheel pivot pin for airplanes flying out of grass runways.

Two of the commenters state that they operate their airplane out of paved runways and fly less than 500 hours a year. Requiring inspections every 200 hours seems more than what the situation warrants.

We infer the commenters feel the proposed initial inspection compliance time of ''within the next 100 hours time-in-service (TIS) after the effective date of this AD'' and the repetitive inspection requirement of ''every 200 hours TIS thereafter'' is unwarranted and too burdensome.

The commenters request the compliance time for the initial and repetitive inspections be changed to the next annual inspection.

We partially agree with the commenters. We cannot enforce a compliance time of ''at the next annual inspection after the effective date of this AD.'' Such a compliance time could cause an increased burden on the owner/operator if their annual inspection came due the day after this AD becomes effective, which would ground the airplane. Unless it is determined to be an urgent safety of flight condition, we are required to give owner/operators a grace period after the AD becomes effective to schedule the airplane for maintenance. We can provide a compliance time of 12 months to coincide with annual inspections.

We will change the compliance times for the initial and repetitive inspections in this final rule AD action to add 12 months and change to 200 hours TIS (whichever occurs later) to allow more time for scheduling purposes and to lessen the burden from the compliance time proposed in the NPRM.

Comment Issue No. 2: AD Unwarranted

Daniel P. Ferry, Jr. of Ferry Aviation LLC states the need for an AD requiring an inspection is unwarranted. He states that the existing service bulletin is adequate to ensure safety, and the problem does not seem widespread or a severe safety risk.

We infer the commenter wants the NPRM withdrawn.

We do not agree with the commenter. We have examined the information provided by the MCAI and determined that an unsafe condition does exist that warrants AD action. Issuing an AD is the only way we can mandate that the instructions and procedures in a service bulletin are followed.

We are not changing the final rule AD action based on this comment.

Conclusion

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the AD.

Costs of Compliance

We estimate that this AD will affect 476 products of U.S. registry. We also estimate that it will take about 1 work-hour per product to comply with basic requirements of this AD. The average labor rate is $80 per work-hour.

Based on these figures, we estimate the cost of this AD to the U.S. operators to be $38,080 or $80 per product.

In addition, we estimate that any necessary follow-on actions will take about 8 work-hours and require parts costing $1,715, for a cost of $2,355 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD Docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2007–17–06 Diamond Aircraft Industries GmbH: Amendment 39–15164; Docket No. FAA–2007–27974; Directorate Identifier 2007–CE–040–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective September 25, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the following airplanes certificated in any category:

Model	Serial Nos.
DA 40 ...	All serial numbers beginning with 40.006.
DA 40F	All serial numbers beginning with 40.F001.
	All serial numbers beginning with 40.FC001.

Subject

(d) Air Transport Association of America (ATA) Code 32: Landing Gear.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

A nose landing gear leg failed in area of the nose gear leg pivot axle. This airplane was mostly operated on grass runways and training operations. This failure was based on a fatigue crack developed in the pivot axle. Material inspections figured out that this cracks may also develop on other serial No. pending the type of operation.

Actions and Compliance

(f) Unless already done, do the following actions:

(1) Inspect the nose landing gear leg for cracks as follows.

(i) Initially within the next 12 months after September 25, 2007 (the effective date of this AD) or within the next 200 hours time-in-service (TIS) after September 25, 2007 (the effective date of this AD), whichever occurs later.

(ii) Repetitively inspect thereafter at intervals not to exceed 12 months or 200 hours TIS, whichever occurs later.

(2) Replace the nose landing gear leg before further flight after any inspection required by paragraph (f)(1) of this AD in which cracks are found.

(3) After doing the replacement required in paragraph (f)(2) of this AD, repetitively inspect at intervals not to exceed 12 months or 200 hours TIS, whichever occurs later.

(4) Do the actions required in paragraphs (f)(1), (f)(2), and (f)(3) of this AD following Diamond Aircraft Industries GmbH Mandatory Service Bulletin No. MSB40–046/1, No. MSBD4–046/1, dated April 25, 2007, and the applicable maintenance manual.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, Standards Staff, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Sarjapur Nagarajan, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4145; fax: (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Austro Control AD No. A–2005–005, dated November 15, 2005; and Diamond Aircraft Industries GmbH Mandatory Service Bulletin No. MSB40–046/1, No. MSBD4–046/1, dated April 25, 2007, for related information.

Material Incorporated by Reference

(i) You must use Diamond Aircraft Industries GmbH Mandatory Service Bulletin No. MSB40–046/1, No. MSBD4–046/1, dated April 25, 2007, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Diamond Aircraft Industries GmbH, N.A. Otto-Strabe 5, A–2700 Wiener Neustadt; Fax: **43–2622–26620; or e-mail: *support@diamond-air.at.*

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Kansas City, Missouri, on August 10, 2007.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–16098 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28610; Directorate Identifier 2007–CE–058–AD; Amendment 39–15166; AD 2007–17–08]

RIN 2120–AA64

Airworthiness Directives; DG Flugzeugbau GmbH Model DG–500MB Gliders and Glaser-Dirks Flugzeugbau GmbH Model DG–800B Gliders

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued by the aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Instead of the hub normally used which carries the starter ring gear and the hub for the tooth belt a slip-clutch can be mounted. The unit contains the hub for the tooth belt and the starter ring gear. Occurrences during service have shown that under bad conditions excessive wear on several parts of the clutch can occur.

This AD requires actions that are intended to address the unsafe condition described in the MCAI.

DATES: This AD becomes effective September 10, 2007.

On September 10, 2007, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

We must receive comments on this AD by September 20, 2007.

ADDRESSES: You may send comments by any of the following methods:

- *DOT Docket Web Site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Gregory Davison, Aerospace Engineer, FAA, Small Airplanes Directorate, 901 Locust St., Room 301, Kansas City, Missouri 64016; telephone: (816) 329–4130; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued Emergency AD No. 2007–0001R1–E, dated January 10, 2007, (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

Instead of the hub normally used which carries the starter ring gear and the hub for

the tooth belt a slip-clutch can be mounted. The unit contains the hub for the tooth belt and the starter ring gear. Occurrences during service have shown that under bad conditions excessive wear on several parts of the clutch can occur. In order to avoid further damages the affected parts of the slip clutch on the engines SOLO 2 625 01 and SOLO 2 652 02 have to be inspected and replaced, if necessary. In order to check the condition of the clutch on all engines SOLO 2 625 in future, additional procedures are installed and additional inspection terms are introduced. The cover place in front of the slip clutch has to be replaced by a stronger plate with the No. 2042888.

The original Emergency AD has now been revised to indicate that the initial inspection of the installed slip-clutch is required when 12.5 hours in operation have been accumulated.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

SOLO Kleinmotoren GmbH has issued Service Bulletin Nr. 4600–2–2, dated December 27, 2006. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all information provided by the State of Design Authority and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might have also required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are described in a separate paragraph of the AD. These requirements take precedence over those copied from the MCAI.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because occurrences during service have shown that under certain conditions, excessive wear on several parts of the clutch can occur. Excessive wear could cause the slip clutch to disengage at an undesired torque, which could result in reduced power during critical phases of flight. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2007–28610; Directorate Identifier 2007–CE–058–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a "significant regulatory action" under Executive Order 12866;

(2) Is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2007–17–08 DG Flugzeugbau GmbH and Glaser-Dirks Flugzeugbau GmbH: Amendment 39–15166; Docket No. FAA–2007–28610; Directorate Identifier 2007–CE–058–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective September 10, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Models DG–500MB and DG–800B gliders, all serial numbers, that:

(1) Have SOLO engine 2 625 01 equipped with optional slip-clutch sets, SOLO part number (P/N) 29 00 202, installed; or

(2) Have SOLO engine 2 625 02 equipped with optional slip-clutch sets, SOLO P/N 29 00 202, installed; and

(3) Are certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 61: Propellers.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Instead of the hub normally used which carries the starter ring gear and the hub for the tooth belt a slip-clutch can be mounted. The unit contains the hub for the tooth belt and the starter ring gear. Occurrences during service have shown that under bad conditions excessive wear on several parts of the clutch can occur. In order to avoid further damages the affected parts of the slip clutch on the engines SOLO 2 625 01 and SOLO 2 652 02 have to be inspected and replaced, if necessary. In order to check the condition of the clutch on all engines SOLO 2 625 in future, additional procedures are installed and additional inspection terms are introduced. The cover place in front of the slip clutch has to be replaced by a stronger plate with the No. 2042888.

The original Emergency AD has now been revised to indicate that the initial inspection of the installed slip-clutch is required when 12.5 hours in operation have been accumulated.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Before further flight after September 10, 2007 (the effective date of this AD):

(i) Remove the cover plate of the slip-clutch;

(ii) Inspect the friction pads for wear. Dimension in new condition is .335 inches (8.5 mm), the wear limit is .256 inches (6.5 mm);

(iii) Inspect the slip-clutch shoes on the contact surface to the hub for wear. The wear limit is .039 inches (1 mm);

(iv) Replace any parts found to be outside the wear limit; and

(v) Assemble the slip-clutch with a new cover plate, P/N 2042888.

(2) Every 12.5 hours time-in-service (TIS) after doing the actions required by paragraph (f)(1) of this AD, repetitively inspect the slip-clutch and replace any parts found to be outside the wear limit before further flight after the inspection in which the part(s) exceeds the specified limit.

(3) Every 25 hours TIS after September 10, 2007 (the effective date of this AD), inspect the tiltplay of the clutch drum on the hub for excessive play.

(i) With the tooth belt released, measure the play in the axial direction on the starter gear. The play limit is .024 inches (0.6 mm); and

(ii) Before further flight after any inspection in which excessive play is found, replace with an FAA-approved part that is new or overhauled by the manufacturer.

(4) Every 50 hours TIS after September 10, 2007 (the effective date of this AD), replace the slip-clutch with an FAA-approved part that is new or overhauled by the manufacturer.

(5) As of September 10, 2007 (the effective date of this AD), only install slip-clutch cover plate P/N 2042888.

(6) Each time before the slip-clutch is mounted, degrease the taper of the crankshaft and the hub of the clutch with thinner following the instructions in the service bulletin specified in paragraph (f)(7) of this AD. The pound inches equivalent to 120 Nm is 1062.1.

(7) Do all actions required by this AD following SOLO Kleinmotoren GmbH Service Bulletin Nr. 4600–2–2, dated December 27, 2006.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, Standards Staff, FAA, ATTN: Gregory Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; fax: (816) 329–4090, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et.seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120π0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) Emergency AD No. 2007–0001R1–E, dated January 10, 2007, and SOLO Kleinmotoren GmbH Service Bulletin Nr. 4600–2–2, dated December 27, 2006, for related information.

Material Incorporated by Reference

(i) You must use SOLO Kleinmotoren GmbH Service Bulletin Nr. 4600–2–2, dated December 27, 2006, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact SOLO Kleinmotoren GmbH, Customer Support, 71050 Sindelfingen, Germany; telephone: +49–(0) 7031–301–210; fax: +49–(0) 7031–301–136; e-mail: *wolfgang.emmerich@solo-germany.com.*

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust St., Room 506, Kansas City, Missouri 64016; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federalπ register/cfr/ibr-locations.html.*

Issued in Kansas City, Missouri on August 14, 2007.

Terry L. Chasteen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 07–4090 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28971; Directorate Identifier 2007–SW–32–AD; Amendment 39–15163; AD 2007–17–05]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation Model S92–A Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for Sikorsky Aircraft Corporation (Sikorsky) Model S92–A helicopters. This action requires, within a specified time, borescope inspecting a certain part-numbered tail rotor pitch change shaft and bearing assembly (shaft and bearing assembly) and also inspecting after any installation. This amendment is prompted by an incident involving failure of a shaft and bearing assembly and servo clevis shaft resulting in loss of tail rotor control. The actions specified in this AD are intended to prevent failure of a shaft and bearing assembly, loss of tail rotor pitch and yaw control, and subsequent loss of control of a helicopter.

DATES: Effective August 21, 2007.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 21, 2007.

Comments for inclusion in the Rules Docket must be received on or before October 22, 2007.

ADDRESSES: Use one of the following addresses to submit comments on this AD:

- *DOT Docket Web site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically;
- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically;
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590;
- *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or
- *Fax:* 202–493–2251.

You may get the service information identified in this AD from Sikorsky Aircraft Corporation, Attn: Manager, Commercial Technical Support, mailstop s581a, 6900 Main Street, Stratford, Connecticut, phone (203) 383–4866, e-mail address *tsslibrary@sikorsky.com*.

Examining the Docket: You may examine the docket that contains the AD, any comments, and other information on the Internet at *http://dms.dot.gov*, or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Operations office (telephone (800) 647–5527) is located in Room W12–140 on the ground floor of the West Building at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

FOR FURTHER INFORMATION CONTACT: Wayne Gaulzetti, Aviation Safety Engineer, Boston Aircraft Certification Office, 12 New England Executive Park, Burlington, MA 01803, telephone (781) 238–7156, fax (781) 238–7170.

SUPPLEMENTARY INFORMATION: This amendment adopts a new AD for Sikorsky Model S92–A helicopters. This action requires, within a specified time, borescope inspecting a certain part-numbered shaft and bearing assembly and also inspecting after any installation. This amendment is prompted by an incident involving failure of a shaft and bearing assembly and servo clevis shaft resulting in loss of tail rotor control. This condition, if not detected, could result in loss of tail rotor pitch and yaw control and subsequent loss of control of a helicopter.

We have reviewed Sikorsky Alert Service Bulletin No. 92–64–002, dated August 3, 2007 (ASB), which describes procedures for doing a one-time borescope inspection of the shaft and bearing assembly.

The ASB requires inspecting the shaft and bearing assembly within 50 hours time-in-service (TIS). This AD requires the inspection within 20 hours TIS based on the ease of the inspection, the availability of borescopes, the flight hours per day for the high time helicopters (about 8 hours), and the potential for a helicopter to ditch while servicing the oil rig industry. Also, this AD requires this inspection between 10 and 15 hours TIS following any installation of a shaft and bearing assembly.

The inspections required by this AD are interim actions; the manufacturer continues to investigate failure of the shaft and bearing assembly and we may either develop follow-on actions or a terminating action for the requirements of this AD.

This unsafe condition is likely to exist or develop on other helicopters of the same type design. Therefore, this AD is being issued to prevent failure of a shaft and bearing assembly, loss of tail rotor pitch and yaw control, and subsequent loss of control of a helicopter. This AD requires, within 20 hours TIS, inspecting each affected shaft and bearing assembly at the tail rotor side and on the servo side through the oil filler cap. This AD also requires borescope inspecting each shaft and bearing assembly that is installed as a replacement. This inspection must be done between 10 and 15 hours TIS after installation. Replacing any unairworthy shaft and bearing assembly is required before further flight.

The short compliance time involved is required because the previously described critical unsafe condition can adversely affect the controllability or structural integrity of the helicopter. Therefore, borescope inspecting the affected shaft and bearing assembly within 20 hours TIS and before further flight following any installation of an affected shaft and bearing assembly are required, and this AD must be issued immediately.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

We estimate that this AD will affect 34 helicopters, and the borescope inspection of the shaft and bearing assembly will take about 2 work hours to do at an average labor rate of $80 per work hour. Required parts will cost about $30,864 per helicopter. Based on these figures, we estimate the total cost impact of the AD on U.S. operators to be $1,054,816.

Comments Invited

This AD is a final rule that involves requirements that affect flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any written data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2007–28971; Directorate Identifier 2007–SW–32–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD. We will consider all comments received by the closing date and may amend the AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of our docket web site, you can find and read the comments to any of our dockets, including the name of the individual who sent the comment. You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov*.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared an economic evaluation of the estimated costs to comply with this AD. See the DMS to examine the economic evaluation.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2007–17–05 Sikorsky Aircraft Corporation: Amendment 39–15163. Docket No. FAA–2007–28971; Directorate Identifier 2007–SW–32–AD.

Applicability

Model S–92A helicopter, with a tail rotor pitch change shaft and bearing assembly (shaft and bearing assembly) part number 92358–06303–041, installed, certificated in any category.

Compliance

Required as indicated, unless accomplished previously.

To prevent failure of a shaft and bearing assembly, loss of tail rotor pitch and yaw control, and subsequent loss of control of a helicopter, do the following:

(a) Within 20 hours time-in-service (TIS), borescope inspect as follows:

(1) Inspect each affected shaft and bearing assembly at tail rotor side by following the Accomplishment Instructions, paragraphs 3.A.(1) through (7) and Figure 4 of Sikorsky Aircraft Corporation Alert Service Bulletin No. 92–64–002, dated August 3, 2007 (ASB). If the shaft bearing fails the inspection, replace the shaft and bearing assembly before further flight.

(2) Inspect each shaft and bearing assembly on the servo side through the oil filler cap by following the Accomplishment Instructions, paragraphs B.(1) through (9) and Figures 2 and 3, of the ASB. If the shaft bearing fails the inspection, replace the shaft and bearing assembly before further flight.

Note: Maintenance Manual SA S92A–ANM–000 pertains to the subject of this AD.

(b) Between 10 and 15 hours TIS after installing a shaft and bearing assembly, borescope inspect it by following paragraph (a) of this AD.

(c) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Manager, Boston Aircraft Certification Office, FAA, ATTN: Wayne Gaulzetti, Aviation Safety Engineer, 12 New England Executive Park, Burlington, MA 01803, telephone (781) 238–7156, fax (781) 238–7170, for information about previously approved alternative methods of compliance.

(d) The inspections of the shaft and bearing assembly shall be done by following Sikorsky Alert Service Bulletin No. 92–64–002, dated August 3, 2007. The Director of the Federal Register approved this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Sikorsky Aircraft Corporation, Attn: Manager, Commercial Technical Support, mailstop s581a, 6900 Main Street, Stratford, Connecticut, phone (203) 383–4866, e-mail address *tsslibrary@sikorsky.com*. Copies may be inspected at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(e) This amendment becomes effective on August 21, 2007.

Issued in Fort Worth, Texas, on August 9, 2007.

Mark R. Schilling,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. E7–15980 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–29014; Directorate Identifier 2007–NM–179–AD; Amendment 39–15165; AD 2007–17–07]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

The Bombardier CL–600–2B19 airplanes have had a history of flap failures at various positions for several years. Flap failure may result in a significant increase in required landing distances and higher fuel consumption than planned during a diversion.

This AD requires actions that are intended to address the unsafe condition described in the MCAI.

DATES: This AD becomes effective September 5, 2007.

The Director of the Federal Register approved the incorporation by reference of certain publications, listed in the AD as of September 5, 2007.

We must receive comments on this AD by September 20, 2007.

ADDRESSES: You may send comments by any of the following methods:

- *DOT Docket Web Site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Dan Parrillo, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7305; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2007–10, dated July 18, 2007 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

On November 22, 2006, due to weather conditions a CRJ 100 executed a missed approach. At the same time, a flaps malfunction resulted in the flaps becoming unresponsive while in the fully deployed position (45 degree). The pilot declared an emergency and diverted to the alternate airport. Due to high fuel consumption when flying in this configuration, the aircraft landed at a diversion airport with 512 pounds of fuel remaining.

The Bombardier CL–600–2B19 airplanes have had a history of flap failures at various positions for several years. Flap failure may result in a significant increase in required landing distances and higher fuel consumption than planned during a diversion. The nature of the malfunction is related to the design and reliability of some of the components of the flap system.

To lower the risk of exposure until a permanent solution becomes available, Transport Canada is implementing the following four mandatory actions:

Part I: AFM Change. This action is mandated to provide the crew with additional guidance information for the FLAPS FAIL abnormal procedure, to address the possibility of fuel exhaustion resulting from a flaps failure at other than 0 degrees, in combination with a diversion to an alternate airport.

Part II: Operational Procedures: The operational procedures mandated herein are aimed at reducing or eliminating the risk caused by flaps failures. These Operational Procedures cover the three most critical flaps failure modes.

Part III: Training Procedures: This action is mandated to provide personnel with training on the operational procedures of Part II of this directive and instruction on reduced or zero flap landing.

Part IV: Maintenance Actions: The maintenance actions are mandated to improve overall Flaps System reliability and bring the failure rate to an acceptable level, until permanent solutions are implemented.

The corrective ''maintenance actions'' include the cleaning and lubrication of the flexible shafts, and applicable related investigative and corrective actions (which include a detailed inspection of the actuator connector sealant bead for signs of damage or delamination, repair of damaged sealant, and if necessary, a low temperature torque check on the actuator and if torque test results are not satisfactory, an installation of a serviceable actuator or, if no serviceable actuators are available, contacting the FAA for corrective action). The corrective ''maintenance actions'' also include installation of metallic seals in the flexible drive-shafts, and applicable related investigative and corrective actions (which include a detailed inspection of the mating surfaces on the flexible drive-shaft for damage (scratches or dents), and if mating surfaces have damage, cleaning the sealing washer and mating surfaces and applying sealant). You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier has issued Service Bulletin 601R–27–150, including Appendix A, dated July 12, 2007; and Canadair Regional Jet Temporary Revision RJ/165, dated July 6, 2007, to the Canadair Regional Jet Airplane Flight Manual CSP A–012. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between the AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the AD.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because the Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes have a history of flap failure during cold weather operations. Flap failure may result in a significant increase in required landing distances and higher fuel consumption than planned during a diversion; therefore, corrective actions are necessary prior to the onset of cold weather operations. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–29014; Directorate Identifier 2007–NM–179–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2007–17–07 Bombardier, Inc. (Formerly Canadair): Amendment 39–15165. Docket No. FAA–2007–29014; Directorate Identifier 2007–NM–179–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective September 5, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category, serial numbers 7003 through 7990 and 8000 and subsequent.

Subject

(d) Air Transport Association (ATA) of America Code 27: Flight Controls.

Reason

(e) The mandatory continued airworthiness information (MCAI) states:

On November 22, 2006, due to weather conditions a CRJ 100 executed a missed approach. At the same time, a flaps malfunction resulted in the flaps becoming unresponsive while in the fully deployed position (45 degree). The pilot declared an emergency and diverted to the alternate airport. Due to high fuel consumption when flying in this configuration, the aircraft landed at a diversion airport with 512 pounds of fuel remaining.

The Bombardier CL–600–2B19 airplanes have had a history of flap failures at various positions for several years. Flap failure may result in a significant increase in required landing distances and higher fuel consumption than planned during a diversion. The nature of the malfunction is related to the design and reliability of some of the components of the flap system.

To lower the risk of exposure until a permanent solution becomes available, Transport Canada is implementing the following four mandatory actions:

Part I: AFM Change. This action is mandated to provide the crew with additional guidance information for the FLAPS FAIL abnormal procedure, to address the possibility of fuel exhaustion resulting from a flaps failure at other than 0 degrees, in combination with a diversion to an alternate airport.

Part II: Operational Procedures: The operational procedures mandated herein are aimed at reducing or eliminating the risk caused by flaps failures. These Operational Procedures cover the three most critical flaps failure modes.

Part III: Training Procedures: This action is mandated to provide personnel with training on the operational procedures of Part II of this directive and instruction on reduced or zero flap landing.

Part IV: Maintenance Actions: The maintenance actions are mandated to improve overall Flaps System reliability and bring the failure rate to an acceptable level, until permanent solutions are implemented.

The corrective ''maintenance actions'' include the cleaning and lubrication of the flexible shafts, and applicable related investigative and corrective actions (which include a detailed inspection of the actuator connector sealant bead for signs of damage or delamination, repair of damaged sealant, and if necessary, a low temperature torque check on the actuator and if torque test results are not satisfactory, an installation of a serviceable actuator or, if no serviceable actuators are available, contacting the FAA for corrective action). The corrective ''maintenance actions'' also include installation of metallic seals in the flexible drive-shafts, and applicable related investigative and corrective actions (which include a detailed inspection of the mating surfaces on the flexible drive-shaft for damage (scratches or dents), and if mating surfaces have damage, cleaning the sealing washer and mating surfaces and applying sealant).

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Part I. Airplane Flight Manual (AFM) Change: Within 30 days after the effective date of this AD, revise the Canadair Regional Jet Airplane Flight Manual CSP A–012, by incorporating the information in Canadair Regional Jet Temporary Revision (TR) RJ/165, dated July 6, 2007, into the AFM.

Note 1: The actions required by paragraph (f)(1) of this AD may be done by inserting a copy of Canadair Regional Jet TR RJ/165, dated July 6, 2007, into the Canadair Regional Jet Airplane Flight Manual CSP A–012. When this TR has been included in general revisions of the AFM, the general revisions may be inserted in the AFM.

(2) Part II. Operational Procedures: Within 30 days after the effective date of this AD, revise the Limitations Section of the Canadair Regional Jet Airplane Flight Manual CSP A–012, to include the following statement. This may be done by inserting a copy of paragraph (f)(2) of this AD in the AFM.

''1. Flap Extended Diversion

Upon arrival at the destination airport, an approach shall not be commenced, nor shall the flaps be extended beyond the 0 degree position, unless one of the following conditions exists:

a. When conducting a precision approach, the reported visibility (or RVR) is confirmed to be at or above the visibility associated with the landing minima for the approach in use, and can be reasonably expected to remain at or above this visibility until after landing; or

b. When conducting a non-precision approach, the reported ceiling and visibility (or RVR) are confirmed to be at or above the ceiling and visibility associated with the landing minima for the approach in use, and can be reasonably expected to remain at or above this ceiling and visibility until after landing; or

c. An emergency or abnormal situation occurs that requires landing at the nearest suitable airport; or

d. The fuel remaining is sufficient to conduct the approach, execute a missed approach, divert to a suitable airport with the flaps extended to the landing position, conduct an approach at the airport and land with 1000 lb (454 kg) of fuel remaining.

Note 1: The fuel burn factor (as per AFM TR/165) shall be applied to the normal fuel consumption for calculation of the flaps extended missed approach, climb, diversion and approach fuel consumption.

Note 2: Terrain and weather must allow a minimum flight altitude not exceeding 15,000 feet along the diversion route.

Note 3: For the purpose of this AD, a ''suitable airport'' is an airport that has at least one usable runway, served by an instrument approach if operating under Instrument Flight Rules (IFR), and the airport is equipped as per the applicable regulations and standards for marking and lighting. The existing and forecast weather for this airport shall be at or above landing minima for the approach in use.

2. Flap Failure After Takeoff

When a takeoff alternate is filed, terrain and weather must allow a minimum flight altitude not exceeding 15,000 feet along the diversion route to that alternate, or other suitable airport. The fuel at departure shall be sufficient to divert to the takeoff alternate or other suitable airport with the flaps extended to the takeoff position, conduct and approach and land with 1000 lb (454 kg) of fuel remaining.

Note: The fuel burn factor (as per AFM TR/165) shall be applied to the normal fuel consumption for calculation of the flaps extended, climb, diversion and approach fuel consumption.

3. Flap Zero Landing

Operations where all useable runways at the destination and alternate airports are forecast to be wet or contaminated (as defined in the AFM) are prohibited during the cold weather season (December to March inclusive in the northern hemisphere) unless one of the following conditions exists:

a. The flap actuators have been verified serviceable in accordance with Part C (Low Temperature Torque Test of the Flap Actuators) of SB 601R–27–150, July 12, 2007, or

b. The flight is conducted at a cruise altitude where the SAT is –60 deg C or warmer. If the SAT in flight is colder than –60 deg C, descent to warmer air shall be initiated within 10 minutes, or

c. The Landing Distance Available on a useable runway at the destination airport is at least equal to the actual landing distance required for flaps zero. This distance shall be based on Bombardier performance data, and shall take into account forecast weather and anticipated runway conditions, or

d. The Landing Distance Available on a useable runway at the filed alternate airport, or other suitable airport is at least equal to the actual landing distance for flaps zero. This distance shall be based on Bombardier performance data, and shall take into account forecast weather and anticipated runway conditions.

Note 1: If the forecast destination weather is less than 200 feet above DH or MDA, or less than 1 mile (1500 meters) above the authorized landing visibility (or equivalent RVR), as applied to the usable runway at the destination airport, condition 3.a., 3.b., or 3.d. above must be satisfied.

Note 2: When conducting No Alternate IFR (NAIFR) operations, condition 3.a., 3.b., or 3.c. above must be satisfied.''

(3) Part III. Training: As of 30 days after the effective date of this AD, no affected airplane may be operated unless the flight crewmembers of that airplane and the operational control/dispatch personnel for that airplane have received training that is acceptable to the Principal Operations Inspector (POI) on the operational procedures required by paragraph (f)(2) of this AD.

(4) Part IV. Maintenance Actions: Within 120 days after the effective date of this AD, do the cleaning and lubrication of the flexible shafts, installation of metallic seals in the flexible drive-shafts, and all applicable related investigative and corrective actions by doing all the applicable actions specified in ''PART A'' of the Accomplishment Instructions of Bombardier Service Bulletin 601R–27–150, dated July 12, 2007; except if torque test results are not satisfactory, before further flight, install a serviceable actuator in accordance with the service bulletin or, if no serviceable actuators are available, contact the Manager, New York Aircraft Certification Office, FAA, for corrective action. Do all applicable related investigative and corrective actions before further flight.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows:

(1) This AD does not require the following actions specified in the MCAI: the training specified in Paragraph 2. of ''Part III. Training;'' and the maintenance tasks specified in the second and third rows of the table in ''Part IV. Maintenance Actions.'' The planned compliance times for those actions would allow enough time to provide notice and opportunity for prior public comment on the merits of those actions. Therefore, we are considering further rulemaking to address this issue.

(2) The MCAI does not specify a corrective action if an actuator is not serviceable (i.e. torque test results are not satisfactory). This AD requires contacting the FAA or installing a serviceable actuator before further flight if torque test results are not satisfactory (corrective actions are specified in paragraph (f)(4) of this AD).

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Dan Parrillo, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7305; fax (516) 794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Canadian Airworthiness Directive CF–2007–10, dated July 18, 2007; Bombardier Service Bulletin 601R–27–150, dated July 12, 2007; and Canadair Regional Jet Temporary Revision RJ/165, dated July 6, 2007, to the Canadair Regional Jet Airplane Flight Manual CSP A–012; for related information.

Material Incorporated by Reference

(i) You must use Bombardier Service Bulletin 601R–27–150, including Appendix A, dated July 12, 2007; and Canadair Regional Jet Temporary Revision RJ/165, dated July 6, 2007, to the Canadair Regional Jet Airplane Flight Manual CSP A–012; as applicable, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on August 13, 2007.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–16367 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28253; Directorate Identifier 2007–NM–031–AD; Amendment 39–15064; AD 2007–11–07]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–100, –200, –200C, –300, –400, and –500 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting a typographical error in an existing airworthiness directive (AD) that was published in the **Federal Register** on May 22, 2007 (72 FR 28597). The error resulted in a confusing compliance time. This AD applies to all Boeing Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. This AD requires repetitive detailed inspections for damage of the electrical wire and sleeve that run to the fuel boost pump through a conduit in the fuel tank, and arcing damage of the conduit and signs of fuel leakage into the conduit; replacement of the sleeve with a new, smaller-diameter sleeve; and related investigative and corrective actions, as applicable.

DATES: Effective June 6, 2007.

ADDRESSES: The AD docket contains the proposed AD, comments, and any final disposition. You may examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Operations office (telephone (800) 647–5527) is located on the ground level of the West Building at the DOT street address stated in the **ADDRESSES** section. This docket number is FAA–2007–28253; the directorate identifier for this docket is 2007–NM–031–AD.

FOR FURTHER INFORMATION CONTACT: Suzanne Lucier, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6438; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: On May 2, 2007, the FAA issued AD 2007–11–07, amendment 39–15064 (72 FR 28597, May 22, 2007), for all Boeing Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. The AD requires repetitive detailed inspections for damage of the electrical wire and sleeve that run to the fuel boost pump through a conduit in the fuel tank, and arcing damage of the conduit and signs of fuel leakage into the conduit; replacement of the sleeve with a new, smaller-diameter sleeve; and related investigative and corrective actions, as applicable.

As published, paragraph (k) of AD 2007–11–07 reads ''* * * Thereafter, repeat the detailed inspection at intervals not to exceed 15,000 flight cycles. * * *'' The correct term, ''flight hours'' (not flight cycles), appears in all other compliance times cited in the AD, as intended.

No other part of the regulatory information has been changed; therefore, the final rule is not republished in the **Federal Register**.

The effective date of this AD remains June 6, 2007.

§ 39.13 [Corrected]

■ In the **Federal Register** of May 22, 2007, on page 28600, in the third column, paragraph (k) of AD 2007–11–07 is corrected to read as follows:

* * * * *

(k) At the applicable time specified by paragraph (k)(1) or (k)(2) of this AD: Do a detailed inspection for damage of the sleeve and electrical wire of the fuel boost pump; and, before further flight, install a new, smaller-diameter sleeve, and do related investigative and corrective actions, as applicable; in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–28A1263, Revision 1, dated March 19, 2007. Thereafter, repeat the detailed inspection at intervals not to exceed 15,000 flight hours. Accomplishment of the initial inspection, applicable corrective actions, and sleeve installation required by this paragraph terminates the requirements of paragraphs (f), (g), (h), and (i) of this AD.

* * * * *

Issued in Renton, Washington, on August 14, 2007.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–16304 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33–8834; 34–56256; 39–2448; IC–27928]

RIN 3235–AG96

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual to reflect updates to the EDGAR system. Revisions are being made primarily to support the expansion of the current interactive data voluntary reporting program to enable mutual funds voluntarily to submit supplemental tagged information contained in the risk/return summary section of their prospectuses on Form N–1A. The EDGAR system is being upgraded to support this functionality on August 20, 2007.

The filer manual is also being revised to incorporate changes in support of several final rules previously adopted by the Commission and implemented in EDGAR. Those rules include the termination of a foreign private issuer's registration of a class of securities under Section 12(g) and duty to file reports under Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (''Exchange Act''); the electronic filing of Transfer Agent (''TA'') forms TA–1, TA–2 and TA–W; and revisions to the accelerated filer definition under the Exchange Act. Other revisions were made to allow an issuer to indicate whether it is subject to reporting obligations after terminating registration of a class of equity securities under the Exchange Act and to remove references to submission types N–14AE and N–14AE/A for the filing of Form N–14 from ''Table 3–5: Investment Company Submission Types Accepted by EDGAR'' of the Filer Manual.

Revisions to the Filer Manual reflect changes within Volumes I and II, entitled EDGAR Filer Manual, Volume I: ''General Information,'' Version 4 (August 2007) and EDGAR Filer Manual, Volume II: ''EDGAR Filing,'' Version 5 (August 2007) respectively. The updated manual will be incorporated by reference into the Code of Federal Regulations.

DATES: *Effective Date:* August 20, 2007. The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of August 20, 2007.

FOR FURTHER INFORMATION CONTACT: In the Office of Information Technology, Rick Heroux, at (202) 551–8800; in the Division of Investment Management, for questions concerning the expansion of the current interactive data voluntary reporting program, Alberto H. Zapata, Senior Counsel, or Brent J. Fields, Assistant Director, Office of Disclosure Regulation, at (202) 551–6784, and for

questions concerning investment company filings, Ruth Armfield Sanders, Senior Special Counsel, Office of Legal and Disclosure, at (202) 551–6989; in the Division of Market Regulation, for questions concerning the electronic filing of Transfer Agent forms, Catherine Moore, Special Counsel, Office of Clearance and Settlement, at (202) 551–5710; and in the Division of Corporation Finance, for questions concerning the definition of accelerated filer for periodic reports, Katherine W. Hsu, Special Counsel, Office of Rulemaking, at (202) 551–3430 and for questions concerning termination of a foreign private issuer's registration, Elliot Staffin, Special Counsel, Office of International Corporate Finance, at (202) 551–3450.

SUPPLEMENTARY INFORMATION: Today we are adopting an updated EDGAR Filer Manual, Volumes I and II. The Filer Manual describes the technical formatting requirements for the preparation and submission of electronic filings through the EDGAR system.[1] It also describes the requirements for filing using EDGARLink[2] and the Online Forms/XML Web site.

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[3] Filers should consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.[4]

Revisions are being made primarily to support the final rule[5] adopted by the Commission to extend the current interactive data voluntary reporting program to enable mutual funds voluntarily to submit supplemental tagged information contained in the risk/return summary section of their prospectuses from Form N–1A using the mutual fund risk/return summary taxonomy developed by the Investment Company Institute (''ICI''). As with the voluntary interactive data program initiated by the Commission in 2005, in which companies voluntarily agree to furnish financial data as exhibit documents in eXtensible Business Reporting Language (''XBRL'') format, the risk/return summary data submitted by mutual funds must also be provided as exhibit documents in XBRL format. A mutual fund submitting tagged risk/return summary information as an exhibit to Form N–1A will be required to name each document ''EX–100'' as specified in the EDGAR Filer Manual. In addition, the XBRL exhibit documents submitted require the use of the appropriate version of standard taxonomies supported by EDGAR. Those standard taxonomies, including the ICI's Mutual Fund Risk/Return Summary Taxonomy, are provided on the SEC's ''Information for EDGAR Filers'' webpage and include a listing of applicable XBRL schemas and linkbases. Core XBRL, XBRL linkbase, eXtensible Markup Language (XML), and XLink schemas and specifications are listed in the EDGAR Filer Manual, Volume II: ''EDGAR Filing''. A mutual fund choosing to tag its risk/return summary information also would continue to file this information in HTML or ASCII format, as currently required.

The filer manual is also being revised to incorporate changes made to support final rules previously adopted by the Commission and implemented in EDGAR. Those rules and EDGAR changes are described below.

- The termination of a foreign private issuer's 12(g) reporting obligations[6] regarding a class of debt securities and to cease its duty to file reports under Section 13(a) or 15(d) of the Exchange Act;

This revision included the addition of new submission types 15F–12B, 15F–12B/A, 15F–12G, 15F–12G/A, 15F–15D, 15F–15D/A which can be submitted using the EDGARLink software and Submission Template #3.

- The electronic filing of forms[7] TA–1, TA–2 and TA–W;

This revision included the addition of electronic forms for the filing of the registration, annual report, and withdrawal from registration of transfer agents. The EDGARLite application was introduced as the tool for filers to use in the creation of their EDGAR submissions. Filers download the EDGARLite package from the EDGAR OnlineForms/XML Web site and install it on their desktop. EDGARLite consists of a Commercial off the Shelf (COTS) software package, Microsoft InfoPath[8] (MS InfoPath), and electronic form templates provided by the Commission. The forms are encoded in Extensible Markup Language (XML) and are submitted to EDGAR using the OnlineForms/XML Web site.

- Revisions to the accelerated filer definition[9] and accelerated periodic report filing deadlines under the Exchange Act;

The addition of a required ''Accelerated Filer Status'' indicator to EDGARLink submission headers for 10–K, 10–K/A, 10–KT, 10–KT/A, 20–F, and 20–F/A forms allows filers of these form types to select one of the following accelerated filer classification values: Large Accelerated Filer, Accelerated Filer, Non-accelerated Filer, and Not Applicable (should be used if a filer is filing an amendment to a Form 10–K or Form 20–F submission for a period that occurred before the accelerated filer

[1] We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33–6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on February 6, 2006. *See* Release No. 33–8656 (January 27, 2006) [71 FR 5596].

[2] This is the filer assistance software we provide filers filing on the EDGAR system.

[3] *See* Rule 301 of Regulation S–T (17 CFR 232.301).

[4] *See* Release Nos. 33–6977 (February 23, 1993) [58 FR 14628], IC–19284 (February 23, 1993) [58 FR 14848], 35–25746 (February 23, 1993) [58 FR 14999], and 33–6980 (February 23, 1993) [58 FR 15009] in which we comprehensively discuss the rules we adopted to govern mandated electronic filing. *See also* Release No. 33–7122 (December 19, 1994) [59 FR 67752], in which we made the EDGAR rules final and applicable to all domestic registrants; Release No. 33–7427 (July 1, 1997) [62 FR 36450], in which we adopted minor amendments to the EDGAR rules; Release No. 33–7472 (October 24, 1997) [62 FR 58647], in which we announced that, as of January 1, 1998, we would not accept in paper filings that we require filers to submit electronically; Release No. 34–40934 (January 12, 1999) [64 FR 2843], in which we made mandatory the electronic filing of Form 13F; Release No. 33–7684 (May 17, 1999) [64 FR 27888], in which we adopted amendments to implement the first stage of EDGAR modernization; Release No. 33–7855 (April 24, 2000) [65 FR 24788], in which we implemented EDGAR Release 7.0; Release No. 33–7999 (August 7, 2001) [66 FR 42941], in which we implemented EDGAR Release 7.5; Release No. 33–8007 (September 24, 2001) [66 FR 49829], in which we implemented EDGAR Release 8.0; Release No. 33–8224 (April 30, 2003) [68 FR 24345], in which we implemented EDGAR Release 8.5; Release Nos. 33–8255 (July 22, 2003) [68 FR 44876] and 33–8255A (September 4, 2003) [68 FR 53289] in which we implemented EDGAR Release 8.6; Release No. 33–8409 (April 19, 2004) [69 FR 21954] in which we implemented EDGAR Release 8.7; Release No. 33–8454 (August 6, 2004) [69 FR 49803] in which we implemented EDGAR Release 8.8; Release No. 33–8528 (February 3, 2005) [70 FR 6573] in which we implemented EDGAR Release 8.10; Release No. 33–8573 (May 19, 2005) [70 FR 30899] in which we implemented EDGAR Release 9.0; Release No. 33–8612 (September 21, 2005) [70 FR 57130] in which the Commission granted the authorization to publish the release adopting the reorganized EDGAR Filer Manual; Release No. 33–8633 (November 1, 2005) [70 FR 67350] in which we implemented EDGAR Release 9.2; and Release No 33–8656 (January 27, 2006) [71 FR 5596] in which we implemented EDGAR Release 9.3.

[5] See Release No. 33–8823 (July 11, 2007) [72 FR 39290].

[6] See Release No. 34–55540 (March 27, 2007) [72 FR 16934].

[7] See Release No. 34–54864 (December 4, 2006) [71 FR 74698].

[8] MS InfoPath 2003 or MS InfoPath 2007 can be used and comes with the Professional Enterprise Edition of Microsoft Office or can be purchased separately for approximately $200.

[9] See Release No. 33–8644 (December 21, 2005) [70 FR 76626].

definition went into effect). The accelerated filer classification is directly related to the filer's reporting deadline as illustrated in the following:[10]

Category of filer	Revised deadlines for filing periodic reports	
	Form 10–K deadline	Form 10–Q deadline
Large Accelerated Filer ($700MM or more)	75 days for fiscal years ending before December 15, 2006 and 60 days for fiscal years ending on or after December 15, 2006.	40 days.
Accelerated Filer ($75MM or more and less than $700MM).	75 days	40 days.
Non-accelerated Filer (less than $75MM)	90 days	45 days.

Additional revisions were made to permit a domestic issuer to indicate whether reporting obligations still exist after terminating registration of a class of equity securities under the Exchange Act. The addition of a required ''Duty to File Reports Remains'' indicator in EDGARLink submission headers for submission types 15–12B, 15–12B/A, 15–12G, 15–12G/A, 15–15D and 15–15D/A allows filers of these form types to indicate whether it is still subject to reporting obligations under the Exchange Act.

Finally, we removed from ''Table 3–5: Investment Company Submission Types Accepted by EDGAR'' of the Filer Manual the reference to submission types N–14AE and N–14AE/A for the filing of Form N–14. All open-end investment companies, including those filed with automatic effectiveness under Rule 488 (business combinations), are to use submission types N–14 and N–14/A for these filings.

For the extension of the current interactive data voluntary reporting program to enable mutual funds voluntarily to submit supplemental tagged information contained in the risk/return summary section of their prospectuses being implemented in EDGAR Release 9.7, the EDGARLink software and submission templates will not be updated. Notice of the new release has previously been provided on the EDGAR Filing Web site and on the Commission's public Web site. The discrete updates are reflected in the updated Filer Manual Volumes.

Along with adoption of the Filer Manual, we are amending Rule 301 of Regulation S–T to provide for the incorporation by reference into the Code of Federal Regulations of today's revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

You may obtain paper copies of the updated Filer Manual at the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE., Room 1580, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. We will post electronic format copies on the Commission's Web site; the address for the Filer Manual is *http://www.sec.gov/info/edgar.shtml.* You may also obtain copies from Thomson Financial, the paper document contractor for the Commission, at (800) 638–8241.

Since the Filer Manual relates solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (APA).[11] It follows that the requirements of the Regulatory Flexibility Act[12] do not apply.

The effective date for the updated Filer Manual and the rule amendments is August 20, 2007. In accordance with the APA,[13] we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The EDGAR system upgrade to Release 9.7 is scheduled to become available on August 20, 2007. The Commission believes that it is necessary to coordinate the effectiveness of the updated Filer Manual with the scheduled system upgrade.

Statutory Basis

We are adopting the amendments to Regulation S–T under Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[14] Sections 3, 12, 13, 14, 15, 23, and 35A of the Exchange Act,[15] Section 319 of the Trust Indenture Act of 1939,[16] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[17]

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

Text of the Amendment

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The authority citation for part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*(d), 79t(a), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

■ 2. Section 232.301 is revised to read as follows:

§ 232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the updated EDGAR Filer Manual, Volume I: ''General Information,'' Version 4 (August 2007). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: ''EDGAR Filing,'' Version 5 (August 2007). Additional provisions applicable to Form N–SAR filers are set forth in the EDGAR Filer Manual, Volume III: ''N–SAR Supplement,'' Version 1 (September 2005). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the

[10] See Release No. 33–8644 (December 21, 2005) [70 FR 76626].

[11] 5 U.S.C. 553(b).

[12] 5 U.S.C. 601–612.

[13] 5 U.S.C. 553(d)(3).

[14] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

[15] 15 U.S.C. 78c, 78*l*, 78m, 78n, 78o, 78w, and 78*ll*.

[16] 15 U.S.C. 77sss.

[17] 15 U.S.C. 80a–8, 80a–29, 80a–30, and 80a–37.

Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You must comply with these requirements in order for documents to be timely received and accepted. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE., Room 1580, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m., or by calling Thomson Financial at (800) 638–8241. Electronic copies are available on the Commission's Web site. The address for the Filer Manual is *http://www.sec.gov/info/edgar.shtml.* You can also photocopy the document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Dated: August 15, 2007.

By the Commission.

Florence E. Harmon,

Deputy Secretary .

[FR Doc. E7–16414 Filed 8–20–07; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 172

[Docket No. 2006F–0059]

Food Additives Permitted for Direct Addition to Food for Human Consumption; Polydextrose

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of polydextrose as a bulking agent, formulation aid, humectant, and texturizer in all foods, except meat and poultry, baby foods, and infant formula. This action is in response to a petition filed by Danisco USA, Inc.

DATES: This rule is effective August 21, 2007. Submit written or electronic objections and requests for a hearing by September 20, 2007. See section VII of the **SUPPLEMENTARY INFORMATION** section of this document for information on the filing of objections. The Director of the Office of the Federal Register approves the incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51 of certain publications in § 172.841(b) (21 CFR 172.841(b)) as of August 21, 2007.

ADDRESSES: You may submit written or electronic objections and requests for a hearing, identified by Docket No. 2006F–0059, by any of the following methods:

Electronic Submissions

Submit electronic objections in the following ways:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web site: *http://www.fda.gov/dockets/ecomments*. Follow the instructions for submitting comments on the agency Web site.

Written Submissions

Submit written objections in the following ways:

- FAX: 301–827–6870.
- Mail/Hand delivery/Courier [For paper, disk, or CD–ROM submissions]: Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of objections, FDA is no longer accepting objections submitted to the agency by e-mail. FDA encourages you to continue to submit electronic objections by using the Federal eRulemaking Portal or the agency Web site, as described in the *Electronic Submissions* portion of this paragraph.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All objections received will be posted without change to *http://www.fda.gov/ohrms/dockets/default.htm*, including any personal information provided. For detailed instructions on submitting objections, see the ''Objections'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or objections received, go to *http://www.fda.gov/ohrms/dockets/default.htm* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Andrew J. Zajac, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 301–436–1267.

SUPPLEMENTARY INFORMATION:

I. Introduction

In a notice published in the **Federal Register** of February 15, 2006 (71 FR 7975), amended April 27, 2006 (71 FR 24856), FDA announced that a food additive petition (FAP 6A4763) had been filed by Danisco USA, Inc., 440 Saw Mill River Rd., Ardsley, NY 10502–2605. The petition proposed to amend the food additive regulations in § 172.841 *Polydextrose* (21 CFR 172.841). Currently, § 172.841 lists 13 specific categories of foods in which polydextrose may be used safely as a bulking agent, formulation aid, humectant, and texturizer. The petition proposed to amend § 172.841 to provide for the safe use of polydextrose as a bulking agent, formulation aid, humectant, and texturizer in all foods, except meat and poultry.

The petition also proposed to incorporate by reference the specifications for polydextrose in the 5th edition of the Food Chemicals Codex (FCC V), effective January 1, 2004. After the petition was filed, Danisco amended the petition to exclude the proposed uses of polydextrose in baby food and infant formula.

II. Determination of Safety

Under the general safety standard in section 409 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348), a food additive cannot be approved for a particular use unless a fair evaluation of the data available to FDA establishes that the additive is safe for that use. FDA's food additive regulations (21 CFR 170.3(i)) define safe as ''a reasonable certainty in the minds of competent scientists that the substance is not harmful under the intended conditions of use.''

To establish with reasonable certainty that a food additive is not harmful under its intended conditions of use, FDA considers the projected human dietary intake of the additive, existing toxicological data, and other relevant information (such as published literature) available to the agency. FDA compares an individual's estimated daily intake (EDI) of the additive from all sources to an acceptable intake level established by toxicological data. The EDI is determined by projections based on the amount of the additive proposed for use in particular foods and on data regarding the amount consumed from all sources of the additive. The agency commonly uses the EDI for the 90th percentile consumer of a food additive as a measure of high chronic dietary intake.

The petitioner estimates that the cumulative intake of polydextrose from all currently-regulated and proposed uses of the additive will result in an exposure to the additive of 16 grams per person per day (g/p/d) (mean) and 31 g/p/d (90th percentile) for all ages (Ref. 1). The previous FDA intake estimate for polydextrose from currently-regulated uses was 18 g/p/d and 30 g/p/d at the mean and 90th percentile, respectively, for persons aged 2 years and above. Despite the additional proposed uses, the petitioner's intake estimate for polydextrose did not differ significantly from the previous FDA intake estimate because it is based on revised use levels and current uses of polydextrose that are more representative of actual uses of polydextrose in food than those used in FDA's previous intake estimate. FDA agrees with the petitioner's intake estimate for polydextrose and concludes that it is sufficiently conservative (Ref. 1). Because consumer exposure to polydextrose has not changed significantly as a result of the petitioned uses, no new toxicological testing is necessary to ensure that the additional uses proposed in the petition, as amended, will be safe. Therefore, FDA concludes that there is a reasonable certainty that no harm from exposure to polydextrose would result from the additional petitioned uses.

The agency also considered the potential for laxation effect due to excessive consumption of polydextrose in sensitive individuals. Currently, the regulation setting out approved food additive uses for polydextrose requires that consumers be informed of this potential effect through special labeling of products containing more than 15 g of polydextrose per serving (21 CFR 172.841(e)). The agency has considered the cumulative effect of the additional petitioned uses and has concluded that because there will be effectively no increase in dietary exposure to polydextrose the current labeling requirement is adequate to protect the public. Accordingly, the agency is amending § 172.841 of the food additive regulations to provide for the use of polydextrose in all foods, except meat, poultry, baby food, and infant formula.

III. Specifications for Polydextrose

As stated previously, the petition proposes that § 172.841 be amended by adopting the specifications for polydextrose in FCC V. Currently, § 172.841 incorporates by reference the specifications of the 4th edition of the Food Chemicals Codex (FCC IV), 1996. The differences between the specifications in the monograph for polydextrose in FCC IV and FCC V are discussed in the amended filing notice published in the **Federal Register** of April 27, 2006. FDA received no comments on the proposed adoption of the FCC V specifications for polydextrose. Subsequent to the publication of the amended filing notice, FDA learned that FCC published an erratum to the polydextrose monograph in the First Supplement to the 5th Edition of the Food Chemicals Codex (effective March 1, 2006). The erratum contained additional instructions on preparing a standard curve for the assay, but did not include any changes to the specifications.

FDA has reviewed the specifications in FCC V and agrees that § 172.841 should be amended by adopting the specifications in FCC V.

IV. Conclusion

FDA reviewed data and information in the petition and other relevant material to evaluate the safety of the proposed use of polydextrose in all foods, except meat and poultry, baby food, and infant formula. Based on its evaluation, FDA concludes that the uses proposed in the petition are safe, and therefore, § 172.841 should be amended as set forth in this document. In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition will be made available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person (see **FOR FURTHER INFORMATION CONTACT**). As provided in § 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

V. Environmental Impact

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Division of Dockets Management (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday.

VI. Paperwork Reduction Act of 1995

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

VII. Objections

Any person who will be adversely affected by this regulation may file with the Division of Dockets Management (see **ADDRESSES**) written or electronic objections. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents are to be submitted and are to be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

VIII. References

The following reference has been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Memorandum from Folmer, Chemistry Review Team, Division of Petition Review, to DeLeo, Regulatory Group I, Division of Petition Review, June 20, 2006.

List of Subjects in 21 CFR Part 172

Food additives, Incorporation by reference, Reporting and recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 172 is amended as follows:

PART 172—FOOD ADDITIVES PERMITTED FOR DIRECT ADDITION TO FOOD FOR HUMAN CONSUMPTION

■ 1. The authority citation for 21 CFR part 172 continues to read as follows:

Authority: 21 U.S.C. 321, 341, 342, 348, 371, 379e.

■ 2. Section 172.841 is amended by revising paragraphs (b) and (c) to read as follows:

§ 172.841 Polydextrose.

* * * * *

(b) The additive meets the specifications of the ''Food Chemicals Codex,'' 5th ed. (January 1, 2004), pp. 336–339, and the First Supplement to the 5th Edition of the Food Chemicals Codex (March 1, 2006), p. 37, which are incorporated by reference. The Director of the Office of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from The National Academies Press, 500 Fifth St. NW., Washington, DC 20001 (Internet address *http://www.nap.edu*). You may inspect a copy at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

(c) When standards of identity established under section 401 of the act do not preclude such use, polydextrose may be used in accordance with current good manufacturing practices as a bulking agent, formulation aid, humectant, and texturizer in all foods, except meat and poultry, baby food, and infant formula.

* * * * *

Dated: August 14, 2007.

Leslye M. Fraser,

Director, Office of Regulations and Policy, Center for Food Safety and Applied Nutrition.

[FR Doc. E7–16322 Filed 8–20–07; 8:45 am]

BILLING CODE 4160–01–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2006–0526; FRL–8446–1]

Approval and Promulgation of Implementation Plans; Arizona—Phoenix PM–10 Nonattainment Area; Salt River Area Plan for Attainment of the 24-hour PM–10 Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval under the Clean Air Act (CAA) of provisions of the Revised PM–10 State Implementation Plan (SIP) for the Salt River Area submitted by the State of Arizona to EPA in October and November 2005. These submittals include adopted rules, resolutions and measures that address particulate matter (PM–10) emissions from fugitive dust sources.

DATES: *Effective Date:* This rule is effective on September 20, 2007.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2006–0526 for this action. The index to the docket is available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Mae Wang, EPA Region IX, (415) 947–4124, *wang.mae@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

Table of Contents

I. Proposed Action
II. Public Comments and EPA Responses
III. EPA Action
IV. Statutory and Executive Order Reviews

I. Proposed Action

On July 12, 2006 (71 FR 39251), EPA proposed to approve the rules, resolutions and measures listed below into the Arizona PM–10 SIP pursuant to the cited CAA sections. We also proposed on July 12, 2006, to approve Maricopa County Air Quality Department (MCAQD) Rule 316, ''Nonmetallic Mineral Processing,'' adopted on June 8, 2005. In this final rule we are approving all the items listed below. EPA is not, however, including Rule 316 in this final action because we are re-evaluating the rule and expect to address it in a separate rulemaking.

TABLE I

Rule/measure/commitment	Relevant CAA section(s)
Maricopa County Air Quality Department (MCAQD) Rule 325, ''Brick and Structural Clay Products (BSCP) Manufacturing,'' adopted August 10, 2005.	189(b)(1)(B) and 188(e).
MCAQD Rule 310, ''Fugitive Dust,'' adopted April 7, 2004	189(b) and 188(e) for subsections 304.5 and 502. 110(a) for other subsections.
MCAQD Rule 310.01, ''Fugitive Dust From Open Areas, Vacant Lots, Unpaved Parking Lots, and Unpaved Roadways,'' adopted February 17, 2005.	110(a).
MCAQD Appendix C, ''Fugitive Dust Test Methods,'' adopted April 7, 2004	189(b) and 188(e) for subsection 3.3.2. 110(a) for other subsections.
MCAQD Appendix F, ''Soil Designations,'' adopted April 7, 2004	189(b) and 188(e).
MCAQD ''Application for Dust Control Permit,'' adopted June 22, 2005 [1]	189(b) and 188(e) for Section 2, subsections 10 and 11, and Section 3, subsection I. 110(a) for other subsections.
MCAQD 'Guidance for Application for Dust Control Permit,'' adopted June 22, 2005 [2]	189(b) and 188(e) for Section 2, subsection 13, and Section 3. 110(a) for other subsections.
Maricopa County Board Resolution No. C–85–05–005–0–00, adopted January 19, 2005	189(b) for enforcement resource provisions of Measures 1 through 4. 110(a) for other provisions, including Measure 5.
City of Phoenix Resolution No. 20114, adopted June 16, 2004	110(a).
Resolutions from 17 municipalities [3] and the Arizona Department of Transportation, adopted on various dates.	110(a).

[1] The reference to an adoption date of July 1, 2005, in the proposed rule was a clerical error (71 FR at 39253).
[2] See footnote 1.
[3] The reference to resolutions from 18 municipalities in the proposed rule was a clerical error (71 FR at 39253).

These provisions were submitted as part of the Revised PM–10 State Implementation Plan for the Salt River Area, Arizona Department of Environmental Quality (ADEQ), September 2005 (Salt River plan) submitted to EPA on October 7, 2005, and the Revised PM–10 State Implementation Plan for the Salt River Area, Additional Submittals (Maricopa County Rule 310.01, Maricopa Dust Control Permit and Guidance for Application for Dust Control Permit), ADEQ, September 2005, Additional Submittal in November 2005, (Salt River supplement), submitted on November 29, 2005.

Located in metropolitan Phoenix, the Salt River area is a 32-square mile subarea of the metropolitan Phoenix (Maricopa County) serious PM–10 nonattainment area. For additional background on the Salt River portion of the Phoenix PM–10 nonattainment area, see 67 FR 19148 (April 18, 2002) and 67 FR 44369 (July 2, 2002).[1]

We proposed to approve the specified rules, resolutions and measures in the Salt River plan and supplement because we determined that they complied with the referenced CAA requirements. CAA section 189(b)(1)(B) requires serious area PM–10 plans to provide for the implementation of Best Available Control Measures (BACM). CAA section 188(e) requires a state seeking an extension of a serious PM–10 area's attainment deadline to demonstrate to our satisfaction that its serious area plan includes the most stringent measures (MSM) that are included in the implementation plan of any state or are achieved in practice in any state and can be feasibly implemented in the area. Our proposed action contains more information on the rules, resolutions and measures and our evaluation of them.

[1] On July 25, 2002, EPA approved multiple documents submitted to EPA by Arizona for the Phoenix area as meeting the CAA requirements for serious PM–10 nonattainment areas for the 24-hour and annual PM–10 national ambient air quality standards (NAAQS). Among these documents is the Revised Maricopa Association of Governments (MAG) 1999 Serious Area Particulate Plan for PM–10 for the Maricopa County Nonattainment Area, February 2000 (MAG plan), that includes the Best Available Control Measures (BACM) demonstrations for all significant source categories (except agriculture) for both the 24-hour and annual PM–10 standards and the State's request and supporting documentation, including the most stringent measure (MSM) analysis (except for agriculture) for an attainment date extension to 2006 for both standards. EPA's July 25, 2002, final action included approval of these elements of the MAG plan. See EPA's proposed and final approval actions at 65 FR 19964 (April 13, 2000), 66 FR 50252 (October 2, 2001) and 67 FR 48718 (July 25, 2002). EPA revoked the annual PM–10 standard effective December 18, 2006. 71 FR 61144 (October 17, 2006).

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received comments from Joy Herr-Cardillo, Arizona Center for Law in the Public Interest (ACLPI). ACLPI's comment letter and our response are summarized below. We also received a comment letter from the Arizona Rock Products Association (ARPA) on our proposed action as it relates to MCAQD Rule 316. Because, as explained above, our final action does not include Rule 316, we are not responding to ARPA's letter here.

Comment: ACLPI comments that our proposed approval does not address the contingency measures discussed in the Salt River plan. ACLPI states that the two measures designated as contingency measures for the Phoenix area in the Arizona State Implementation Plan are already implemented, and that the purpose of contingency provisions is to assure that the State will act promptly to protect public health if a milestone for reasonable further progress or the attainment date is not met. ACLPI notes that the attainment date for the Phoenix area is December 31, 2006. ACLPI contends that the CAA envisions additional measures which are automatically and immediately implemented if and when the deadline is missed without additional EPA or state action. ACLPI states that the fact that Arizona did not rely upon the existing contingency measures in its attainment demonstration is not relevant. ACLPI concludes that because the Salt River plan fails to include meaningful contingency measures, it does not satisfy the CAA requirements.

Response: Our current action on the Salt River plan and supplement is limited to the rules, resolutions and measures in these documents. On June 6, 2007, we determined that the Phoenix area did not attain the 24-hour PM–10 standard by the required December 31, 2006, deadline. 72 FR 31183. Under CAA section 189(d), the State must therefore submit plan revisions by December 31, 2007, that provide for ''attainment of the PM–10 air quality standard and, from the date of such submission until attainment, for an annual reduction in PM–10 or PM–10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most recent inventory prepared for such area.'' In addition to the attainment demonstration and 5 percent requirements, the plan must address all applicable requirements of the CAA, including sections 110(a), 172(c), 176(c) and 189(c)(1).

III. EPA Action

As discussed above, this action does not address MCAQD Rule 316. With respect to the other submitted rules, resolutions and measures that we proposed for approval on July 12, 2006 (71 FR 39251), and that are listed in Table I above, we received no comments that change our assessment that they comply with the applicable CAA requirements. Therefore, as authorized in CAA section 110(k)(3), EPA is fully approving the rules, resolutions and measures in Table I as meeting the CAA requirements indicated therein.

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255,

August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal standard.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission; to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

The Congressional Review Act, 5 U.S.C. section 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. section 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 22, 2007. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: July 12, 2007.

Keith Takata,

Acting Regional Administrator, Region IX.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart D—Arizona

■ 2. Section 52.120 is amended by adding paragraphs (c)(137) and (138)to read as follows:

§ 52.120 Identification of plan.

* * * * *

(c) * * *

(137) The Administrator is approving the following elements of the *Revised PM–10 State Implementation Plan for the Salt River Area,* September 2005, submitted on October 7, 2005, by the Governor's designee.

(i) *Incorporation by reference.*

(A) Maricopa County Air Quality Department.

(*1*) Rule 325, adopted on August 10, 2005.

(*2*) Rule 310, revised on April 7, 2004.

(*3*) Appendix C, ''Fugitive Dust Test Methods,'' adopted on June 16, 1999, and revised on April 7, 2004.

(*4*) Appendix F, ''Soil Designations,'' adopted on April 7, 2004.

(*5*) Resolution No. C–85–05–005–0–00: Resolution to Implement Additional Measures for the Maricopa County, Arizona Serious PM–10 Nonattainment Area (including Exhibit A), adopted on January 19, 2005.

(B) City of Apache Junction.

(*1*) Resolution No. 04–24: A Resolution of the Mayor and City Council of the City of Apache Junction, Arizona, Implementing Measures to Reduce Reentrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A), adopted on September 21, 2004.

(C) City of Avondale.

(*1*) Resolution No. 2448–04: A Resolution of the Council of the City of Avondale, Arizona, Implementing Measures to Reduce Reentrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A), adopted on September 20, 2004.

(D) Town of Buckeye.

(*1*) Resolution No. 58–04: A Resolution of the Mayor and Town Council of the Town of Buckeye, Arizona, Implementing Measures to Reduce Reentrained Dust Emission from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A), adopted on November 16, 2004.

(E) City of Chandler.

(*1*) Resolution No. 3782: Resolution to Implement Measures to Reduce Re-entrained Dust Emissions from Identified Paved Roads in Chandler As Part of the Revised PM–10 State Implementation Plan for Air Quality (including Exhibit A and Exhibit B), adopted on October 14, 2004.

(F) City of El Mirage.

(*1*) Resolution No. R04–10–54: A Resolution of the Mayor and City Council of the City of El Mirage, Maricopa County, Arizona, Implementing Measures to Reduce Re-entrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A), adopted on October 28, 2004.

(G) Town of Fountain Hills.

(*1*) Resolution No. 2004–63: A Resolution of the Mayor and Council of the Town of Fountain Hills, Arizona, Implementing Measures to Reduce Reentrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A and Protocol to Reduce Reentrained Dust Emissions from Targeted Paved Roads), adopted on November 18, 2004.

(H) Town of Gilbert.

(*1*) Resolution No. 2575: A Resolution of the Common Council of the Town of Gilbert, Arizona to Implement Measures to Reduce Reentrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A and Town of Gilbert Protocol for Reducing PM–10 Emissions from ''High Dust'' Paved Roads), adopted on March 29, 2005.

(I) City of Glendale.

(*1*) Resolution No. 3796 New Series: A Resolution of the Council of the City of Glendale, Maricopa County, Arizona, Implementing Measures to Reduce Re-entrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A and

Glendale Targeted Street Sweeping Protocol to Reduce Dust Emissions), adopted on September 14, 2004.

(J) City of Goodyear.

(*1*) Resolution No. 04–941: A Resolution of the Mayor and Council of the City of Goodyear, Maricopa County, Arizona, to Authorize the City Manager to Implement Measures to Reduce Reentrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A and Protocol for Reducing Reentrained Dust Emissions from Targeted Paved Roads), adopted on October 25, 2004.

(K) City of Mesa.

(*1*) Resolution No. 8344: A Resolution of the City Council of the City of Mesa, Maricopa County, Arizona, Stating the City's Intent to Implement Measures to Reduce Particulate Pollution (including Exhibit A), adopted on October 4, 2004.

(L) Town of Paradise Valley.

(*1*) Resolution Number 1084: Resolution to Implement Measures to Reduce Reentrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A), adopted on September 23, 2004.

(M) City of Peoria.

(*1*) Resolution No. 04–235: A Resolution of the Mayor and City Council of the City of Peoria, Maricopa County, Arizona, Implementing Measures to Reduce Reentrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A and City of Peoria Targeted Paved Roadways Dust Control Protocol, September 24, 2004), adopted on October 5, 2004.

(N) City of Phoenix.

(*1*) Resolution No. 20114: A Resolution Stating the City's Intent to Implement Measures to Reduce Air Pollution (including Exhibit A, City of Phoenix 2004 Protocol and Implementation Plan for Paved Streets with Potential for Dust Emissions, and Attachment A), adopted on June 16, 2004.

(O) City of Scottsdale.

(*1*) Resolution No. 6588: A Resolution of the Council of the City of Scottsdale, Maricopa County Arizona, Authorizing Implementation of Measures to Reduce Reentrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A and Attachment #1—Protocol to Reduce Reentrained Dust Emissions from Targeted Paved Roads), adopted on December 6, 2004.

(P) City of Surprise.

(*1*) Resolution No. 04–163: A Resolution of the Mayor and Council of the City of Surprise, Arizona, to Implement Measures to Reduce Reentrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A and Protocol), adopted on September 23, 2004.

(Q) City of Tempe.

(*1*) Resolution No. 2004.84: A Resolution of the Mayor and City Council of the City of Tempe, Arizona, to Implement Measures to Reduce Re-entrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A and Protocol for Reducing Re-entrained Dust Emissions from Targeted Paved Roads, September 30, 2004), adopted on September 30, 2004.

(R) City of Tolleson.

(*1*) Resolution No. 947: A Resolution of the Mayor and City Council of the City of Tolleson, Maricopa County, Arizona, Implementing Measures to Reduce Reentrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A), adopted on September 28, 2004.

(S) Town of Youngtown.

(*1*) Resolution No. 05–01: Resolution to Implement Measures to Reduce Reentrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A), adopted on January 20, 2005.

(T) Arizona Department of Transportation.

(*1*) Resolution to Implement Measures to Reduce Reentrained Dust Emissions from Targeted Paved Roads in the Revised PM–10 State Implementation Plan for the Salt River Area (including Exhibit A and Arizona Department of Transportation Plan to Reduce Reentrained Dust Emissions from Targeted Paved Roads), adopted on September 17, 2004.

(138) The Administrator is approving the following elements of the *Revised PM–10 State Implementation Plan for the Salt River Area*, Additional Submittals, September 2005, Additional Submittal in November 2005, submitted on November 29, 2005, by the Governor's designee.

(i) *Incorporation by reference.*

(A) Maricopa County Air Quality Department.

(*1*) Rule 310.01, adopted on June 16, 1999, and revised on February 17, 2005.

(*2*) Application for Dust Control Permit, adopted on June 22, 2005.

(*3*) Guidance for Application for Dust Control Permit, adopted on June 22, 2005.

* * * * *

[FR Doc. E7–16223 Filed 8–20–07; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–300

RIN 1215–AB46

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Disabled Veterans, Recently Separated Veterans, Other Protected Veterans, and Armed Forces Service Medal Veterans; Correction

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule; correction.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is correcting a final rule that appeared in the **Federal Register** of August 8, 2007, (72 FR 44393). That document set forth the final regulations implementing the amendments to the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (''VEVRAA'') that were made by the Jobs for Veterans Act (''JVA'') enacted in 2002.

DATES: *Effective Date:* These final regulations are effective September 7, 2007.

FOR FURTHER INFORMATION CONTACT: Lynn A. Clements, Acting Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, NW., Room N3422, Washington, DC 20210. Telephone: (202) 693–0102 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION: In FR Doc. E7–15385, beginning on page 44393 in the issue of Wednesday, August 8, 2007, make the following correction. On page 44401, in the first column, correct the words of issuance to read:

■ ''Accordingly, for the reasons set forth in the preamble, Chapter 60 of Title 41 of the Code of Federal Regulations is amended by adding Part 60–300 to read as follows:''

Dated: August 15, 2007.

Charles E. James, Sr.,

Deputy Assistant Secretary for Federal Contract Compliance.

[FR Doc. E7–16361 Filed 8–20–07; 8:45 am]

BILLING CODE 4510–CM–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 061020273–7001–03]

RIN 0648–XC05

Fisheries of the Northeastern United States; Summer Flounder Fishery; Commercial Quota Harvested for Massachusetts

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that the 2007 summer flounder commercial quota allocated to the Commonwealth of Massachusetts has been harvested. Vessels issued a commercial Federal fisheries permit for the summer flounder fishery may not land summer flounder in Massachusetts for the remainder of calendar year 2007, unless additional quota becomes available through a transfer from another state. Regulations governing the summer flounder fishery require publication of this notification to advise Massachusetts that the quota has been harvested and to advise vessel permit holders and dealer permit holders that no commercial quota is available for landing summer flounder in Massachusetts.

DATES: Effective 0001 hours, August 16, 2007 through 2400 hours, December 31, 2007.

FOR FURTHER INFORMATION CONTACT: Emily Bryant, Fishery Management Specialist, (978) 281–9244.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned on a percentage basis among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.100.

The initial total commercial quota for summer flounder for the 2007 calendar year was set equal to 7,789,800 lb (3,533 mt) (71 FR 75134, December 14, 2006). This quota was increased through an emergency action to 10,267,098 lb (4,658 mt) (72 FR 2458, January 19, 2007). The percent allocated to vessels landing summer flounder in Massachusetts is 6.82046 percent, resulting in a commercial quota of 700,270 lb (318 mt). The 2007 allocation was reduced to 684,331 lb (310 mt) when research set-aside was deducted and then reduced to 654,285 (297 mt) after the 2006 overages had been applied.

Section 648.101(b) requires the Administrator, Northeast Region, NMFS (Regional Administrator) to monitor state commercial quotas and to determine when a state's commercial quota has been harvested. NMFS then publishes a notification in the **Federal Register** to advise the state and to notify Federal vessel and dealer permit holders that, effective upon a specific date, the state's commercial quota has been harvested and no commercial quota is available for landing summer flounder in that state. The Regional Administrator has determined, based upon dealer reports and other available information, that Massachusetts has harvested its quota for 2007.

The regulations at § 648.4(b) provide that Federal permit holders agree, as a condition of the permit, not to land summer flounder in any state that the Regional Administrator has determined no longer has commercial quota available. Therefore, effective 0001 hours, August 16, 2007, further landings of summer flounder in Massachusetts by vessels holding summer flounder commercial Federal fisheries permits are prohibited for the remainder of the 2007 calendar year, unless additional quota becomes available through a transfer and is announced in the **Federal Register**. Effective 0001 hours, August 16, 2007, federally permitted dealers are also notified that they may not purchase summer flounder from federally permitted vessels that land in Massachusetts for the remainder of the calendar year, or until additional quota becomes available through a transfer from another state.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 15, 2007.

James P. Burgess,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 07–4091 Filed 8–16–07; 1:23 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 72, No. 161
Tuesday, August 21, 2007

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket No. PRM–50–88]

Energy Solutions; Receipt of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; notice of receipt.

SUMMARY: The Nuclear Regulatory Commission (NRC) has received and requests public comment on a petition for rulemaking, dated May 29, 2007, filed by Thomas E. Magette of Energy*Solutions.* The petition was docketed by the NRC on June 6, 2007, and has been assigned Docket No. PRM–50–88. The petitioner requests that the NRC amend its regulations to provide a regulatory framework that would allow funds from licensees' decommissioning trust funds to be used for the cost of disposal of ''major radioactive components'' (MRCs) that have been removed from reactors prior to the permanent cessation of operations.

DATES: Submit comments by November 5, 2007. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Please include PRM–50–88 in the subject line of your comments. Comments on petitions submitted in writing or in electronic form will be made available to the public in their entirety on the NRC rulemaking Web site. Personal information, such as your name, address, telephone number, e-mail address, etc., will not be removed from your submission.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to: *SECY@nrc.gov.* If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at (301) 415–1966. You may also submit comments via the NRC's rulemaking Web site at *http://ruleforum.llnl.gov.* Address questions about our rulemaking Web site to Carol Gallagher (301) 415–5905; e-mail *cag@nrc.gov.* Comments can also be submitted via the Federal eRulemaking Portal *http://www.regulations.gov.*

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. Federal workdays (telephone (301) 415–1966).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at (301) 415–1101.

Publicly available documents related to this petition may be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), Room O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents, including comments, may be viewed and downloaded electronically via the NRC rulemaking Web site at *http://ruleforum.llnl.gov.*

Publicly available documents created or received at the NRC after November 1, 1999, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, the public can gain entry into the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–7163 or Toll Free: 800–368–5642.

SUPPLEMENTARY INFORMATION:

The Petitioner

The petitioner is Energy*Solutions.* Energy*Solutions* is a nuclear services firm that provides services to private and government organizations involved in nuclear activities. The petitioner states that it has broad experience and expertise with the NRC licensing process and the standards that apply to the regulation of nuclear facilities, the use of radioactive materials, the clean-up and decommissioning of nuclear facilities, and the disposal of radioactive waste.

Background

The petitioner states that 10 CFR 50.2 defines decommissioning as not beginning until the site or facility ceases operations, and asserts that the definition implies that an entire facility must be removed from service before an activity can be considered as part of decommissioning. The petitioner also states that 10 CFR 50.82(a)(8) allows withdrawals from decommissioning trust funds for decommissioning expenses only, and further limits withdrawals for planning activities prior to the submittal of the post-shutdown decommissioning activities report (PSDAR) following cessation of operations. According to the petitioner, the disposal costs for MRCs that have been removed from service but are awaiting disposal while the facility is still in service are not covered by decommissioning trust funds. The petitioner states that most licensees, rather than use limited operating funds, defer the disposal of MRCs until the time of decommissioning, when they can use their trust funds to remove and dispose of the MRCs in order to achieve the radiation dose limits specified in Subpart E to 10 CFR Part 20. The petitioner asserts that this disposal may not take place for decades, giving rise to adverse environmental impacts if not properly managed.

The Proposed Amendments

The petitioner requests that NRC amend its regulations at 10 CFR 50.82, ''Termination of License,'' to provide a process that would permit a licensee, in advance of permanently ceasing operation at a site, to facilitate the decommissioning process by allowing decommissioning trust funds to be used for disposal of removed MRCs. (Note: The petitioner is not requesting that

NRC amend its regulations to allow the use of decommissioning trust funds to cover the costs of removing the MRCs from the reactor.) Specifically, the petitioner is requesting that 10 CFR 50.82(a)(8)(iii) through (a)(8)(iv) be redesignated as 10 CFR 50.82(a)(8)(iv) through (a)(8)(v), and that a new 10 CFR 50.82(a)(8)(iii) be added. The petitioner proposes the new language read as follows:

(iii) Notwithstanding the limitations of §§ 50.82(a)(8)(i)(A) and 8(ii), a licensee may use decommissioning trust funds to dispose of major radioactive components that have been removed from the reactor provided:

A. The licensee has submitted to the NRC with a copy to the Federal or State government agency (e.g., Federal Energy Regulatory Commission and State Public Utility Commissions), if any, which has rate regulation oversight responsibility for the licensee's decommissioning trust fund:

(1) A request to allow it to withdraw a specified amount from its decommissioning trust fund for the purpose of disposing of specific major radioactive component(s);

(2) A site-specific decommissioning cost estimate that includes the disposal costs for major components stored on site; and

(3) An analysis demonstrating that if the licensee withdraws funds for the costs of disposing of the particular component(s) from the decommissioning trust fund, the remaining funds in the licensee's decommissioning trust fund are sufficient to meet the provisions of §§ 50.82(a)(8)(i)(B) and (C); and

B. The NRC has concluded that there is reasonable assurance that the provisions of §§ 50.82(a)(8)(B) and (C) will be met if the licensee withdraws the funds requested under § 50.82(a)(8)(iii)(A)(1).

The petitioner's asserted justifications for this amendment include:

(1) Reducing the radioactive source term associated with the contaminated components at reactor sites;

(2) Exposing site workers to less radiation;

(3) Eliminating unnecessary regulatory burdens by avoiding the costs associated with both maintaining the components on-site and providing protection to workers as a result of maintaining those components;

(4) Reducing the overall costs to decommission sites; and

(5) Ensuring that more funds are available to decommission reactors at the time the reactors cease operation.

Conclusion

The petitioner concludes that it is in the public interest to provide a regulatory framework to allow funds from licensees' decommissioning trust funds to be used for the cost of disposal of MRCs that have been removed from reactors prior to the permanent cessation of operations. Accordingly, the petitioner requests that the NRC amend its regulations as described previously in the section titled, ''The Proposed Amendments.''

Dated at Rockville, Maryland, this 15th day of August 2007.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E7–16476 Filed 8–20–07; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

10 CFR Part 905

RIN 1901–AB24

Energy Planning and Management Program; Integrated Resource Planning Approval Criteria

AGENCY: Western Area Power Administration, Department of Energy (DOE).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Western Area Power Administration (Western) is proposing changes to current regulations that require customers to prepare integrated resource plans (IRP). Western is proposing to facilitate public review of customer IRPs by making them more readily available, such as by posting customer IRPs on Western's external Web site. Western is also proposing language to encourage participation in regional IRPs by customers who may not be members of a member-based association (MBA). Finally, Western proposes to modify the requirement that each member of an MBA approve the IRP. Publication of this **Federal Register** notice begins the formal process for the proposed regulation revisions.

DATES: The comment period begins today and will end November 19, 2007. Western will present a detailed explanation of the proposed revisions to its current regulations and accept oral and written comments at a joint public information and public comment forum. The public forum will be held on the following date: September 6, 2007, 1 p.m. MDT, Denver, CO. Western will accept written comments any time during the comment period.

ADDRESSES: Send written comments to Ron Horstman, Energy Services Specialist, Western Area Power Administration, P.O. Box 281213, Lakewood, CO 80228–8213. Comments may be sent by fax to (720) 962–7427 or by electronic mail to *horstman@wapa.gov.* Western will post information about the public process on its Web site at *http://www.wapa.gov.* Western will post official comments received via letter and e-mail to its Web site after the close of the comment period. Western must receive written comments by the end of the comment period to ensure they are considered in Western's decision process.

The public forum location will be the Radisson Hotel Denver Stapleton Plaza, 3333 Quebec Street, Denver, Colorado 80207.

FOR FURTHER INFORMATION CONTACT: Project manager-Ron Horstman, (720) 962–7419, e-mail *horstman@wapa.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction and Discussion of Proposal

Section 114 of the Energy Policy Act of 1992 (EPAct), Public Law 102–486, amended the Hoover Power Plant Act of 1984 (42 U.S.C. 7275–7276) to require integrated resource planning by Western's customers. Western implemented section 114 of EPAct through completion of the Energy Planning and Management Program (Program) in October 1995. 60 FR 54151 (October 20, 1995). The Program was revised in March of 2000 to allow customers more alternatives in meeting the IRP requirements. 65 FR 16789 (March 30, 2000). Western's current regulations are published in the Code of Federal Regulations at 10 CFR part 905.

Western is proposing to revise its IRP rule pursuant to 10 CFR 905.24, which allows Western at appropriate intervals to initiate a public process to review and revise its regulations. Specifically, Western is proposing to change its IRP regulations in three respects. The first proposed change is to the public participation requirement under 10 CFR 905.11 (b)(4). Given the large number of members of some MBAs and the diversity of the member's interests, Western proposes to eliminate the requirement that members of an MBA unanimously approve the IRP (10 CFR 905.11(b)(4)(i)). Instead, Western proposes to require approval only by the governing body of an MBA, which serves the interests of each MBA member through the member's representation on the MBA board. Western is proposing no other changes to the full public participation requirement in section 905.11(b)(4).

Secondly, Western is proposing to add a paragraph to section 905.12(b) to encourage cooperation among customers in the preparation of regional IRPs by clarifying that such a regional approach is acceptable, with advance approval by Western, even if the participating

customers are not members of an MBA. Collaboration on transmission projects through a regional planning approach is particularly appropriate.

Finally, consistent with the requirement for full public participation in the preparation, development, revision or amendment of an IRP, Western proposes to make current customer IRPs more readily available to the public, such as by posting such documents on Western's external Web site. Customers may continue to request confidential treatment of sensitive information covered by an exemption in the Freedom of Information Act when the IRP is filed with Western. If Western agrees, the sensitive information will be redacted and not released. This proposal is in response to feedback from interested parties that IRPs prepared by Western's customers are more difficult to obtain than investor-owned utility IRPs. Western is proposing to clarify its ability to release customer IRPs in section 905.23.

II. Procedural and Regulatory Review Requirements

A. Review Under Executive Order 12866

Western has an exemption from centralized regulatory review under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this notice of proposed rulemaking was not reviewed by OMB under the Executive Order.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601, *et seq.*) requires Federal agencies to perform a regulatory flexibility analysis if a final rule is likely to have a significant economic impact on a substantial number of small entities and there is a legal requirement to issue a general notice of proposed rulemaking. The proposed rule would make a change to the process of approving IRPs; encourage cooperation among customers by clarifying that a regional approach including non-members may be approved by Western; and provide for making customer IRPs more readily available to the public, such as by posting on Western's Web site. Western is proposing no new substantive requirements, and the proposed rule, if promulgated as a final rule, would not have a significant economic impact on any entity. On this basis, Western's Administrator has certified that the proposed rule would have no significant economic impact on a substantial number of small entities.

C. Review Under the Paperwork Reduction Act

No new information or record keeping requirements are imposed by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

D. Review Under the National Environmental Policy Act of 1969

In compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*); the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508); and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021), Western has determined this action is categorically excluded from preparing an environmental assessment or an environmental impact statement. This rulemaking would amend an existing regulation without changing the environmental effect of the regulation being amended and, therefore, is covered under the Categorical Exclusion in paragraph A5 to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism'' (64 FR 43255, August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). Western has examined today's proposed rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Federal agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Federal agencies to determine whether the regulations meet the applicable standards in section 3(a) and section 3(b), or it is unreasonable to meet one or more of them. Western has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to assess the effects of a Federal regulatory action on State, local, and tribal governments, and the private sector. Western has determined that today's regulatory action does not impose a Federal mandate on State, local or tribal governments or on the private sector.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, Western has concluded

that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by the Office of Management and Budget (OMB). OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). Western has reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as: (1) Any action by an agency that promulgated or is expected to lead to promulgation of a final rule; (2) is a significant regulatory action under Executive Order 12866, or any successor order; and (3) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action is not a significant energy action. Accordingly, Western has not prepared a Statement of Energy Effects.

III. Public Comment Procedures

Interested persons are invited to participate by submitting data, views, or arguments with respect to the proposed amendments to part 905 set forth in this notice. Written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice. All brochures, studies, comments, letters, memorandums, or other documents that Western initiates or uses to develop the proposed regulation revisions are available for inspection and copying at Western's Corporate Services Office in Lakewood, Colorado. Many of these documents and supporting information are also available on Western's Web site located at *http://www.wapa.gov.*

Any information that a commenter considers to be confidential must be so identified and submitted in writing, one copy only. Western reserves the right to determine the appropriateness of confidential status for the information and to treat it in accordance with its determination.

IV. Approval of the Office of the Secretary

The Secretary of Energy has approved the publication of today's proposed rule.

List of Subjects in 10 CFR Part 905

Electric power, Electric utilities, Energy, Energy conservation, Hydroelectric power and utilities, Reporting and recordkeeping requirements.

Dated: August 6, 2007.

Timothy J. Meeks,

Administrator.

For the reasons set forth in the supplementary information section, 10 CFR part 905 is proposed to be amended as set forth below.

PART 905—ENERGY PLANNING AND MANAGEMENT PROGRAM

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

Authority: 42 U.S.C. 7152, 7191; 42 U.S.C. 7275–7276c.

§ 905.11 [Amended]

2. Section 905.11(b)(4)(i) is amended by removing ''and each MBA member (such as a board of directors or city council)''; and by removing ''included or referred to in the IRP''.

3. Section 905.12 is amended by adding paragraph (b)(4) to read as follows:

§ 905.12 How must IRPs be submitted?

(b) * * *

(4) Customers may work together to develop and submit regional IRPs. Customers who wish to submit regional IRPs must first obtain approval by Western to do so. Regional IRPs must be approved individually by each participating customer prior to submittal of the IRP to Western.

* * * * *

4. Section 905.23 is revised to read as follows:

§ 905.23 What are the opportunities for using the Freedom of Information Act to request data?

IRPs, small customer plans, minimum investment reports, public benefits reports, and EE/RE reports and associated data submitted to Western are subject to the Freedom of Information Act (FOIA) and may be made available to the public upon request. Customers may request confidential treatment of all or part of a submitted document under applicable FOIA exemptions. Western's FOIA Officer will make his/her own determination whether particular information is exempt from public access. Western will not disclose to the public information it has determined to be exempt from disclosure under FOIA. Western will make customer IRPs available to the public, such as through posting them on Western's external Web site, subject to the same confidentiality determinations made in response to FOIA requests.

[FR Doc. E7–16477 Filed 8–20–07; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–29030; Directorate Identifier 2006–NM–284–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Model F.28 Mark 0070, 0100, 1000, 2000, 3000, and 4000 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, * * * Special Federal Aviation Regulation 88 (SFAR88) * * * required a safety review of the aircraft Fuel Tank System * * *.

* * * * *

Fuel Airworthiness Limitations are items arising from a systems safety analysis that have been shown to have failure mode(s)

associated with an ''unsafe condition'' * * *. These are identified in Failure Conditions for which an unacceptable probability of ignition risk could exist if specific tasks and/or practices are not performed in accordance with the manufacturers' requirements.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by September 20, 2007.

ADDRESSES: You may send comments by any of the following methods:

- *DOT Docket Web Site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Streamlined Issuance of AD

The FAA is implementing a new process for streamlining the issuance of ADs related to MCAI. This streamlined process will allow us to adopt MCAI safety requirements in a more efficient manner and will reduce safety risks to the public. This process continues to follow all FAA AD issuance processes to meet legal, economic, Administrative Procedure Act, and **Federal Register** requirements. We also continue to meet our technical decision-making responsibilities to identify and correct unsafe conditions on U.S.-certificated products.

This proposed AD references the MCAI and related service information that we considered in forming the engineering basis to correct the unsafe condition. The proposed AD contains text copied from the MCAI and for this reason might not follow our plain language principles.

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–29030; Directorate Identifier 2006–NM–284–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2006–0206, dated June 11, 2006, and EASA Airworthiness Directive 2006–0208, dated July 12, 2006 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA published Special Federal Aviation Regulation 88 (SFAR 88) in June 2001. SFAR 88 required a safety review of the aircraft Fuel Tank System to determine that the design meets the requirements of FAR (Federal Aviation Regulation) § 25.901 and § 25.981(a) and (b).

A similar regulation has been recommended by the JAA (Joint Aviation Authorities) to the European National Aviation Authorities in JAA letter 04/00/02/07/03–L024 of 3 February 2003. The review was requested to be mandated by NAA's (National Aviation Authorities) using JAR (Joint Aviation Regulation) § 25.901(c), § 25.1309.

In August 2005 EASA published a policy statement on the process for developing instructions for maintenance and inspection of Fuel Tank System ignition source prevention (EASA D 2005/CPRO, *http://www.easa.eu.int/home/cert_policy_statements_en.html*) that also included the EASA expectations with regard to compliance times of the corrective actions on the unsafe and the not unsafe part of the harmonised design review results. On a global scale the TC (type certificate) holders committed themselves to the EASA published compliance dates (see EASA policy statement). The EASA policy statement has been revised in March 2006: The date of 31–12–2005 for the unsafe related actions has now been set at 01–07–2006.

Fuel Airworthiness Limitations are items arising from a systems safety analysis that have been shown to have failure mode(s) associated with an ''unsafe condition'' as defined in FAA's memo 2003–112–15 ''SFAR 88—Mandatory Action Decision Criteria''. These are identified in Failure Conditions for which an unacceptable probability of ignition risk could exist if specific tasks and/or practices are not performed in accordance with the manufacturers' requirements.

This EASA Airworthiness Directive mandates the Fuel System Airworthiness Limitations, comprising maintenance/inspection tasks and Critical Design Configuration Control Limitations (CDCCL) for the type of aircraft, that resulted from the design reviews and the JAA recommendation and EASA policy statement mentioned above.

The corrective action includes revising the Airworthiness Limitations Section of the Instructions for Continued Airworthiness for certain airplanes, and the FAA-approved maintenance program for certain other airplanes, to incorporate new limitations for fuel tank systems. You may obtain further information by examining the MCAI in the AD docket.

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (i.e., type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design

holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: single failures, single failures in combination with a latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

The Joint Aviation Authorities (JAA) has issued a regulation that is similar to SFAR 88. (The JAA is an associated body of the European Civil Aviation Conference (ECAC) representing the civil aviation regulatory authorities of a number of European States who have agreed to co-operate in developing and implementing common safety regulatory standards and procedures.) Under this regulation, the JAA stated that all members of the ECAC that hold type certificates for transport category airplanes are required to conduct a design review against explosion risks.

We have determined that the actions identified in this AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Relevant Service Information

Fokker Services B.V. has issued Fokker Service Bulletin F28/28–050, dated June 30, 2006; and Fokker 70/100 Fuel Airworthiness Limitation Items (ALI) and Critical Design Configuration Control Limitations (CDCCL) Report SE–672, Issue 1, dated January 31, 2006. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 18 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $1,440, or $80 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Fokker Services B.V.: Docket No. FAA–2007–29030; Directorate Identifier 2006–NM–284–AD.

Comments Due Date

(a) We must receive comments by September 20, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Fokker Model F.28 Mark 0070 and 0100 airplanes, all serial numbers, certificated in any category; and Model F.28 Mark 1000, 2000, 3000, and 4000 airplanes, serial numbers 11003 through

11241, 11991 and 11992, certificated in any category.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (g) of this AD. The request should include a description of changes to the required inspections that will ensure the continued damage tolerance of the affected structure. The FAA has provided guidance for this determination in Advisory Circular (AC) 25.1529–1.

Subject

(d) Transport Association (ATA) of America Code 28: Fuel.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA published Special Federal Aviation Regulation 88 (SFAR 88) in June 2001. SFAR 88 required a safety review of the aircraft Fuel Tank System to determine that the design meets the requirements of FAR (Federal Aviation Regulation) § 25.901 and § 25.981(a) and (b).

A similar regulation has been recommended by the JAA (Joint Aviation Authorities) to the European National Aviation Authorities in JAA letter 04/00/02/07/03–L024 of 3 February 2003. The review was requested to be mandated by NAA's (National Aviation Authorities) using JAR (Joint Aviation Regulation) § 25.901(c), § 25.1309.

In August 2005 EASA published a policy statement on the process for developing instructions for maintenance and inspection of Fuel Tank System ignition source prevention (EASA D 2005/CPRO, *http://www.easa.eu.int/home/cert_policy_statements_en.html*) that also included the EASA expectations with regard to compliance times of the corrective actions on the unsafe and the not unsafe part of the harmonised design review results. On a global scale the TC (type certificate) holders committed themselves to the EASA published compliance dates (see EASA policy statement). The EASA policy statement has been revised in March 2006: the date of 31–12–2005 for the unsafe related actions has now been set at 01–07–2006.

Fuel Airworthiness Limitations are items arising from a systems safety analysis that have been shown to have failure mode(s) associated with an 'unsafe condition' as defined in FAA's memo 2003–112–15 'SFAR 88—Mandatory Action Decision Criteria'. These are identified in Failure Conditions for which an unacceptable probability of ignition risk could exist if specific tasks and/or practices are not performed in accordance with the manufacturers' requirements.

This EASA Airworthiness Directive mandates the Fuel System Airworthiness Limitations, comprising maintenance/inspection tasks and Critical Design Configuration Control Limitations (CDCCL) for the type of aircraft, that resulted from the design reviews and the JAA recommendation and EASA policy statement mentioned above.

The corrective action includes revising the Airworthiness Limitations Section of the Instructions for Continued Airworthiness for certain airplanes, and the FAA-approved maintenance program for certain other airplanes, to incorporate new limitations for fuel tank systems.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Within 3 months after the effective date of this AD, do the action in paragraph (f)(1)(i) or (f)(1)(ii) of this AD, as applicable. For all identified tasks, the initial compliance time starts from the effective date of this AD. The repetitive inspections must be accomplished thereafter at the intervals not to exceed those specified in Fokker 70/100 Fuel Airworthiness Limitation Items (ALI) and Critical Design Configuration Control Limitations (CDCCL) Report SE–672, Issue 1, dated January 31, 2006; or Fokker Service Bulletin F28/28–050, dated June 30, 2006; as applicable; except as provided by paragraph (f)(3) of this AD.

(i) For Model F.28 Mark 0070 and 0100 airplanes, revise the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness to incorporate the limits specified in Fokker 70/100 Fuel Airworthiness Limitation Items (ALI) and Critical Design Configuration Control Limitations (CDCCL) Report SE–672, Issue 1, dated January 31, 2006; or Fokker Service Bulletin F28/28–050, dated June 30, 2006; as applicable.

(ii) For Model F.28 Mark 1000, 2000, 3000, and 4000 airplanes, incorporate into the FAA-approved maintenance inspection program the limits specified in Fokker 70/100 Fuel Airworthiness Limitation Items (ALI) and Critical Design Configuration Control Limitations (CDCCL) Report SE–672, Issue 1, dated January 31, 2006; or Fokker Service Bulletin F28/28–050, dated June 30, 2006.

(2) Within 3 months after the effective date of this AD, do the action in paragraph (f)(2)(i) or (f)(2)(ii) of this AD, as applicable.

(i) For Model F.28 Mark 0070 and 0100 airplanes, revise the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness to incorporate the CDCCLs as defined in Fokker 70/100 Fuel Airworthiness Limitation Items (ALI) and Critical Design Configuration Control Limitations (CDCCLs) Report SE–672, Issue 1, dated January 31, 2006; or Fokker Service Bulletin F28/28–050, dated June 30, 2006.

(ii) For Model F.28 Mark 1000, 2000, 3000, and 4000 airplanes, incorporate into the FAA-approved maintenance inspection program the CDCCLs as defined in Fokker 70/100 Fuel Airworthiness Limitation Items (ALI) and Critical Design Configuration Control Limitations (CDCCLs) Report SE–672, Issue 1, dated January 31, 2006; or Fokker Service Bulletin F28/28–050, dated June 30, 2006.

(3) Where Fokker 70/100 Fuel Airworthiness Limitation Items (ALI) and Critical Design Configuration Control Limitations (CDCCLs) Report SE–672, Issue 1, dated January 31, 2006; and Fokker Service Bulletin F28/28–050, dated June 30, 2006; allow for exceptional short-term extensions, an exception is acceptable to the FAA if it is approved by the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

(4) Except as provided by paragraph (g)(1) of this AD: After accomplishing the actions specified in paragraphs (f)(1) and (f)(2) of this AD, no alternative inspection, inspection intervals, or CDCCLs may be used.

Note 2: For Model F.28 Mark 1000, 2000, 3000, and 4000 airplanes, after an operator complies with the requirements of paragraphs (f)(1)(ii) and (f)(2)(ii) of this AD, those paragraphs do not require that operators subsequently record accomplishment of those requirements each time an applicable action is accomplished according to that operator's FAA-approved maintenance inspection program.

FAA AD Differences

Note 3: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2006–0206, dated June 11, 2006; EASA Airworthiness Directive 2006–0208,

dated July 12, 2006; Fokker 70/100 Fuel Airworthiness Limitation Items (ALI) and Critical Design Configuration Control Limitations (CDCCL) Report SE–672, Issue 1, dated January 31, 2006; and Fokker Service Bulletin F28/28–050, dated June 30, 2006; for related information.

Issued in Renton, Washington, on August 14, 2007.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–16426 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22623; Directorate Identifier 2004–NM–80–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 767 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: The FAA is revising an earlier proposed airworthiness directive (AD) for all Boeing Model 767 airplanes. The original NPRM would have required the following actions for the drive mechanism of the horizontal stabilizer: Repetitive detailed inspections for discrepancies and loose ball bearings; repetitive lubrication of the ballnut and ballscrew; repetitive measurements of the freeplay between the ballnut and the ballscrew; and corrective action if necessary. The original NPRM resulted from a report of extensive corrosion of a ballscrew in the drive mechanism of the horizontal stabilizer on a similar airplane model. This action revises the original NPRM by including additional initial and repetitive inspections of the ballscrew-to-ballnut freeplay for certain airplanes, and adding a new compliance time for those inspections. We are proposing this supplemental NPRM to prevent an undetected failure of the primary load path for the ballscrew in the drive mechanism of the horizontal stabilizer and subsequent wear and failure of the secondary load path, which could lead to loss of control of the horizontal stabilizer and consequent loss of control of the airplane.

DATES: We must receive comments on this supplemental NPRM by September 17, 2007.

ADDRESSES: Use one of the following addresses to submit comments on this supplemental NPRM.

- *DOT Docket Web site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Fax:* (202) 493–2251.
- *Hand Delivery:* Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Kelly McGuckin, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Airplane Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6490; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this supplemental NPRM. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number ''Docket No. FAA–2005–22623; Directorate Identifier 2004–NM–80–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this supplemental NPRM. We will consider all comments received by the closing date and may amend this supplemental NPRM in light of those comments.

We will post all comments submitted, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this supplemental NPRM. Using the search function of that web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov*.

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Operations office (telephone (800) 647–5527) is located on the ground floor of the West Building at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Discussion

We proposed to amend 14 CFR part 39 with a notice of proposed rulemaking (NPRM) for an AD (the ''original NPRM'') for all Boeing Model 767 airplanes. The original NPRM was published in the **Federal Register** on October 7, 2005 (70 FR 58620). The original NPRM proposed to require the following actions for the drive mechanism of the horizontal stabilizer: Repetitive detailed inspections for discrepancies and loose ball bearings; repetitive lubrication of the ballnut and ballscrew; repetitive measurements of the freeplay between the ballnut and the ballscrew; and corrective action if necessary.

Actions Since Original NPRM Was Issued

Since we issued the original NPRM, Boeing has revised certain service information to add initial and repetitive inspections of the ballscrew-to-ballnut freeplay for certain airplanes, and to add a new compliance time for those inspections.

Relevant Service Information

We have reviewed the following service bulletins:

- Boeing Service Bulletin 767–27A0194, Revision 2, dated July 13, 2006 (for Model 767–200, –300, and –300F series airplanes); and
- Boeing Service Bulletin 767–27A0195, Revision 2, dated July 13, 2006 (for Model 767–400ER series airplanes).

The procedures in Revision 2 of the service bulletins are essentially the same as those in Revision 1 of the service bulletins, both dated July 21, 2005 (which were referenced in the NPRM as the appropriate sources of service information for accomplishing the specified actions); except Revision 2 includes additional requirements for

airplanes on which the A55001–22 lock equipment was used to accomplish the ballscrew-to-ballnut freeplay inspection specified in Revision 1 of the service bulletins. For airplanes on which the ballscrew-to-ballnut freeplay inspection was done incorrectly, as specified in section 1.D. ''Description'' of the service bulletins, Revision 2 also adds a new compliance time for that additional ballscrew-to-ballnut freeplay inspection of within 60 months after the last inspection, or 60 months after the delivery date of the airplane, or 18 months after the date on the service bulletin, whichever occurs latest. Revision 2 also recommends repeating those inspections thereafter at intervals not to exceed 72 months. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. We added a new paragraph (g) to this AD to include these requirements.

Comments

We have considered the following comments on the original NPRM.

Request To Change Relevant Service Information Section

Boeing asks that we change the second paragraph of the Relevant Service Information section in the original NPRM to read ''For airplanes on which an FAA-approved low utilization maintenance program is in effect * * *'' We agree with Boeing that the second paragraph could be changed for clarification; however, that paragraph is not included in this supplemental NPRM. We have made no change to the supplemental NPRM in this regard.

Request To Change Additional Sources of Service Information Table

Boeing asks that we change the table in Note 1 of the original NPRM titled ''Additional Sources of Service Information'' to reflect that the airplane maintenance manual is applicable to all Model 767 airplanes, not just Model 767–200 airplanes. Boeing states that the original NPRM is applicable to all Model 767 airplanes. We agree with Boeing for the reason provided, and we have changed Note 1 of this supplemental NPRM accordingly.

Request To Change Compliance Time for Previously Accomplished Actions

Boeing asks that the compliance time specified in paragraph (g) of the original NPRM (paragraph (h) of the supplemental NPRM) be reduced from 4,000 to 3,500 flight hours. Boeing states that this compliance time is specified in section 1.D. ''Description'' of Service Bulletin 767–27A0194, Revision 1. We agree with Boeing for the reason provided. The compliance time specified in Service Bulletin 767–27A0195, Revision 1, is also 3,500 flight hours. The compliance time specified in the original NPRM was incorrect; therefore, we have changed the compliance time in paragraph (h) of this supplemental NPRM accordingly.

Request To Withdraw Original NPRM

Air Transport Association (ATA) on behalf of its member Delta Airlines, states that operators are already accomplishing the intent of the original NPRM and there are no instances of the underlying airworthiness concerns occurring on Model 767 airplanes.

Delta Airlines disagrees with the requirements in the original NPRM that would mandate what it considers routine maintenance program tasks. Delta states that it already performs all of these tasks and does not agree that the tasks should be mandated. Delta adds that the tasks and compliance intervals specified in the referenced service bulletins are similar to the tasks and intervals already defined in the Maintenance Planning Document (MPD). Delta notes that bundling these tasks allows efficiency, but mandating arbitrary limits through an AD significantly reduces operator scheduling flexibility and is not merited in this case.

We infer that the commenters are asking that the original NPRM be withdrawn; we do not agree. We have determined that a degraded stabilizer trim actuator can be a safety concern because each airplane has only one stabilizer trim actuator, which is both a critical system component and a critical structural component of the airplane. As we stated in the original NPRM, the unsafe condition is undetected failure of the primary load path for the ballscrew in the horizontal stabilizer and subsequent wear and failure of the secondary load path, which could lead to loss of control of the horizontal stabilizer and consequent loss of control of the airplane. The proposed maintenance tasks and intervals must be mandated because of the criticality of the horizontal stabilizer system, the consequences of not performing the maintenance tasks, and the adverse service history attributed to problems with the horizontal stabilizer system on other airplanes. These tasks and intervals were not chosen arbitrarily, but instead were based on the minimum maintenance requirements needed to maintain the integrity of the stabilizer trim system. Although the lubrication and inspection procedures are normally handled by the procedures in the maintenance program, these maintenance actions can affect the safety of the airplane if they are not performed in a timely manner. We do not mandate the implementation of MPD revisions, and we cannot control escalation of MPD intervals related to maintenance. We consider it unacceptable that maintenance intervals can be escalated for economic reasons when these maintenance actions directly affect the safety of the airplane. Failure to perform these maintenance tasks at the proper intervals can lead to an unsafe condition. Therefore, we consider that mandating the actions in this supplemental NPRM appropriate and necessary.

Requests To Extend Compliance Times

Delta states that there are no data provided in the original NPRM to support the proposed compliance time limits. Delta notes that both of these limits fall short of its C–check visit, and would impose significant down time and costs to accomplish tasks with such arbitrary limits. Delta recommends that, if the FAA decides to mandate these tasks, the limits be written in a manner that allows flexibility in scheduling, such as ''the later of either (a) or (b), where (a) is 2,000 flight hours or 12 months, whichever occurs first; or (b) every C–check.''

United Parcel Service (UPS) asks that we consider revising the NPRM to specify accomplishment of the referenced time-controlled tasks within paragraph (g) of the original NPRM as follows: ''For airplanes on which Boeing Maintenance Program Changes are in place to perform repetitive Inspections/Lubrications/Freeplay checks of the horizontal stabilizer, within 15,000 flight hours after the last Ballscrew-to-Ballnut Freeplay Inspection, or 24 months after the effective date, accomplish applicable actions required by paragraph (f) of this AD.'' UPS states that the continuation of the referenced time-controlled tasks would provide an equivalent level of safety and relieve scheduling burdens that might be encountered during the accomplishment of proposed requirements.

We do not agree with allowing operators to perform the actions at later compliance times. We cannot specify a letter check for mandatory inspection intervals because letter checks vary among different operators and can be escalated. The inspection intervals were determined from the results of a safety review by means of testing, failure mode analysis, and fault tree analysis. In developing an appropriate compliance time for this action, we also considered

the urgency associated with the subject unsafe condition, the practical aspect of accomplishing the required actions within an interval of time that corresponds to the normal scheduled maintenance for most affected operators, and the recommendation of the manufacturer. However, according to the provisions of paragraph (k) of this AD, we may approve requests to adjust the compliance time if the request includes data that substantiate that the new compliance time would provide an acceptable level of safety. We have made no change to the supplemental NPRM in this regard.

Request To Change Paragraph (i) of the Proposed AD

UPS states that no overhaul instructions are provided in the referenced service bulletins that are specified in paragraph (i) of the original NPRM, and adds that sufficient inspection requirements are given in the Component Maintenance Manual (CMM). Therefore, UPS recommends that paragraph (i) of the original NPRM (Parts Installation) specify that ''* * * no person may install on any airplane a horizontal stabilizer trim actuator unless it is new or has been overhauled in accordance with the CMM; or has been inspected, lubricated, and measured in accordance with paragraph (f) of this AD.'' UPS states that the referenced service bulletins do not provide any direction over and above the requirements of the associated CMM.

We disagree that the referenced service bulletins do not contain the overhaul instructions for the horizontal stabilizer trim actuator. Although the service bulletins do not list the detailed steps required to overhaul the stabilizer trim actuator, the bulletins do reference the appropriate CMM for accomplishing this task. We have made no change to the supplemental NPRM in this regard.

Request for Addition of Indication

The Air Line Pilots Association (ALPA) recommends that there be a clear indication to the operator when the primary load path has been compromised to the point of loading the secondary load path, so that corrective action can be taken immediately. The ALPA did not provide a specific reason for, or data to support, its recommendation.

We acknowledge ALPA's request; however, we do not agree with the need for this specific indication. The maintenance tasks and intervals identified in the service bulletins, and proposed by this supplemental NPRM, are intended to ensure proper operation and detect any degradation of the stabilizer trim actuator ballscrew and ballnut, without the need to provide a separate indication. Detection of any degradation of the primary load path, as detailed in the service bulletins, requires corrective action before further flight. The proposed maintenance interval limits are intended to detect any degradation of the primary load path in advance of loading the secondary load path. We have made no change to the supplemental NPRM in this regard.

Request To Notify Boeing of the Status of Original NPRM

Royal Brunei Airlines asks that Boeing be notified of the status of the original NPRM if the FAA's intent is to mandate Service Bulletin 767–27A0194, Revision 2 (the original NPRM is identified in Revision 2 as related information); then operators can eliminate unnecessary duplication of tasks. Royal Brunei Airlines states that the inspection and lubrication of the horizontal trim actuator are already called out in the relevant Boeing maintenance schedule. Royal Brunei Airlines adds that the Boeing maintenance schedule is approved and mandated by its local regulatory authority.

We acknowledge the commenter's request. However, it is not necessary that Boeing be notified of the status of the original NPRM. Boeing is aware that this supplemental NPRM to the original NPRM will be issued to include the procedures specified in Revision 2 of the referenced service bulletins. Boeing is also aware of the duplication of tasks between the MPD and Service Bulletin 767–27A0194, Revision 2. Although we agree that the inspection and lubrication tasks are duplicated, the requirements in this AD take precedence over the maintenance actions in the MPD. Boeing may, in a future revision to the MPD, align the MPD with the requirements of the service bulletin. We have made no change to the supplemental NPRM in this regard.

FAA's Determination and Proposed Requirements of the Supplemental NPRM

Certain changes discussed above expand the scope of the original NPRM; therefore, we have determined that it is necessary to reopen the comment period to provide additional opportunity for public comment on this supplemental NPRM.

Explanation of Change to Costs of Compliance

After the original NPRM was issued, we reviewed the figures we have used over the past several years to calculate AD costs to operators. To account for various inflationary costs in the airline industry, we find it necessary to increase the labor rate used in these calculations from $65 per work hour to $80 per work hour. The cost impact information, below, reflects this increase in the specified hourly labor rate.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

We have revised this action to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Costs of Compliance

There are about 941 airplanes of the affected design in the worldwide fleet. This supplemental NPRM would affect about 411 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this proposed AD, per cycle.

ESTIMATED COSTS

Repetitive actions	Work hours	Average labor rate per hour	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Detailed inspection	1	$80	$80	411	$32,880
Lubrication	1	80	80	411	32,880
Freeplay measurement	3	80	240	411	98,640

The additional ballscrew-to-ballnut freeplay inspection would take about 1 work hour per airplane, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of the new inspection on U.S. operators is $32,880, or $80 per airplane, per inspection cycle.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this supplemental NPRM and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2005–22623; Directorate Identifier 2004–NM–80–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by September 17, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Boeing Model 767–200, –300, –300F, and –400ER series airplanes, certificated in any category.

Unsafe Condition

(d) This AD was prompted by a report of extensive corrosion of a ballscrew in the horizontal stabilizer of a similar airplane model. We are issuing this AD to prevent an undetected failure of the primary load path for the ballscrew in the drive mechanism of the horizontal stabilizer and subsequent wear and failure of the secondary load path, which could lead to loss of control of the horizontal stabilizer and consequent loss of control of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Repetitive Detailed Inspections/Lubrications/Freeplay Measurement/Corrective Action

(f) Do all the applicable actions, including any applicable corrective action, specified in Work Packages 1, 2, and 3 of the Accomplishment Instructions of Boeing Service Bulletin 767–27A0194 (for Model 767–200, –300, and –300F series airplanes) or Boeing Service Bulletin 767–27A0195 (for Model 767–400ER series airplanes), both Revision 1, both dated July 21, 2005, or Revision 2, both dated July 13, 2006, as applicable. Do the actions at the applicable compliance time specified in Table 1 of paragraph 1.E. ''Compliance'' of the service bulletins; except, where the service bulletins specify a compliance time relative to the original issue date of the service bulletin, this AD requires compliance relative to the effective date of this AD. Where the service bulletins specify a compliance time relative to the delivery date of the airplane, this AD requires compliance relative to the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness. Do all applicable corrective actions before further flight. Repeat the actions at the applicable repeat interval specified in Table 1 of paragraph 1.E ''Compliance'' of the service bulletins. As of the effective date of this AD only Revision 2 of the service bulletin may be used.

Repetitive Ballscrew-to-Ballnut Freeplay Inspections

(g) For airplanes on which the A55001–22 lock equipment was used to do the ballscrew-to-ballnut freeplay inspection, and the maintenance records do not show that the tool was correctly adjusted in accordance with Appendix A, step 1.E.3, of Boeing Service Bulletin 767–27A0194 or 767–27A0195, both Revision 1, both dated July 21, 2005: Do the ballscrew-to-ballnut freeplay inspection specified in Work Package 3, including any applicable corrective action, at the time specified in Table 1 of paragraph 1.E. ''Compliance'' of Boeing Service Bulletin 767–27A0194 or 767–27A0195, both Revision 2, both dated July 13, 2006, as applicable. Do all applicable corrective actions before further flight. Repeat the inspection thereafter at the intervals specified in Table 1 of paragraph 1.E ''Compliance'' of the service bulletins.

Previously Accomplished Actions

(h) For airplanes on which the drive mechanism of the horizontal stabilizer was replaced before the effective date of this AD with a drive mechanism that was not new or overhauled, and the detailed and freeplay inspections were not accomplished in accordance with Boeing Alert Service Bulletin 767–27A0194 or 767–27A0195, both dated August 21, 2003: Within 3,500 flight hours or 24 months after the effective date of this AD, whichever is first, accomplish the inspections and perform all applicable corrective actions before further flight in accordance with Work Package 3 of the Accomplishment Instructions of Boeing Service Bulletin 767–27A0194 or Boeing Service Bulletin 767–27A0195, both Revision 1, both dated July 21, 2005; or Revision 2, both dated July 13, 2006; as applicable. As of the effective date of this AD only Revision 2 of the service bulletin may be used.

(i) For Model 767 airplanes that have line numbers 002 through 175 inclusive: Accomplishing the initial inspection, applicable corrective action, and lubrication before the effective date of this AD in accordance with Boeing Alert Service Bulletin 767–27A0185, dated July 10, 2003; is considered acceptable for compliance with the applicable actions required by paragraph (f) of this AD.

Note 1: Boeing Service Bulletins 767–27A0194 and 767–27A0195, both Revision 2, both dated July 13, 2006, refer to the applicable Boeing 767 Airplane Maintenance Manuals as additional sources of service information for accomplishing the detailed inspections, lubrications, freeplay measurements, and corrective action.

Parts Installation

(j) As of the effective date of this AD, no person may install on any airplane a horizontal stabilizer trim actuator unless it is new or has been overhauled as specified in Boeing Service Bulletins 767–27A0194 and 767–27A0195, both Revision 2, both dated July 13, 2006; or has been inspected, lubricated, and measured in accordance with paragraph (f) of this AD.

Alternative Methods of Compliance (AMOCs)

(k)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Issued in Renton, Washington, on July 31, 2007.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–16424 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28844; Directorate Identifier 2007–CE–066–AD]

RIN 2120–AA64

Airworthiness Directives; Aeromot-Industria Mecanico Metalurgica Ltda. Model AMT–100/200/200S/300 Gliders

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

It has been found the occurrence of incorrect use of the self-locking nuts in bolts subject to rotational loads in bolted fittings of some assemblies of metallic components. Such event may result in disconnection of those fittings, which jeopardizes the structural integrity of the aircraft or its flight controls.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by September 20, 2007.

ADDRESSES: You may send comments by any of the following methods:

- *DOT Docket Web Site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Greg Davison, Glider Program Manager, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–28844; Directorate Identifier 2007–CE–066–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The Departamento de Aviacao Civil (DAC), which is the aviation authority for Brazil, has issued AD No. 2005–12–01, dated January 17, 2006 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

It has been found the occurrence of incorrect use of the self-locking nuts in bolts subject to rotational loads in bolted fittings of some assemblies of metallic components. Such even may result in disconnection of those fittings, which jeopardizes the structural integrity of the aircraft or its flight controls.

Since this condition may occur in other airplanes of the same type and affects flight safety, a corrective action is required. Thus, sufficient reason exists to request compliance with this AD in the indicated time limit.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Aeromot has issued Service Bulletin (SB) No. 200–20–102, revision B, dated January 23, 2006. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ

substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 56 products of U.S. registry. We also estimate that it would take about 8 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $430 per product.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $59,920 or $1,070 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Aeromot-Industria Mecanico Metalurgica ltda.: Docket No. FAA–2007–28844; Directorate Identifier 2007–CE–066–AD.

Comments Due Date

(a) We must receive comments by September 20, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the following gliders in the table below that:

(1) are certificated in any category and

(2) have not incorporated the actions in their entirety of Aeromot SB No. 200–20–102, revision A, dated April 19, 2005.

AIRPLANE APPLICABILITY

Model	Serial Nos.
AMT–100	100.001 through 100.003, 100.005 through 100.015, 100.017, 100.019, 100.022 through 100.039, and 100.041 through 100.044.
AMT–100 (modified to AMT–200)	100.004, 100.016, 100.018, 100.020, and 100.021.
AMT–200	200.040, 200.045 through 200.105, 200.108 through 200.111, 200.113 through 200.118, and 200.121.
AMT–200S	200.119, 200.122 through 200.124, and 200.126 through 200.161.
AMT–300	300.106, 300.107, 300.115, and 300.125.

Subject

(d) Air Transport Association of America (ATA) Code 51: Structures.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

It has been found the occurrence of incorrect use of the self-locking nuts in bolts subject to rotational loads in bolted fittings of some assemblies of metallic components. Such even may result in disconnection of those fittings, which jeopardizes the structural integrity of the aircraft or its flight controls.

Since this condition may occur in other airplanes of the same type and affects flight safety, a corrective action is required. Thus, sufficient reason exists to request compliance with this AD in the indicated time limit.

Actions and Compliance

(f) Unless already done, within the next 50 hours time-in-service (TIS) after the effective date of this AD, following Aeromot Service Bulletin No. 200–20–102 Rev. B, dated January 23, 2006, install new bolts, washers, and castellated nuts with cotter pins in the following areas:

(1) both main landing gear legs,

(2) swivel tail wheel,

(3) eye-bolt fittings located at firewall inside cabin,

(4) left and right rudder pedal assembly,

(5) bellcranks of the rudder cables assembly,

(6) bellcranks of the propeller pitch control assembly, and

(7) left and right wing hinge point.

FAA AD Differences

No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Staff, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Greg Davison, Glider Program Manager, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; fax: (816)

329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Departamento de Aviacao Civil (DAC), which is the aviation authority for Brazil, AD No. 2005–12–01; and Aeromot SB No. 200–20–102, revision B, dated January 23, 2006, for related information.

Issued in Kansas City, Missouri, on August 14, 2007.

Terry L. Chasteen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–16421 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28730; Directorate Identifier 2007–CE–063–AD]

RIN 2120–AA64

Airworthiness Directives; GARMIN International GSM 85 Servo Gearbox Units

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain GARMIN International (GARMIN) GSM 85 servo gearbox units that are installed on airplanes. This proposed AD would require you to inspect the GSM 85 servo gearbox for foreign object debris and return the unit to the manufacturer for replacement if you find debris. This proposed AD results from reports of certain GARMIN GSM 85 servo gearbox units that have foreign object debris inside the assembly. We are proposing this AD to detect and correct defective GARMIN GSM 85 servo gearbox units, which could result in jamming of the gearbox. Jamming of the gearbox could lead to the pilot having to apply excessive manual force to control the airplane.

DATES: We must receive comments on this proposed AD by October 22, 2007.

ADDRESSES: Use one of the following addresses to comment on this proposed AD:

- *DOT Docket Web site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Fax:* (202) 493–2251.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.

For service information identified in this proposed AD, contact GARMIN International Inc., 1200 East 151st Street, Olathe, KS 66062; telephone: 913–397–8200; fax: 913–397–8282.

FOR FURTHER INFORMATION CONTACT: Roger A. Souter, Aerospace Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: 316–946–4134; fax: 316–946–4107; e-mail address: *roger.souter@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number, ''FAA–2007–28730; Directorate Identifier 2007–CE–063–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive concerning this proposed AD.

Discussion

We have received reports of certain GARMIN GSM 85 servo gearbox units having foreign object debris inside the assembly. The debris was found during installation and removal.

The GSM 85 servo gearbox extrusion (housing) is composed primarily of aluminum. The manufacturer selectively uses a tumbling process to deburr the housing, which resulted in foreign object debris collecting in the housing cavities.

We have determined that foreign object debris inside the gear-assembly housing may come loose causing the GSM 85 servo gearbox to jam.

This condition, if not corrected, could result in the GSM 85 servo gearbox unit becoming jammed. Jamming of the servo gearbox could lead to the pilot having to apply excessive manual force to control the airplane.

Relevant Service Information

We have reviewed GARMIN International, Inc. Service Bulletin No. 0713, Revision A, dated May 7, 2007; GARMIN International, Inc. Service Bulletin No. 0713, Revision B, dated May 18, 2007; GARMIN International, Inc. Service Bulletin No. 0713, Revision C, dated May 29, 2007; and GARMIN International, Inc. Service Bulletin No. 0713, Revision D, dated June 13, 2007. These service bulletins describe procedures for inspecting the GSM 85 servo gearbox for foreign object debris and returning the unit to the manufacturer for replacement if debris is found.

FAA's Determination and Requirements of the Proposed AD

We are proposing this AD because we evaluated all information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design. This proposed AD would require you to inspect the GSM 85 servo gearbox for foreign object debris and return the unit to the manufacturer for replacement if you find debris.

Costs of Compliance

We estimate that this proposed AD would affect 900 airplanes in the U.S. registry.

We estimate the following costs to do the proposed inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
7 work-hours × $80 per hour = $560	Not applicable	$560	$504,000

For airplanes that would need to replace the GSM 85 servo gearbox based on the results of the proposed inspection, we estimate the following costs to set the torque value of the slip-clutch breakaway required for installation. We have no way of determining the number of airplanes that may need this replacement:

Labor cost per GSM 85 Servo Gearbox	Parts cost	Total cost per GSM 85 Servo Gearbox
.5 work-hours × $80 per hour = $40	Not applicable	$40

Warranty credit will be given to the extent specified in the service information.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket that contains the proposed AD, the regulatory evaluation, any comments received, and other information on the Internet at *http://dms.dot.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone (800) 647–5527) is located at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

GARMIN International: Docket No. FAA–2007–28730; Directorate Identifier 2007–CE–063–AD.

Comments Due Date

(a) We must receive comments on this airworthiness directive (AD) action by October 22, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the GSM 85 servo gearbox units that are specified in paragraph (c)(1) of this AD and are installed on airplanes. These GSM 85 servo gearbox units are installed in, but not limited to, airplanes that are certificated in any category and presented in paragraph (c)(2) of this AD:

(1) *GSM 85 servo gearbox units, part numbers (P/Ns):* 011–00894–00, 011–00894–02, 011–00894–04, 011–00894–06, 011–00894–07, 011–00894–08, 011–00894–09, 011–00894–10, 011–00894–11, and 011–00894–14.

(2) *Airplanes with the GSM 85 servo gearbox units installed (other aircraft could have installations through other methods such as field approval):*

Type certificate holder	Models
(i) Cessna Aircraft Company	182T, T182T, 206H, and T206H.
(ii) Hawker Beechcraft Corporation	G36 and G58.
(iii) Diamond Aircraft Industries GmbH	DA40 and DA40F.
(iv) Columbia Aircraft Manufacturing	350 and 400.
(v) Mooney Airplane Company, Inc	M20M and M20R.

Unsafe Condition

(d) This AD results from reports of certain GARMIN GSM 85 servo gearbox units that have foreign object debris inside the assembly. We are issuing this AD to detect and correct defective GARMIN GSM 85 servo gearbox units, which could result in jamming of the servo gearbox. This jamming could

lead to the pilot having to apply excessive manual force to control the airplane.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Check the serial tag of the installed GSM 85 servo gearbox unit to determine the mod level. The mod level marked on the serial tag indicates if the GSM 85 servo gearbox unit is already in compliance with this AD. (i) If the serial tag on the installed GSM 85 servo gearbox unit for P/Ns 011–00894–00 or 011–00894–10 is marked at mod level 3, no further action is required. (ii) If the serial tag on the installed GSM 85 servo gearbox unit for P/Ns 011–00894–02, 011–00894–04, 011–00894–06, 011–00894–07, 011–00894–08, 011–00894–09, 011–00894–11, or 011–00894–14 is marked at mod level 1, no further action is required. (iii) If the serial tag on the above GSM servo gearbox unit is not at mod level 1 or 3, then go to paragraph (e)(2) of this AD.	Check within the next 100 hours time-in-service (TIS) after the effective date of this AD or within the next 3 months after the effective date of this AD, whichever occurs first.	Check following GARMIN International, Inc. Service Bulletin No. 0713, Revision A, dated May 7, 2007; Service Bulletin No. 0713, Revision B, dated May 18, 2007; Service Bulletin No. 0713, Revision C, dated May 29, 2007; or Service Bulletin No. 0713, Revision D, dated June 13, 2007. If the Mod Level of the P/Ns specified in paragraph (e)(1)(i) and (e)(1)(ii) are at mod level 1 and mod level 3, as applicable, make an entry into the aircraft logbook showing compliance with this portion of the AD in accordance with section 43.9 of the Federal Aviation Regulations (14 CFR 43.9). The owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may do this action.
(2) If the serial tag on the GSM 85 servo gearbox for P/Ns specified in paragraph (e)(1) of this AD is not marked at mod level 1 or mod level 3 as applicable, inspect the servo gearbox for foreign object debris.	Within the next 100 hours TIS after the effective date of this AD or within the next 3 calendar months after the effective date of this AD, whichever occurs first.	Follow the Modification Instructions in GARMIN International, Inc. Service Bulletin No. 0713, Revision A, dated May 7, 2007; Service Bulletin No. 0713, Revision B, dated May 18, 2007; Service Bulletin No. 0713, Revision C, dated May 29, 2007; or Service Bulletin No. 0713, Revision D, dated June 13, 2007.
(3) If foreign object debris is found during the inspection required in paragraph (e)(2) of this AD, remove and return the GSM 85 servo gearbox to the manufacturer for replacement.	Before further flight after the inspection required in paragraph (e)(2) of this AD.	Follow the Modification Instructions in GARMIN International, Inc. Service Bulletin No. 0713, Revision A, dated May 7, 2007; Service Bulletin No. 0713, Revision B, dated May 18, 2007; Service Bulletin No. 0713, Revision C, dated May 29, 2007; or Service Bulletin No. 0713, Revision D, dated June 13, 2007.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Roger A. Souter, Aerospace Engineer, FAA, Wichita ACO, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4134; fax: (316) 946–4107; e-mail address: *roger.souter@faa.gov.* Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Related Information

(g) To get copies of the service information referenced in this AD, contact GARMIN International Inc., 1200 East 151st Street, Olathe, KS 66062; telephone: (913) 397–8200; fax: (913) 397–8282. To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://dms.dot.gov.* The docket number is Docket No. FAA–2007–28730; Directorate Identifier 2007–CE–063–AD.

Issued in Kansas City, Missouri, on August 14, 2007.

Terry L. Chasteen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–16416 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2007–28400; Airspace Docket No. 07–ANM–11]

Proposed Amendment to Class E Airspace; Helena, MT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify Class E airspace at Helena, MT. Additional controlled airspace is necessary to accommodate aircraft using a new Localizer (LOC) Back Course (BC)–C Standard Instrument Approach Procedures (SIAP) at Helena Regional Airport. The FAA is proposing this action to enhance the safety and management of aircraft operations at Helena Regional Airport, Helena, MT.

DATES: Comments must be received on or before October 5, 2007.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room at 12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone (202) 366–9826. You must identify FAA Docket No. FAA–2007–28400; Airspace Docket No. 07–ANM–11, at the beginning of your comments. You may also submit comments through the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Western Service Area Office, System Support Group, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 917–6726.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2007–28400 and Airspace Docket No. 07–ANM–11) and be submitted in triplicate to Docket Operations (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://dms.dot.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2007–28400 and Airspace Docket No. 07–ANM–11''. The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the Federal Register's Web page at *http://www.gpoaccess.gov/fr/index.html.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Area, System Support Group, 1601 Lind Avenue, SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying Class E airspace at Helena, MT. Additional controlled airspace is necessary to accommodate aircraft using the new LOC/BC–C SIAP at Helena Regional Airport. This action would enhance the safety and management of aircraft operations at Helena Regional Airport, Helena, MT.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9P, dated September 1, 2006, and effective September 15, 2006, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the FAA Order 7400.9P, Airspace Designations and Reporting Points, dated September 1, 2006, and effective September 15, 2006 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ANM MT E5 Helena, MT [Modified]

Helena Regional Airport, MT
(Lat. 46°36′25″ N., long. 111°58′58″ W.)
Helena VORTAC
(Lat. 46°36′25″ N., long. 111°57′13″ W.)

That airspace extending upward from 700 feet above the surface within a 10.5-mile radius of the Helena VORTAC, and within 5.3 miles northwest and 3.5 miles southeast of the Helena VORTAC 104° radial extending from the 10.5-mile radius to 18.3 miles southeast of the Helena VORTAC, and within 4.0 miles either side of Helena VORTAC 282° (267°M) radial extending from the 10.5-mile radius to 25 miles west of the Helena VORTAC; that airspace extending upward from 1,200 feet above the surface within a 20.9-mile radius of the Helena VORTAC, and within 5.3 miles south and 7.9 miles north of the Helena VORTAC 272° radial extending from the 20.9-mile radius to 39.2 miles west of the VORTAC, and within 13.5 miles west and parallel to the Helena VORTAC 352° radial extending from the 20.9-mile radius to 27 miles north of the VORTAC, and within 4.3 miles east and 7.9 miles west of the Helena VORTAC 023° radial extending from the 20.9-mile radius to 31.4 miles northeast of the VORTAC, and within 5.3 miles south and 8.3 miles north of the Helena VORTAC 102° radial extending from the 20.9-mile radius to 24.8 miles east of the VORTAC.

* * * * *

Issued in Seattle, Washington, on August 10, 2007.

Clark Desing,

Manager, System Support Group, Western Service Area.

[FR Doc. E7–16398 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 20

[REG–119097–05]

RIN 1545–BE52

Grantor Retained Interest Trusts—Application of Sections 2036 and 2039; Hearing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Change of location for public hearing.

SUMMARY: This document provides a change of location for a public hearing on proposed regulations providing guidance on the portion of a trust properly includible in a grantor's gross estate under Internal Revenue Code sections 2036 and 2039 if the grantor has retained the use of property in a trust or the right to annuity, unitrust, or other income payment from such trust for life, for any period not ascertainable without reference to the grantor's death, or for a period that does not in fact end before the grantor's death.

DATES: The public hearing is being held on Wednesday, September 26, 2007, at 10 a.m.

ADDRESSES: The public hearing was originally being held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. The hearing location has changed. The public hearing will be held in room 2116, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: LaNita Van Dyke, (202) 622–3215 or Richard Hurst at *Richard.A.Hurst@irscounsel.treas.gov*.

SUPPLEMENTARY INFORMATION: The subject of the public hearing is a notice of proposed rulemaking (REG–119097–05) that was published in the **Federal Register** on Thursday, June 7, 2007 (72 FR 31487).

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who submit written comments and outlines by September 5, 2007, may present oral comments at the hearing.

A period of 10 minutes is allotted to each person for presenting oral comments. The IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E7–16377 Filed 8–20–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD01–07–091]

RIN 1625–AA09

Drawbridge Operation Regulations; Quinnipiac River, New Haven, CT

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to temporarily change the drawbridge operating regulations governing the operation of the Ferry Street Bridge, across the Quinnipiac River, mile 0.7, at New Haven, Connecticut. This notice of proposed rulemaking allows the bridge owner to keep one of the two moveable bascule spans in the closed position at all times from September 28, 2007 through April 30, 2008. This temporary rule is necessary to facilitate scheduled bridge maintenance.

DATES: Comments and related material must reach the Coast Guard on or before September 20, 2007.

ADDRESSES: You may mail comments and related material to Commander (dpb), First Coast Guard District Bridge Branch, One South Street, Battery Park Building, New York, New York, 10004, or deliver them to the same address between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (212) 668–7165. The First Coast Guard District, Bridge Branch, maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the First Coast Guard District, Bridge Branch, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Judy Leung-Yee, Project Officer, First Coast Guard District, (212) 668–7195.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD01–07–091), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know if they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting; however, you may submit a request for a meeting by writing to the First Coast Guard District, Bridge Branch, at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The Ferry Street Bridge, across the Quinnipiac River, mile 0.7, at New Haven, Connecticut, has a vertical clearance in the closed position of 25 feet at mean high water and 31 feet at mean low water. The existing regulations are listed at 33 CFR 117.213.

In early 2007, the Connecticut Department of Transportation requested a temporary deviation to facilitate scheduled structural repairs and bridge painting at the Ferry Street Bridge at New Haven, Connecticut. In order to perform the structural repairs, one bascule bridge span had to remain in the closed position while the other span could remain in the full open position at all times for the passage of vessel traffic.

As a result of the above request, the Coast Guard published a temporary deviation from the drawbridge operation regulations in the **Federal Register** (72 FR 18884), on April 16, 2007, in effect from April 16, 2007 through September 27, 2007.

On June 22, 2007, the Coast Guard was notified that the scheduled repairs authorized under the temporary deviation listed above would not be completed by the end of the effective period, scheduled to end on September 27, 2007.

As a result of the above information, Connecticut Department of Transportation requested a temporary regulation to allow the repair work to continue at the bridge through April 30, 2008, in order to complete the remaining work.

Under this notice of proposed rulemaking, from September 28, 2007 through April 30, 2008, the Ferry Street Bridge across the Quinnipiac River, mile 0.7, at New Haven, Connecticut, would keep one of the two bascule bridge spans in the closed position at all times while keeping the second bascule span in the fully open position for the passage of vessel traffic at all times.

Note that due to the need to have a temporary final rule in place when the current deviation expires on September 27, 2007, we plan on issuing a temporary final rule with an effective date less than 30 days from the date of publication in the **Federal Register**. We ask specifically for comments on this planned course of action.

Discussion of Proposed Rule

This proposed change would amend 33 CFR 117.213 by suspending paragraph (a) and adding a new temporary paragraph (g) that would list the temporary bridge opening schedule for the Ferry Street Bridge, as well as restating the existing operating schedules for the remaining bridges listed in paragraph (a).

This temporary rule is necessary to facilitate the rehabilitation construction at the bridge.

This proposed change would allow the Ferry Street Bridge to keep one of the two bascule spans in the open position at all times while keeping the second span in the closed position at all times from September 28, 2007 through April 30, 2008.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

This conclusion is based on the fact that existing vessel traffic will be able to transit through the single open span at the bridge at all times.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under section 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This conclusion is based on the fact that the existing vessel traffic will be able to transit through an open bridge span at all times.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact, Commander (dpb), First Coast Guard District, Bridge Branch, One South Street, New York, NY 10004. The telephone number is (212) 668–7165. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not

likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.1D, and Department of Homeland Security Management Directive 5100.1, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, we believe that this rule should be categorically excluded, under figure 2–1, paragraph (32)(e) of the Instruction, from further environmental documentation as this action relates to the promulgation of operating regulations or procedures for drawbridges. Under figure 2–1, paragraph (32)(e) of the Instruction, an ''Environmental Analysis Checklist'' is not required for this rule. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1(g); Department of Homeland Security Delegation No. 0170.1.

2. From September 28, 2007 through April 30, 2008, § 117.213 is amended by suspending paragraph (a) and adding a temporary paragraph (g) to read as follows:

§ 117.213 Connecticut River.

* * * * *

(g) The draws shall open on signal; except as follows:

(1) From 7:30 a.m. to 8:30 a.m., noon to 12:15 p.m., 12:45 p.m. to 1 p.m., and 4:45 p.m. to 5:45 p.m., the draws need not be opened.

(2) The draw of the Ferry Street Bridge, mile 0.7, at New Haven, shall maintain one of the two moveable bascule bridge spans in the full open position at all times for the passage of vessel traffic. The second moveable bascule bridge span may remain in the closed position at all times.

(3) From 11 p.m. to 7 a.m., the draw of the Grand Avenue bridge, Quinnipiac River, shall open on signal if at least one hour notice is given to the drawtender at the Ferry Street bridge. In the event that the drawtender is at the Chapel Street bridge, a delay of up to an additional hour may be expected.

(4) From 9 p.m. to 5 a.m., the draw of the Chapel Street bridge, Mill River, shall open on signal if at least one hour notice is given to the drawtender at Ferry Street bridge. In the event that the drawtender is at the Grand Avenue bridge, a delay of up to an additional hour may be expected.

Dated: August 10, 2007.

Timothy V. Skuby,

Captain, U.S. Coast Guard, Acting Commander, First Coast Guard District.

[FR Doc. E7–16399 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 070627217–7218–01]

RIN 0648–AV70

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Region Standardized Bycatch Reporting Methodology Omnibus Amendment

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement the Standardized Bycatch Reporting Methodology (SBRM) Omnibus Amendment (SBRM Amendment) to the Fishery Management Plans (FMPs) of the Northeast Region, developed by the Mid-Atlantic and New England Fishery Management Councils (Councils). The SBRM Amendment would establish an SBRM for all 13 Northeast Region FMPs, as required under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The proposed measures include: Bycatch reporting and monitoring mechanisms; analytical techniques and allocation of at-sea fisheries observers; an SBRM performance standard; a review and reporting process; framework adjustment and annual specifications provisions; a prioritization process; and provisions for industry-funded observers and observer set-aside programs.

DATES: Comments must be received on or before September 20, 2007.

ADDRESSES: You may submit comments by any of the following methods:

- E-mail: *SBRM.Amend.PR@noaa.gov*. Include in the subject line the following identifier: ''Comments on the Proposed Rule to implement the SBRM Omnibus Amendment.''
- Federal e-rulemaking portal: *http://www.regulations.gov*.
- Mail: Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope: ''Comments on the Proposed Rule to implement the SBRM Omnibus Amendment.''

- Fax: (978) 281–9135

Copies of the SBRM Amendment, and of the draft Environmental Assessment and preliminary Regulatory Impact Review (EA/RIR), are available from Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19901–6790; and from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950. The EA/RIR is also accessible via the Internet at *http://www.nero.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Michael Pentony, Senior Fishery Policy Analyst, 978–281–9283.

SUPPLEMENTARY INFORMATION:

Background

Section 303(a)(11) of the Magnuson-Stevens Act requires that all FMPs ''establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery.'' In 2004, several conservation organizations challenged the approval of two major amendments to Northeast Region FMPs. In ruling on these suits, the U.S. District Court for the District of Columbia found that the FMPs did not clearly establish an SBRM as required under the relevant section of the Magnuson-Stevens Act and remanded the amendments back to the agency to fully develop and establish the required SBRM. In particular, the Court found that the amendments (1) failed to fully evaluate reporting methodologies to assess bycatch, (2) did not mandate an SBRM, and (3) failed to respond to potentially important scientific evidence.

In response, the Councils, working closely with NMFS, undertook development of a remedy that would address all Northeast Region FMPs. In January 2006, development began on the Northeast Region Omnibus SBRM Amendment. This amendment covers 13 FMPs, 39 managed species, and 14 types of fishing gear. The purpose of the amendment is to: Explain the methods and processes by which bycatch is currently monitored and assessed for Northeast Region fisheries; determine whether these methods and processes need to be modified and/or supplemented; establish standards of precision for bycatch estimation for all Northeast Region fisheries; and, thereby, document the SBRM established for all fisheries managed through the FMPs of the Northeast Region. The amendment also responds to the ''potentially important scientific evidence'' cited by the Court in the two decisions referenced above.

The Northeast Region SBRM Amendment would establish an SBRM comprised of seven elements: (1) The methods by which data and information on discards are collected and obtained; (2) the methods by which the data obtained through the mechanisms identified in element 1 are analyzed and utilized to determine the appropriate allocation of at-sea observers; (3) a performance measure by which the effectiveness of the Northeast Region SBRM can be measured, tracked, and utilized to effectively allocate the appropriate number of observer sea days; (4) a process to provide the Councils with periodic reports on discards occurring in Northeast Region fisheries and on the effectiveness of the SBRM; (5) a measure to enable the Councils to make changes to the SBRM through framework adjustments and/or annual specification packages rather than full FMP amendments; (6) a process to provide the Councils and the public with an opportunity to consider, and provide input into, the decisions regarding prioritization of at-sea observer coverage allocations; and (7) to implement consistent, cross-cutting observer service provider approval and certification procedures and to enable the Councils to implement either a requirement for industry-funded observers or an observer set-aside program through a framework adjustment rather than an FMP amendment.

Bycatch Reporting and Monitoring Mechanisms

This element addresses the methods by which data and information on discards occurring in Northeast Region fisheries would be collected and obtained. The amendment proposes to maintain the status quo. The Northeast Region SBRM would employ sampling designs developed to minimize bias to the maximum extent practicable. The Northeast Fisheries Observer Program (NEFOP) would serve as the primary mechanism to obtain data on discards in all Northeast Region commercial fisheries managed under one or more of the subject FMPs. All subject FMPs would continue to require vessels permitted to participate in said fisheries to carry an at-sea observer upon request, and all data obtained by the NEFOP under this SBRM would be collected according to the techniques and protocols established and detailed in the Fisheries Observer Program Manual and the Biological Sampling Manual. Data collected by the NEFOP would include, but not be limited to, the following items: Vessel name; date/time sailed; date/time landed; steam time; crew size; home port; port landed; dealer name; fishing vessel trip report (FVTR) serial number; gear type(s) used; number/amount of gear; number of hauls; weather; location of each haul (beginning and ending latitude and longitude); species caught; disposition (kept/discarded); reason for discards; and weight of catch. These data would be collected on all species of biological organisms caught by the fishing vessel and brought on board, including species managed under the subject FMPs, but also including species of non-managed fish, invertebrates, and marine plants. To obtain information on discards occurring in recreational fisheries subject to a Northeast Region FMP, the Northeast Region SBRM would fully incorporate, to the extent practicable and appropriate for the Region, all surveys and data collection mechanisms implemented by NMFS and affected states as a result of the agency-wide redesign of the Marine Recreational Fisheries Statistics Survey (MRFSS) Program.

Analytical Techniques and Allocation of At-sea Fisheries Observers

This element addresses the methods by which the data obtained through the mechanisms included above would be analyzed and utilized to determine the appropriate allocation of at-sea observers across the subject fishing modes. The amendment proposes to substantially expand and refine the status quo methods to fully incorporate all managed species and all relevant fishing gear types in the Northeast Region. At-sea fisheries observers would, to the maximum extent possible and subject to available resources, be allocated and assigned to fishing vessels according to the procedures established through the amendment. All appropriate filters identified in the amendment would be applied to the results of the analysis to determine the observer coverage levels needed to achieve the objectives of the SBRM.

SBRM Performance Standard

The amendment proposes to ensure that the data collected under the Northeast Region SBRM are sufficient to produce a coefficient of variation (CV) of the discard estimate of no more than 30 percent, in order to ensure that the effectiveness of the Northeast Region SBRM can be measured, tracked, and utilized to effectively allocate the appropriate number of observer sea days. Each year, the Regional Administrator and the Science and Research Director would, subject to any

external operational constraints, allocate at-sea observer coverage to the applicable fisheries of the Northeast Region sufficient to achieve a level of precision (measured as the CV) no greater than 30 percent for each applicable species and/or species group, subject to the use of the filters noted above.

SBRM Review and Reporting Process

The amendment proposes to require an annual report on discards occurring in Northeast Region fisheries to be prepared by NMFS and provided to the Councils, and also to require a report every 3 years that evaluates the effectiveness of the Northeast Region SBRM. Every 3 years, the Regional Administrator and the Science and Research Director would appoint appropriate staff to work with staff appointed by the Executive Directors of the Councils to obtain and review available data on discards and to prepare a report assessing the effectiveness of the Northeast Region SBRM. This report would include, at a minimum: (1) A review of the recent levels of observer coverage in each applicable fishery; (2) a review of recent observed encounters with each species in each fishery, and a summary of observed discards by weight; a review of the CV of the discard information collected for each fishery; (4) an estimate of the total discards associated with each fishery; (5) an evaluation of the effectiveness of the SBRM at meeting the performance standard for each fishery; (6) a description of the methods used to calculate the reported CVs and to determine observer coverage levels, if those methods are different from those described and evaluated in the SBRM Amendment; (7) an updated assessment of potential sources of bias in the sampling program and analyses of accuracy; and (8) an evaluation of the implications for management of the discard information collected under the SBRM, for any cases in which the evaluation performed for item 5 indicates that the performance standard is not met. Once each year, the Science and Research Director would present to the Councils a report on catch and discards occurring in Northeast Region fisheries, as reported to the NEFOP by at-sea fisheries observers. This annual discard report would include: (1) The number of observer sea days scheduled for each fishery, by area and gear type, in each quarter; (2) the percent of total trips observed, by gear type, in each quarter; (3) the distribution of sea sampling trips by gear type and statistical area in each fishery; (4) the observed catch and discards of each species, by gear type and fishery, in each quarter; and (5) the observed catch and discards of each species, by gear type and fishery, in each statistical area.

Framework Adjustment and/or Annual Specification Provisions

The amendment proposes a measure to enable the Councils to make changes to certain elements of the SBRM through framework adjustments and/or annual specification packages rather than full FMP amendments. All subject FMPs would provide for an efficient process to modify aspects of the Northeast Region SBRM, as relates to each specific FMP, should the need arise and the appropriate Council determine that a change to the SBRM is warranted and needed to address a contemporary management or scientific issue. Depending on the provisions of each FMP, changes to the SBRM may be effected either through a framework adjustment to the FMP or through annual or periodic specifications. Such changes to the SBRM may include modifications to the CV-based performance standard, the means by which discard data are collected/obtained in the fishery, reporting on discards or the SBRM, or the stratification (modes) used as the basis for SBRM-related analyses. Such changes may also include the establishment of a requirement for industry-funded observers and/or observer set-aside provisions.

Prioritization Process

The amendment proposes a process to provide the Councils and the public with an opportunity to consider, and provide input into, the decisions regarding prioritization of at-sea observer coverage allocations, if the expected resources necessary may not be available. In any year in which external operational constraints would prevent NMFS from fully implementing the required at-sea observer coverage levels, the Regional Administrator and Science and Research Director would consult with the Councils to determine the most appropriate prioritization for how the available resources should be allocated. In order to facilitate this consultation, in these years, the Regional Administrator and the Science and Research Director would provide the Councils, at the earliest practicable opportunity: (1) The at-sea observer coverage levels required to attain the SBRM performance standard in each applicable fishery; (2) the coverage levels that would be available if the resource shortfall were allocated proportionately across all applicable fisheries; (3) the coverage levels that incorporate the recommended prioritization; and (4) the rationale for the recommended prioritization. The recommended prioritization should be based on: Meeting the data needs of upcoming stock assessments; legal mandates of the agency under other applicable laws, such as the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA); meeting the data needs of upcoming fishery management actions, taking into account the status of each fishery resource; improving the quality of discard data across all fishing modes; and/or any other criteria identified by NMFS and/or the Councils. The Councils may choose to accept the proposed observer coverage allocation or to recommend revisions or additional considerations for the prioritized observer allocations ultimately adopted and implemented by the Regional Administrator and the Science and Research Director.

Industry-funded Observers and Observer Set-aside Program Provisions

The amendment proposes to implement consistent, cross-cutting observer service provider approval and certification procedures and to enable the Councils to implement either a requirement for industry-funded observers and/or an observer set-aside program through a framework adjustment, rather than an FMP amendment.

Classification

At this time, NMFS has not determined that the FMP amendment that this proposed rule would implement is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. NMFS, in making that determination, will take into account the data, views, and comments received during the comment period.

A notice of availability of the Draft EA/RIR, which analyzed the impacts of all the measures under consideration in the SBRM Amendment, was published at 72 FR 41047, July 26, 2007.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.The proposed rule would modify the regulations at 50 CFR part 648 to require additional information be prepared by NMFS and provided to the

Mid-Atlantic and New England Fishery Management Councils, and authorize said Councils to modify certain elements of the Northeast Region SBRM through the use of framework adjustments and/or annual specifications rather than full FMP amendments. The Northeast Region Omnibus SBRM Amendment establishes a more comprehensive methodology that NMFS must follow in determining the appropriate allocations of at-sea fisheries observers and in collecting and analyzing bycatch information in the subject fisheries. As such, this proposed rule only addresses a limited number of administrative aspects of the proposed SBRM. These administrative changes are intended to ensure high quality data are available for use in stock assessments and in management decisions, consistent with section 303(a)(11) and National Standards 1 and 2 of the Magnuson-Stevens Act. Therefore, this proposed rule would not impose significant new direct or indirect economic impacts on small entities, as all affected entities are already subject to the observer requirements stipulated at § 648.11. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: August 13, 2007.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 648.11, paragraphs (h) and (i) are revised to read as follows:

§ 648.11 At-sea sea sampler/observer coverage.

* * * * *

(h) *Observer service provider approval and responsibilities*—(1) *General.* An entity seeking to provide observer services must apply for and obtain approval from NMFS following submission of a complete application to The Observer Program Branch Chief, 25 Bernard St Jean Drive, East Falmouth, MA 02536. A list of approved observer service providers shall be distributed to vessel owners and shall be posted on the NMFS/NEFOP website at *http://www.nefsc.noaa.gov/femad/fsb/*.

(2) *Existing observer service providers.* Observer service providers that currently deploy certified observers in the Northeast must submit an application containing the information specified in paragraph (h)(3) of this section, excluding any information specified in paragraph (h)(3) of this section that has already been submitted to NMFS.

(3) *Contents of application.* An application to become an approved observer service provider shall contain the following:

(i) Identification of the management, organizational structure, and ownership structure of the applicant's business, including identification by name and general function of all controlling management interests in the company, including but not limited to owners, board members, officers, authorized agents, and staff. If the applicant is a corporation, the articles of incorporation must be provided. If the applicant is a partnership, the partnership agreement must be provided.

(ii) The permanent mailing address, phone and fax numbers where the owner(s) can be contacted for official correspondence, and the current physical location, business mailing address, business telephone and fax numbers, and business e-mail address for each office.

(iii) A statement, signed under penalty of perjury, from each owner or owners, board members, and officers, if a corporation, that they are free from a conflict of interest as described under paragraph (h)(6) of this section.

(iv) A statement, signed under penalty of perjury, from each owner or owners, board members, and officers, if a corporation, describing any criminal convictions, Federal contracts they have had, and the performance rating they received on the contract, and previous decertification action while working as an observer or observer service provider.

(v) A description of any prior experience the applicant may have in placing individuals in remote field and/or marine work environments. This includes, but is not limited to, recruiting, hiring, deployment, and personnel administration.

(vi) A description of the applicant's ability to carry out the responsibilities and duties of a fishery observer services provider as set out under paragraph (h)(2) of this section, and the arrangements to be used.

(vii) Evidence of holding adequate insurance to cover injury, liability, and accidental death for observers during their period of employment (including during training). Workers' Compensation and Maritime Employer's Liability insurance must be provided to cover the observer, vessel owner, and observer provider. The minimum coverage required is $5 million. Observer service providers shall provide copies of the insurance policies to observers to display to the vessel owner, operator, or vessel manager, when requested.

(viii) Proof that its observers, either contracted or employed by the service provider, are compensated with salaries that meet or exceed the U.S. Department of Labor (DOL) guidelines for observers. Observers shall be compensated as a Fair Labor Standards Act (FLSA) non-exempt employees. Observer providers shall provide any other benefits and personnel services in accordance with the terms of each observer's contract or employment status.

(ix) The names of its fully equipped, NMFS/NEFOP certified observers on staff or a list of its training candidates (with resumes) and a request for an appropriate NMFS/NEFOP Observer Training class. The NEFOP training has a minimum class size of eight individuals, which may be split among multiple vendors requesting training. Requests for training classes with less than eight individuals will be delayed until further requests make up the full training class size. Requests for training classes must be made 30 days in advance of the requested date and must have a complete roster of trainees at that time.

(x) An Emergency Action Plan (EAP) describing its response to an ''at sea'' emergency with an observer, including, but not limited to, personal injury, death, harassment, or intimidation.

(4) *Application evaluation.* (i) NMFS shall review and evaluate each application submitted under paragraphs (h)(2) and (h)(3) of this section. Issuance of approval as an observer provider shall be based on completeness of the application, and a determination of the applicant's ability to perform the duties and responsibilities of a fishery observer service provider, as demonstrated in the application information. A decision to approve or deny an application shall be made by NMFS within 15 business days of receipt of the application by NMFS.

(ii) If NMFS approves the application, the observer service provider's name will be added to the list of approved observer service providers found on the NMFS/NEFOP website specified in paragraph (h)(1) of this section, and in any outreach information to the industry. Approved observer service providers shall be notified in writing and provided with any information

pertinent to its participation in the fishery observer program.

(iii) An application shall be denied if NMFS determines that the information provided in the application is not complete or the evaluation criteria are not met. NMFS shall notify the applicant in writing of any deficiencies in the application or information submitted in support of the application. An applicant who receives a denial of his or her application may present additional information to rectify the deficiencies specified in the written denial, provided such information is submitted to NMFS within 30 days of the applicant's receipt of the denial notification from NMFS. In the absence of additional information, and after 30 days from an applicant's receipt of a denial, an observer provider is required to resubmit an application containing all of the information required under the application process specified in paragraph (h)(3) of this section to be re-considered for being added to the list of approved observer service providers.

(5) *Responsibilities of observer service providers*. (i) An observer service provider must provide observers certified by NMFS/NEFOP pursuant to paragraph (i) of this section for deployment in a fishery when contacted and contracted by the owner, operator, or vessel manager of a vessel fishing, unless the observer service provider refuses to deploy an observer on a requesting vessel for any of the reasons specified at paragraph (h)(5)(viii) of this section. An approved observer service provider must maintain a minimum of eight appropriately trained NEFOP certified observers in order to remain approved; should a service provider cadre drop below eight, the provider must submit the appropriate number of candidates for the next available training class. Failure to do so shall be cause for suspension of their approved status until rectified.

(ii) An observer service provider must provide to each of its observers:

(A) All necessary transportation, including arrangements and logistics, of observers to the initial location of deployment, to all subsequent vessel assignments, and to any debriefing locations, if necessary;

(B) Lodging, per diem, and any other services necessary for observers assigned to a fishing vessel or to attend an appropriate NMFS/NEFOP Observer Training class;

(C) The required observer equipment, in accordance with equipment requirements listed on the NMFS/NEFOP website specified in paragraph (h)(1) of this section, prior to any deployment and/or prior to NMFS observer certification training; and

(D) Individually assigned communication equipment, in working order, such as a cell phone or pager, for all necessary communication. An observer service provider may alternatively compensate observers for the use of the observer's personal cell phone or pager for communications made in support of, or necessary for, the observer's duties.

(iii) *Observer deployment logistics*. Each approved observer service provider must assign an available certified observer to a vessel upon request. Each approved observer service provider must provide for access by industry 24 hours per day, 7 days per week, to enable an owner, operator, or manager of a vessel to secure observer coverage when requested. The telephone system must be monitored a minimum of four times daily to ensure rapid response to industry requests. Observer service providers approved under paragraph (h) of this section are required to report observer deployments to NMFS daily for the purpose of determining whether the predetermined coverage levels are being achieved in the appropriate fishery.

(iv) *Observer deployment limitations*. Unless alternative arrangements are approved by NMFS, an observer provider must not deploy any observer on the same vessel for two or more consecutive deployments, and not more than twice in any given month. A certified observer's first deployment and the resulting data shall be immediately edited, and approved, by NMFS prior to any further deployments of that observer.

(v) *Communications with observers*. An observer service provider must have an employee responsible for observer activities on call 24 hours a day to handle emergencies involving observers or problems concerning observer logistics, whenever observers are at sea, stationed shoreside, in transit, or in port awaiting vessel assignment.

(vi) *Observer training requirements*. The following information must be submitted to NMFS to request a certified observer training class at least 30 days prior to the beginning of the proposed training class: Date of requested training; a list of observer candidates, with a minimum of eight individuals; observer candidate resumes; and a statement signed by the candidate, under penalty of perjury, that discloses the candidate's criminal convictions, if any. All observer trainees must complete a basic cardiopulmonary resuscitation/first aid course prior to the beginning of a NMFS/NEFOP Observer Training class. NMFS may reject a candidate for training if the candidate does not meet the minimum qualification requirements as outlined by NMFS National Minimum Eligibility Standards for observers as described in paragraph (i)(1) of this section.

(vii) *Reports*—(A) *Observer deployment reports*. The observer service provider must report to NMFS when, where, to whom, and to what fishery an observer has been deployed, within 24 hours of their departure. The observer service provider must ensure that the observer reports back to NMFS its Observer Contract (OBSCON) data, as described in the certified observer training, within 12 hours of landing. OBSCON data are to be submitted electronically or by other means as specified by NMFS. The observer service provider shall provide the raw (unedited) data collected by the observer to NMFS within 72 hours of the trip landing.

(B) *Safety refusals*. The observer service provider must report to NMFS any trip that has been refused due to safety issues, e.g., failure to hold a valid USCG Commercial Fishing Vessel Safety Examination Decal or to meet the safety requirements of the observer's pre-trip vessel safety checklist, within 24 hours of the refusal.

(C) *Biological samples*. The observer service provider must ensure that biological samples, including whole marine mammals, sea turtles, and sea birds, are stored/handled properly and transported to NMFS within 7 days of landing.

(D) *Observer debriefing*. The observer service provider must ensure that the observer remains available to NMFS, including NMFS Office for Law Enforcement, for debriefing for at least 2 weeks following any observed trip. If requested by NMFS, an observer that is at sea during the 2-week period must contact NMFS upon his or her return.

(E) *Observer availability report*. The observer service provider must report to NMFS any occurrence of inability to respond to an industry request for observer coverage due to the lack of available observers on staff by 5 pm, Eastern Standard Time, of any day on which the provider is unable to respond to an industry request for observer coverage.

(F) *Other reports*. The observer provider must report possible observer harassment, discrimination, concerns about vessel safety or marine casualty, observer illness or injury, and any information, allegations, or reports regarding observer conflict of interest or breach of the standards of behavior must be submitted to NMFS within 24 hours

of the event or within 24 hours of learning of the event.

(viii) *Refusal to deploy an observer.* (A) An observer service provider may refuse to deploy an observer on a requesting fishing vessel if the observer service provider does not have an available observer within 72 hours of receiving a request for an observer from a vessel.

(B) An observer service provider may refuse to deploy an observer on a requesting fishing vessel if the observer service provider has determined that the requesting vessel is inadequate or unsafe pursuant to the reasons described at § 600.746.

(C) The observer service provider may refuse to deploy an observer on a fishing vessel that is otherwise eligible to carry an observer for any other reason, including failure to pay for previous observer deployments, provided the observer service provider has received prior written confirmation from NMFS authorizing such refusal.

(6) *Limitations on conflict of interest.* An observer service provider:

(i) Must not have a direct or indirect interest in a fishery managed under Federal regulations, including, but not limited to, a fishing vessel, fish dealer, fishery advocacy group, and/or fishery research;

(ii) Must assign observers without regard to any preference by representatives of vessels other than when an observer will be deployed; and

(iii) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who conducts fishing or fishing related activities that are regulated by NMFS, or who has interests that may be substantially affected by the performance or nonperformance of the official duties of observer providers.

(7) *Removal of observer service provider from the list of approved observer service providers.* An observer provider that fails to meet the requirements, conditions, and responsibilities specified in paragraphs (h)(5) and (h)(6) of this section shall be notified by NMFS, in writing, that it is subject to removal from the list of approved observer service providers. Such notification shall specify the reasons for the pending removal. An observer service provider that has received notification that it is subject to removal from the list of approved observer service providers may submit information to rebut the reasons for removal from the list. Such rebuttal must be submitted within 30 days of notification received by the observer service provider that the observer service provider is subject to removal and must be accompanied by written evidence that clearly disproves the reasons for removal. NMFS shall review information rebutting the pending removal and shall notify the observer service provider within 15 days of receipt of the rebuttal whether or not the removal is warranted. If no response to a pending removal is received by NMFS, the observer service provider shall be automatically removed from the list of approved observer service providers. The decision to remove the observer service provider from the list, either after reviewing a rebuttal, or if no rebuttal is submitted, shall be the final decision of NMFS and the Department of Commerce. Removal from the list of approved observer service providers does not necessarily prevent such observer service provider from obtaining an approval in the future if a new application is submitted that demonstrates that the reasons for removal are remedied. Certified observers under contract with an observer service provider that has been removed from the list of approved service providers must complete their assigned duties for any fishing trips on which the observers are deployed at the time the observer service provider is removed from the list of approved observer service providers. An observer service provider removed from the list of approved observer service providers is responsible for providing NMFS with the information required in paragraph (h)(5)(vii) of this section following completion of the trip. NMFS may consider, but is not limited to, the following in determining if an observer service provider may remain on the list of approved observer service providers:

(i) Failure to meet the requirements, conditions, and responsibilities of observer service providers specified in paragraphs (h)(5) and (h)(6) of this section;

(ii) Evidence of conflict of interest as defined under paragraph (h)(3) of this section;

(iii) Evidence of criminal convictions related to:

(A) Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(B) The commission of any other crimes of dishonesty, as defined by state law or Federal law that would seriously and directly affect the fitness of an applicant in providing observer services under this section;

(iv) Unsatisfactory performance ratings on any Federal contracts held by the applicant; and

(v) Evidence of any history of decertification as either an observer or observer provider.

(i) *Observer certification.* (1) To be certified, employees or sub-contractors operating as observers for observer service providers approved under paragraph (h) of this section must meet NMFS National Minimum Eligibility Standards for observers. NMFS National Minimum Eligibility Standards are available at the National Observer Program website: *http://www.st.nmfs.gov/st4/nop/*.

(2) *Observer training.* In order to be deployed on any fishing vessel, a candidate observer must have passed an appropriate NMFS/NEFOP Observer Training course. If a candidate fails training, the candidate shall be notified in writing on or before the last day of training. The notification will indicate the reasons the candidate failed the training. Observer training shall include an observer training trip, as part of the observer's training, aboard a fishing vessel with a trainer. A certified observer's first deployment and the resulting data shall be immediately edited, and approved, by NMFS prior to any further deployments of that observer.

(3) *Observer requirements.* All observers must:

(i) Have a valid NMFS/NEFOP fisheries observer certification pursuant to paragraph (i)(1) of this section;

(ii) Be physically and mentally capable of carrying out the responsibilities of an observer on board fishing vessels, pursuant to standards established by NMFS. Such standards are available from NMFS/NEFOP website specified in paragraph (h)(1) of this section and shall be provided to each approved observer service provider;

(iii) Have successfully completed all NMFS-required training and briefings for observers before deployment, pursuant to paragraph (i)(2) of this section; and

(iv) Hold a current Red Cross (or equivalence) CPR/first aid certification.

(4) *Probation and decertification.* NMFS has the authority to review observer certifications and issue observer certification probation and/or decertification as described in NMFS policy found on the NMFS/NEFOP website specified in paragraph (h)(1) of this section.

(5) *Issuance of decertification.* Upon determination that decertification is warranted under paragraph (i)(3) of this section, NMFS shall issue a written decision to decertify the observer to the observer and approved observer service providers via certified mail at the

observer's most current address provided to NMFS. The decision shall identify whether a certification is revoked and shall identify the specific reasons for the action taken. Decertification is effective immediately as of the date of issuance, unless the decertification official notes a compelling reason for maintaining certification for a specified period and under specified conditions. Decertification is the final decision of NMFS and the Department of Commerce and may not be appealed.

3. Add § 648.18 to subpart A to read as follows:

§ 648.18 Standardized bycatch reporting methodology.

NMFS shall comply with the Standardized Bycatch Reporting Methodology (SBRM) provisions established in the following fishery management plans: Atlantic Bluefish; Atlantic Herring; Atlantic Salmon; Deep-Sea Red Crab; Mackerel, Squid, and Butterfish; Monkfish; Northeast Multispecies; Northeast Skate Complex; Sea Scallop; Spiny Dogfish; Summer Flounder, Scup, and Black Sea Bass; Surfclam and Ocean Quahog; and Tilefish.

4. In § 648.21, paragraph (c)(13) is added to read as follows:

§ 648.21 Procedures for determining initial annual amounts.

(c) * * *

(13) Changes, as appropriate, to the Northeast Region SBRM, including the coefficient of variation (CV) based performance standard, fishery stratification, and/or reports.

* * * * *

5. In § 648.24, paragraph (a)(1) is revised to read as follows:

§ 648.24 Framework adjustments to management measures.

(a) * * *

(1) *Adjustment process*. The Council shall develop and analyze appropriate management actions over the span of at least two Council meetings. The Council must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and biological analyses, and the opportunity to comment on the proposed adjustment(s) at the first meeting and prior to and at the second Council meeting. The Council's recommendations on adjustments or additions to management measures must come from one or more of the following categories: Minimum fish size, maximum fish size, gear restrictions, gear requirements or prohibitions, permitting restrictions, recreational possession limit, recreational seasons, closed areas, commercial seasons, commercial trip limits, commercial quota system including commercial quota allocation procedure and possible quota set asides to mitigate bycatch, recreational harvest limit, annual specification quota setting process, FMP Monitoring Committee composition and process, description and identification of EFH (and fishing gear management measures that impact EFH), description and identification of habitat areas of particular concern, overfishing definition and related thresholds and targets, regional gear restrictions, regional season restrictions (including option to split seasons), restrictions on vessel size (LOA and GRT) or shaft horsepower, changes to the Northeast Region SBRM (including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs), any other management measures currently included in the FMP, set aside quota for scientific research, regional management, and process for inseason adjustment to the annual specification.

* * * * *

6. In § 648.55, paragraph (e)(32) is revised and paragraph (e)(33) is added to read as follows:

§ 648.55 Framework adjustments to management measures.

* * * * *

(e) * * *

(32) Changes to the Northeast Region SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs.

(33) Any other management measures currently included in the FMP.

* * * * *

7. In § 648.77, paragraph (a)(1) is revised to read as follows:

§ 648.77 Framework adjustments to management measures.

(a) * * *

(1) *Adjustment process*. The Council shall develop and analyze appropriate management actions over the span of at least two Council meetings. The Council must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and biological analyses, and the opportunity to comment on the proposed adjustment(s) at the first meeting, and prior to and at the second Council meeting. The Council's recommendations on adjustments or additions to management measures must come from one or more of the following categories: The overfishing definition (both the threshold and target levels), description and identification of EFH (and fishing gear management measures that impact EFH), habitat areas of particular concern, set-aside quota for scientific research, VMS, OY range, suspension or adjustment of the surfclam minimum size limit, and changes to the Northeast Region SBRM (including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs).

* * * * *

8. In § 648.90, paragraphs (a)(2)(i), (a)(2)(iii), (b)(1)(ii), and (c)(1)(i) are revised to read as follows:

§ 648.90 NE Multispecies assessment, framework procedures and specifications, and flexible area action system.

* * * * *

(a) * * *

(2) *Biennial review*. (i) Beginning in 2005, the NE Multispecies PDT shall meet on or before September 30 every other year, unless otherwise specified in paragraph (a)(3) of this section, under the conditions specified in that paragraph, to perform a review of the fishery, using the most current scientific information available provided primarily from the NEFSC. Data provided by states, ASMFC, the USCG, and other sources may also be considered by the PDT. Based on this review, the PDT will develop target TACs for the upcoming fishing year(s) and develop options for Council consideration, if necessary, on any changes, adjustments, or additions to DAS allocations, closed areas, or on other measures necessary to achieve the FMP goals and objectives, including changes to the Northeast Region SBRM. For the 2005 biennial review, an updated groundfish assessment, peer-reviewed by independent scientists, will be conducted to facilitate the PDT review for the biennial adjustment, if needed, for the 2006 fishing year. Amendment 13 biomass and fishing mortality targets may not be modified by the 2006 biennial adjustment unless review of all valid pertinent scientific work during the 2005 review process justifies consideration.

* * * * *

(iii) Based on this review, the PDT shall recommend target TACs and develop options necessary to achieve

the FMP goals and objectives, which may include a preferred option. The PDT must demonstrate through analyses and documentation that the options they develop are expected to meet the FMP goals and objectives. The PDT may review the performance of different user groups or fleet Sectors in developing options. The range of options developed by the PDT may include any of the management measures in the FMP, including, but not limited to: Target TACs, which must be based on the projected fishing mortality levels required to meet the goals and objectives outlined in the FMP for the 10 regulated species, Atlantic halibut (if able to be determined), and ocean pout; DAS changes; possession limits; gear restrictions; closed areas; permitting restrictions; minimum fish sizes; recreational fishing measures; description and identification of EFH; fishing gear management measures to protect EFH; designation of habitat areas of particular concern within EFH; and changes to the Northeast Region SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs. In addition, the following conditions and measures may be adjusted through future framework adjustments: Revisions to status determination criteria, including, but not limited to, changes in the target fishing mortality rates, minimum biomass thresholds, numerical estimates of parameter values, and the use of a proxy for biomass; DAS allocations (such as the category of DAS under the DAS reserve program, etc.) and DAS baselines, etc.; modifications to capacity measures, such as changes to the DAS transfer or DAS leasing measures; calculation of area-specific TACs, area management boundaries, and adoption of area-specific management measures; Sector allocation requirements and specifications, including establishment of a new Sector; measures to implement the U.S./Canada Resource Sharing Understanding, including any specified TACs (hard or target); changes to administrative measures; additional uses for Regular B DAS; future uses for C DAS; reporting requirements; the GOM Inshore Conservation and Management Stewardship Plan; GB Cod Gillnet Sector allocation; allowable percent of TAC available to a Sector through a Sector allocation; categorization of DAS; DAS leasing provisions; adjustments for steaming time; adjustments to the Handgear A permit; gear requirements to improve selectivity, reduce bycatch, and/or reduce impacts of the fishery on EFH; SAP modifications; and any other measures currently included in the FMP.

* * * * *

(b) * * *

(1) * * *

(ii) The WMC shall recommend management options necessary to achieve FMP goals and objectives pertaining to small-mesh multispecies, which may include a preferred option. The WMC must demonstrate through analyses and documentation that the options it develops are expected to meet the FMP goals and objectives. The WMC may review the performance of different user groups or fleet Sectors in developing options. The range of options developed by the WMC may include any of the management measures in the FMP, including, but not limited to: Annual target TACs, which must be based on the projected fishing mortality levels required to meet the goals and objectives outlined in the FMP for the small-mesh multispecies; possession limits; gear restrictions; closed areas; permitting restrictions; minimum fish sizes; recreational fishing measures; description and identification of EFH; fishing gear management measures to protect EFH; designation of habitat areas of particular concern within EFH; changes to the Northeast Region SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs; and any other management measures currently included in the FMP.

* * * * *

(c) * * *

(1) * * *

(i) After a management action has been initiated, the Council shall develop and analyze appropriate management actions over the span of at least two Council meetings. The Council shall provide the public with advance notice of the availability of both the proposals and the analyses and opportunity to comment on them prior to and at the second Council meeting. The Council's recommendation on adjustments or additions to management measures, other than to address gear conflicts, must come from one or more of the following categories: DAS changes, effort monitoring, data reporting, possession limits, gear restrictions, closed areas, permitting restrictions, crew limits, minimum fish sizes, onboard observers, minimum hook size and hook style, the use of crucifer in the hook-gear fishery, fleet Sector shares, recreational fishing measures, area closures and other appropriate measures to mitigate marine mammal entanglements and interactions, description and identification of EFH, fishing gear management measures to protect EFH, designation of habitat areas of particular concern within EFH, changes to the Northeast Region SBRM, and any other management measures currently included in the FMP. In addition, the Council's recommendation on adjustments or additions to management measures pertaining to small-mesh NE multispecies, other than to address gear conflicts, must come from one or more of the following categories: Quotas and appropriate seasonal adjustments for vessels fishing in experimental or exempted fisheries that use small mesh in combination with a separator trawl/grate (if applicable), modifications to separator grate (if applicable) and mesh configurations for fishing for small-mesh NE multispecies, adjustments to whiting stock boundaries for management purposes, adjustments for fisheries exempted from minimum mesh requirements to fish for small-mesh NE multispecies (if applicable), season adjustments, declarations, participation requirements for the Cultivator Shoal Whiting Fishery Exemption Area, and changes to the Northeast Region SBRM (including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs).

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9. In § 648.96, paragraphs (a), (b)(5), and (c)(1)(i) are revised to read as follows:

§ 648.96 Monkfish annual adjustment process and framework specifications.

(a) *General*. The Monkfish Monitoring Committee (MFMC) shall meet on or before November 15 of each year to develop target TACs for the upcoming fishing year in accordance with paragraph (b)(1) of this section, and options for NEFMC and MAFMC consideration on any changes, adjustment, or additions to DAS allocations, trip limits, size limits, the Northeast Region SBRM (including the CV-based performance standard, fishery stratification, and/or reports), or other measures necessary to achieve the Monkfish FMP's goals and objectives. The MFMC shall review available data pertaining to discards and landings, DAS, and other measures of fishing effort; stock status and fishing mortality rates; enforcement of and compliance

with management measures; and any other relevant information.

(b) * * *

(5) *Annual review process*. The Monkfish Monitoring Committee (MFMC) shall meet on or before November 15 of each year to develop options for the upcoming fishing year, as needed, and options for NEFMC and MAFMC consideration on any changes, adjustment, or additions to DAS allocations, trip limits, size limits, the Northeast Region SBRM (including the CV-based performance standard, fishery stratification, and/or reports), or other measures necessary to achieve the Monkfish FMP's goals and objectives. The MFMC shall review available data pertaining to discards and landings, DAS, and other measures of fishing effort; stock status and fishing mortality rates; enforcement of and compliance with management measures; and any other relevant information.

* * * * *

(c) * * *

(1) * * *

(i) Based on their annual review, the MFMC may develop and recommend, in addition to the target TACs and management measures established under paragraph (b) of this section, other options necessary to achieve the Monkfish FMP's goals and objectives, which may include a preferred option. The MFMC must demonstrate through analysis and documentation that the options it develops are expected to meet the Monkfish FMP goals and objectives. The MFMC may review the performance of different user groups or fleet sectors in developing options. The range of options developed by the MFMC may include any of the management measures in the Monkfish FMP, including, but not limited to: Closed seasons or closed areas; minimum size limits; mesh size limits; net limits; liver-to-monkfish landings ratios; annual monkfish DAS allocations and monitoring; trip or possession limits; blocks of time out of the fishery; gear restrictions; transferability of permits and permit rights or administration of vessel upgrades, vessel replacement, or permit assignment; measures to minimize the impact of the monkfish fishery on protected species; gear requirements or restrictions that minimize bycatch or bycatch mortality; transferable DAS programs; changes to the Northeast Region SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs; and other frameworkable measures included in §§ 648.55 and 648.90.

* * * * *

10. In § 648.100, paragraph (a) is revised and paragraph (b)(12) is added to read as follows:

§ 648.100 Catch quotas and other restrictions.

(a) *Review*. The Summer Flounder Monitoring Committee shall review each year the following data, subject to availability, unless a TAL has already been established for the upcoming calendar year as part of a multiple-year specification process, provided that new information does not require a modification to the multiple-year quotas, to determine the annual allowable levels of fishing and other restrictions necessary to achieve, with at least a 50–percent probability of success, a fishing mortality rate (F) that produces the maximum yield per recruit (F_{max}): Commercial, recreational, and research catch data; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results; levels of noncompliance by fishermen or individual states; impact of size/mesh regulations; discards; sea sampling and winter trawl survey data or, if sea sampling data are unavailable, length frequency information from the winter trawl survey and mesh selectivity analyses; impact of gear other than otter trawls on the mortality of summer flounder; and any other relevant information.

(b) * * *

(12) Changes, as appropriate, to the Northeast Region SBRM, including the CV-based performance standard, fishery stratification, and/or reports.

* * * * *

11. In § 648.108, paragraph (a)(1) is revised to read as follows:

§ 648.108 Framework adjustments to management measures.

(a) * * *

(1) *Adjustment process*. The Council shall develop and analyze appropriate management actions over the span of at least two Council meetings. The Council must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and biological analyses, and the opportunity to comment on the proposed adjustment(s) at the first meeting and prior to and at the second Council meeting. The Council's recommendations on adjustments or additions to management measures must come from one or more of the following categories: Minimum fish size, maximum fish size, gear restrictions, gear requirements or prohibitions, permitting restrictions, recreational possession limit, recreational seasons, closed areas, commercial seasons, commercial trip limits, commercial quota system including commercial quota allocation procedure and possible quota set asides to mitigate bycatch, recreational harvest limit, annual specification quota setting process, FMP Monitoring Committee composition and process, description and identification of essential fish habitat (and fishing gear management measures that impact EFH), description and identification of habitat areas of particular concern, overfishing definition and related thresholds and targets, regional gear restrictions, regional season restrictions (including option to split seasons), restrictions on vessel size (LOA and GRT) or shaft horsepower, operator permits, changes to the Northeast Region SBRM (including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs), any other commercial or recreational management measures, any other management measures currently included in the FMP, and set aside quota for scientific research.

* * * * *

12. In § 648.120, paragraph (a) is revised and paragraph (b)(13) is added to read as follows:

§ 648.120 Catch quotas and other restrictions.

(a) *Review*. The Scup Monitoring Committee shall review each year the following data, subject to availability, unless a TAL already has been established for the upcoming calendar year as part of a multiple-year specification process, provided that new information does not require a modification to the multiple-year quotas: Commercial, recreational, and research data; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results; levels of noncompliance by fishermen or individual states; impact of size/mesh regulations; impact of gear on the mortality of scup; discards; and any other relevant information. This review will be conducted to determine the allowable levels of fishing and other restrictions necessary to achieve the F that produces the maximum yield per recruit (F_{max}).

(b) * * *

(13) Changes, as appropriate, to the Northeast Region SBRM, including the CV-based performance standard, fishery stratification, and/or reports.

* * * * *

13. In § 648.140, paragraph (a) is revised and paragraph (b)(12) is added to read as follows:

§ 648.140 Catch quotas and other restrictions.

(a) *Review*. The Black Sea Bass Monitoring Committee shall review each year the following data, subject to availability, unless a TAL already has been established for the upcoming calendar year as part of a multiple-year specification process, provided that new information does not require a modification to the multiple-year quotas, to determine the allowable levels of fishing and other restrictions necessary to result in a target exploitation rate of 23 percent (based on F_{max}) in 2003 and subsequent years: Commercial, recreational, and research catch data; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results; levels of noncompliance by fishermen or individual states; impact of size/mesh regulations; discards; sea sampling and winter trawl survey data, or if sea sampling data are unavailable, length frequency information from the winter trawl survey and mesh selectivity analyses; impact of gear other than otter trawls, pots and traps on the mortality of black sea bass; and any other relevant information.

(b) * * *

(12) Changes, as appropriate, to the Northeast Region SBRM, including the CV-based performance standard, fishery stratification, and/or reports.

* * * * *

14. In § 648.160, paragraph (a) is revised and paragraph (b)(9) is added to read as follows:

§ 648.160 Catch quotas and other restrictions.

* * * * *

(a) *Annual review*. On or before August 15 of each year, the Bluefish Monitoring Committee will meet to determine the total allowable level of landings (TAL) and other restrictions necessary to achieve the target fishing mortality rate (F) specified in the Fishery Management Plan for Atlantic Bluefish for the upcoming fishing year or the estimated F for the fishing year preceding the Council submission of the recommended specifications, whichever F is lower. In determining the TAL and other restrictions necessary to achieve the specified F, the Bluefish Monitoring Committee will review the following data, subject to availability: Commercial, recreational, and research catch data; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results; levels of noncompliance by fishermen or individual states; impact of size/mesh regulations; discards; sea sampling data; impact of gear other than otter trawls and gill nets on the mortality of bluefish; and any other relevant information.

(b) * * *

(9) Changes, as appropriate, to the Northeast Region SBRM, including the CV-based performance standard, fishery stratification, and/or reports.

* * * * *

15. In § 648.165, paragraph (a)(1) is revised to read as follows:

§ 648.165 Framework specifications.

(a) * * *

(1) *Adjustment process*. After a management action has been initiated, the Council shall develop and analyze appropriate management actions over the span of at least two Council meetings. The Council shall provide the public with advance notice of the availability of both the proposals and the analysis and the opportunity to comment on them prior to and at the second Council meeting. The Council's recommendation on adjustments or additions to management measures must come from one or more of the following categories: Minimum fish size, maximum fish size, gear restrictions, gear requirements or prohibitions, permitting restrictions, recreational possession limit, recreational season, closed areas, commercial season, description and identification of essential fish habitat (EFH), fishing gear management measures to protect EFH, designation of habitat areas of particular concern within EFH, changes to the Northeast Region SBRM (including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports and/or industry-funded observers or observer set-aside programs), and any other management measures currently included in the FMP.

* * * * *

16. In § 648.200, paragraph (b) introductory text is revised to read as follows:

§ 648.200 Specifications.

* * * * *

(b) *Guidelines*. As the basis for its recommendations under paragraph (a) of this section, the PDT shall review available data pertaining to: Commercial and recreational catch data; current estimates of fishing mortality; discards; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling and trawl survey data or, if sea sampling data are unavailable, length frequency information from trawl surveys; impact of other fisheries on herring mortality; and any other relevant information. The specifications recommended pursuant to paragraph (a) of this section must be consistent with the following:

* * * * *

17. In § 648.206, paragraphs (b)(28) and (b)(29) are revised and paragraph (b)(30) is added to read as follows:

§ 648.206 Framework provisions.

* * * * *

(b) * * *

(28) TAC set-aside amounts, provisions, adjustments;

(29) Changes, as appropriate, to the Northeast Region SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs; and

(30) Any other measure currently included in the FMP.

* * * * *

18. In § 648.230, paragraphs (a), (b)(4), and (b)(5) are revised and paragraph (b)(6) is added to read as follows:

§ 648.230 Catch quotas and other restrictions.

(a) *Process for setting specifications*. The Spiny Dogfish Monitoring Committee will review the following data at least every 5 years, subject to availability, to determine the total allowable level of landings (TAL) and other restrictions necessary to assure that a target fishing mortality rate specified in the Spiny Dogfish Fishery Management Plan will not be exceeded in each year for which TAL and any other measures are recommended: Commercial and recreational catch data; discards; current estimates of F; stock status; recent estimates of recruitment; virtual population analysis results; levels of noncompliance by fishermen or individual states; impact of size/mesh regulations; sea sampling data; impact of gear other than otter trawls and gill nets on the mortality of spiny dogfish; and any other relevant information.

(b) * * *

(4) Trip limits;

(5) Changes to the Northeast Region SBRM, including the CV-based

performance standard, fishery stratification, and/or reports; or

(6) Other gear restrictions.

* * * * *

19. In § 648.237, paragraph (a)(1) is revised to read as follows:

§ 648.237 Framework provisions.

(a) * * *

(1) *Adjustment process.* After the Councils initiate a management action, they shall develop and analyze appropriate management actions over the span of at least two Council meetings. The Councils shall provide the public with advance notice of the availability of both the proposals and the analysis for comment prior to, and at, the second Council meeting. The Councils' recommendation on adjustments or additions to management measures must come from one or more of the following categories: Minimum fish size; maximum fish size; gear requirements, restrictions or prohibitions (including, but not limited to, mesh size restrictions and net limits); regional gear restrictions; permitting restrictions and reporting requirements; recreational fishery measures (including possession and size limits and season and area restrictions); commercial season and area restrictions; commercial trip or possession limits; fin weight to spiny dogfish landing weight restrictions; onboard observer requirements; commercial quota system (including commercial quota allocation procedures and possible quota set-asides to mitigate bycatch, conduct scientific research, or for other purposes); recreational harvest limit; annual quota specification process; FMP Monitoring Committee composition and process; description and identification of essential fish habitat; description and identification of habitat areas of particular concern; overfishing definition and related thresholds and targets; regional season restrictions (including option to split seasons); restrictions on vessel size (length and GRT) or shaft horsepower; target quotas; measures to mitigate marine mammal entanglements and interactions; regional management; changes to the Northeast Region SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside program; any other management measures currently included in the Spiny Dogfish FMP; and measures to regulate aquaculture projects.

* * * * *

20. In § 648.260, paragraph (b) introductory text is revised to read as follows:

§ 648.260 Specifications.

* * * * *

(b) *Development of specifications.* In developing the management measures and specifications, the PDT shall review at least the following data, if available: Commercial catch data; current estimates of fishing mortality and catch-per-unit-effort (CPUE); discards; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling, port sampling, and survey data or, if sea sampling data are unavailable, length frequency information from port sampling and/or surveys; impact of other fisheries on the mortality of red crabs; and any other relevant information.

* * * * *

21. In § 648.293, paragraphs (a)(1)(xiv) and (xv) are revised and paragraph (a)(1)(xvi) is added to read as follows:

§ 648.293 Framework specifications.

(a) * * *

(1) * * *

(xiv) Habitat areas of particular concern,

(xv) Set-aside quotas for scientific research, and

(xvi) Changes to the Northeast Region SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs.

* * * * *

22. In § 648.321, paragraphs (b)(19) and (b)(20) are revised and paragraph (b)(21) is added to read as follows:

§ 648.321 Framework adjustment process.

* * * * *

(b) * * *

(19) OY and/or MSY specifications;

(20) Changes to the Northeast Region SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs; and

(21) Any other measures contained in the FMP.

* * * * *

[FR Doc. E7–16238 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 72, No. 161

Tuesday, August 21, 2007

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

August 16, 2007.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Nursery and Christmas Tree Production Survey and Nursery and Floriculture Chemical Use Survey.

OMB Control Number: 0535–0244.

Summary of Collection: The National Agricultural Statistics Service (NASS) is charged with the responsibility of providing reliable, up-to-date information concerning the Nation's crop and livestock production, prices, and disposition, as well as environmental statistics. This includes estimates of production and value of key nursery products and chemical use by nursery and floriculture production operations. Congress appropriated funds for the collection of pesticide use data on nursery and floriculture operations. This data will expand the existing NASS pesticide database that contains comprehensive annual pesticide use reports. NASS will collect the information using surveys. The authority for these data collection activities is granted under U.S. Code Title 7, Section 2204.

Need and Use of the Information: Nursery and Christmas tree production data and nursery and floriculture chemical use data will be used by NASS, the Environmental Protection Agency, the nursery and floriculture industries, and other parties to assess the environmental and economic impact of various programs, policies, and procedures on nursery and floriculture operators and workers. The basic chemical use and farm practices information also will be used to enhance the national chemical use database maintained by NASS. This database is an integral source of data necessary for on-going risk assessments related to dietary exposure to chemicals, worker safety, water quality, and ecological resources.

Description of Respondents: Farms; Business or other for-profit.

Number of Respondents: 37,288.

Frequency of Responses: Reporting: Triennial.

Total Burden Hours: 3,807.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E7–16435 Filed 8–20–07; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

August 16, 2007.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Food Stamp Program Regulations, Part 275—Quality Control.

OMB Control Number: 0584–0303.

Summary of Collection: Section 16 of the Food Stamp Act of 1977 provides the legislative basis for the operation of

the Food Stamp Program Quality Control system. The Food and Nutrition Service (FNS), as administrator of the Food Stamp Program, requires each State agency to implement a quality control system to provide basis for determining each State agency's error rates through review of a sample of Food Stamp cases. Each State agency is responsible for the design and selection of the quality control samples and must submit a quality control sampling plan for approval to FNS. Additionally, State agencies are required to maintain case records for three years to ensure compliance with provisions of the Food Stamp Act of 1977.

Need and Use of the Information: The quality control sampling plan is necessary for FNS to monitor State operations and is essential to the determination of a State agency's error rate and corresponding entitlement to increased Federal share of its administrative costs or liability for sanctions.

Description of Respondents: State, Local, or Tribal Government; Federal Government.

Number of Respondents: 53.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Annually.

Total Burden Hours: 1,267.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E7–16436 Filed 8–20–07; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

August 16, 2007.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Specified Risk Materials.

OMB Control Number: 0583–0127.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031 *et seq.*). This statutes mandate that FSIS protect the public by ensuring that meat and poultry products are safe, wholesome, unadulterated, and properly labeled and packaged. FSIS established new, flexible procedures to actively encourage the development and use of new technologies in meat and poultry establishments and egg products plants. The new procedures will facilitate notification to the Agency of any new technology that is intended for use in meat and poultry establishments and egg products plants so that the Agency can decide whether the new technology requires a pre-use review. A pre-use review often includes an in-plant trail.

Need and Use of the Information: FSIS will collect information to determine if an in-plant trail is necessary, FSIS will request that the firm submit a protocol that is designed to collect relevant data to support the use of the new technology. To not collect this information would reduce the effectiveness of the meat, poultry, and egg products inspection program.

Description of Respondents: Business or other for-profit.

Number of Respondents: 250.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 8,400.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E7–16443 Filed 8–20–07; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Announcement of a Workshop on the Topic of ''Future Energy Science and Education Initiatives Within the REE Mission Area''

AGENCY: Research, Education, and Economics, USDA.

ACTION: Notice of Workshop.

SUMMARY: In accordance with the section 3124a of Title 7 of the United States Code, the United States Department of Agriculture (USDA) announces an energy science and education workshop to be conducted by the Research, Education, and Economics Mission Area (REE).

DATES: The workshop will be held on September 5 and 6, 2007.

ADDRESSES: The workshop will take place at the Sheraton Crystal City Hotel, 1800 Jefferson Davis Highway, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Joseph A. Dunn, PhD; telephone: (202) 720–3075; fax: (202) 690–2842; or e-mail: *Joseph.Dunn@usda.gov*.

SUPPLEMENTARY INFORMATION: On Wednesday, September 5, 2007, and Thursday, September 6, 2007, from 8 a.m. to 5 p.m. the REE mission area of the USDA will hold a workshop, including breakout sessions, to discuss and plan the scope and effectiveness of REE's research, extension, and economics programs as they relate to energy science and education. The purpose of this workshop is to obtain input from experts of the four REE Agencies, the Agricultural Research Service, the Cooperative State Research, Education and Economics Service, the National Agriculture Statistics Service and the Economics Research Service, along with experts from the mission area's Land-Grant partners, on energy science and education issues of high priority to the USDA and to the Nation. Particular emphasis will be placed on results from breakout sessions conducted within the workshop which

will assist in the planning of future energy science and education initiatives within the purview of the four REE agencies.

On Wednesday, September 5 at 8 a.m. the workshop will begin with introductory remarks provided by the Under Secretary for Research, Education and Economics, Dr. Gale Buchanan. The workshop will conclude on Thursday, September 6 at 5 p.m. There will be an opportunity for public comment during the workshop. The findings of this workshop will be consolidated into a document containing the Mission Area's energy science and education vision and goals along with a roadmap for achieving this vision and goals. This document will be posted on the mission area Web site (*www.ree.usda.gov*).

Done in Washington, DC this 14th day of August, 2007.

Merle D. Pierson,

Deputy Under Secretary, Research, Education, and Economics.

[FR Doc. E7–16391 Filed 8–20–07; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

National Urban and Community Forestry Advisory Council

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The National Urban and Community Forestry Advisory Council will meet in Boston, Massachusetts, October 16–18, 2007. The purpose of the meeting is to discuss emerging issues in urban and community forestry.

DATES: The meeting will be held on October 16–18, 2007.

ADDRESSES: The meeting will be held at the Double Tree Hotel Downtown, 821 Washington Street, Boston, Massachusetts. Written comments concerning this meeting should be addressed to Nancy Stremple, Executive Staff to National Urban and Community Forestry Advisory Council, 201 14th St., SW., Yates Building (1 Central) MS–1151, Washington, DC 20250–1151. Comments may also be sent via e-mail to *nstremple@fs.fed.us*, or via facsimile to 202–690–5792.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at 201 14th St., SW., Yates Building (1 Central) MS–1151, Washington, DC 20250–1151. Visitors are encouraged to call ahead to 202–205–1054 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Nancy Stremple, Executive Staff or Robert Prather Staff Assistant to National Urban and Community Forestry Advisory Council, 201 14th St., SW., Yates Building (1 Central) MS–1151, Washington, DC 20250–1151, phone 202–205–1054.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Council discussion is limited to Forest Service staff and Council members; however, persons who wish to bring urban and community forestry matters to the attention of the Council may file written statements with the Council staff (201 14th St., SW., Yates Building (1 Central) MS–1151, Washington, DC 20250–1151, e-mail *nstremple@fs.fed.us*) before or after the meeting. Public input sessions will be provided at the meeting.

Dated: August 13, 2007.

Robin L. Thompson,

Associate Deputy Chief, State and Private Forestry.

[FR Doc. E7–16413 Filed 8–20–07; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Availability of a Finding of No Significant Impact (FONSI)

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Notice of availability of a Finding of No Significant Impact for a project on McDonald Creek for review and comment.

SUMMARY: The NRCS has issued a Finding of No Significant Impact (FONSI) for a stream restoration project on a private landowner's land on McDonald Creek. A copy of the FONSI and the final Environmental Assessment (EA) is available for public review at the following locations:

- NRCS Office, 10507 N. McAlister Road, OR 97850.
- Grande Ronde Model Watershed, 1114 J Avenue, La Grande, OR 97850.
- La Grande Public Library, 2006 Fourth Street, La Grande, OR 97850.
- Additional copies may be obtained by contacting Greg Kuehl, NRCS, 541–963–4178, ext. 107.

DATES: Comments will be received for a 30-day period commencing with this date of publication.

ADDRESSES: Address all requests and comments to Greg Kuehl, Basin Team Leader, Natural Resources Conservation Service (NRCS), 10507 N. McAlister Road, OR 97850; (541)–963–1022 (fax).

FOR FURTHER INFORMATION CONTACT: Alan Bahn, NRCS, 541–523–7121, ext. 115.

Dated: August 13, 2007.

Bob Graham,

State Conservationist, Portland, OR.

[FR Doc. E7–16380 Filed 8–20–07; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Dunloup Creek Watershed, Fayette and Raleigh Counties, WV

AGENCY: Natural Resources Conservation Service.

ACTION: Notice of Availability of a Record of Decision.

SUMMARY: Kevin Wickey, responsible Federal official for projects administered under the provisions of the Watershed Protection and Flood Prevention Act, Public Law 83–566, 16 U.S.C. 1001–1008, in the State of West Virginia, is hereby providing notification that a Record of Decision to proceed with the installation of the Dunloup Creek Watershed Project is available. Single copies of this Record of Decision may be obtained from Kevin Wickey at the address shown below.

FOR FURTHER INFORMATION CONTACT: Kevin Wickey, State Conservationist, Natural Resources Conservation Service, 75 High Street, Room 301, Morgantown, West Virginia 26505, telephone (304) 284–7545.

Dated: August 10, 2007.

Kevin Wickey,

State Conservationist.

(This activity is listed in the Catalog of Federal Domestic Assistance under No. 10–904—Watershed Protection and Flood Prevention—and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials.)

[FR Doc. E7–16382 Filed 8–20–07; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Proposed Changes to Section IV of the Iowa State Technical Guide

AGENCY: Natural Resources Conservation Service (NRCS), U.S. Department of Agriculture.

ACTION: Notice of availability of proposed changes in the Iowa NRCS State Technical Guide for review and comment.

SUMMARY: It has been determined by the NRCS State Conservationist for Iowa that changes must be made in the NRCS State Technical Guide, specifically in Section IV Practice Standards and Specifications, Stripcropping (585) to account for improved technology. This practice standard can be used in systems that treat highly erodible land.

DATES: Comments will be received for a 30-day period commencing with this date of publication.

FOR FURTHER INFORMATION CONTACT: Richard Van Klaveren, State Conservationist, Natural Resources Conservation Service, 210 Walnut Street, Room 693, Des Moines, Iowa 50309; telephone 515–284–6655; fax 515–284–4394.

SUPPLEMENTARY INFORMATION: Section 343 of the Federal Agriculture Improvement and Reform Act of 1996 states that revisions made after enactment of the law to NRCS State technical guides used to carry out highly erodible land and wetland provisions of the law shall be made available for public review and comment. For the next 30 days the NRCS will receive comments relative to the proposed changes. Following that period, a determination will be made by the NRCS regarding disposition of those comments and a final determination of change will be made.

Dated: August 3, 2007.

Richard Van Klaveren,

State Conservationist.

[FR Doc. E7–16381 Filed 8–20–07; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket Number 070723403–7404–01]

Suspension of the Geographically Updated Population Certification Program (GUPCP) for Places Incorporating or Annexing Between Censuses

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of Suspension of Program.

SUMMARY: This document serves notice to state and local governments and to other federal agencies that beginning on January 1, 2008, the Bureau of the Census will suspend the Geographically Updated Population Certification Program for five years—the two years preceding the decennial census, the decennial census year, and the two years following it—to accommodate the taking of the 2010 Census. During this time, the Bureau of the Census will not provide the operations necessary to determine the updated April 1, 2000, census population and housing unit counts for entities that annex territory or that incorporate or organize as counties, boroughs, cities, towns, villages, townships, or other general purpose governments. However, all requests for population and housing count updates received in writing before January 1, 2008 will be considered.

DATES: As of January 1, 2008, the Geographically Updated Population Certification Program will be suspended.

FOR FURTHER INFORMATION CONTACT: Mr. Darryl Cohen, Population Division, Bureau of the Census, Washington, DC 20233, telephone (301) 763–2419, e-mail at *Darryl.T.Cohen@census.gov.*

SUPPLEMENTARY INFORMATION: The Census Bureau first began to make updated decennial census count determinations to reflect geographic boundary changes in 1972 in response to the requests of local governments to establish eligibility for participation in the General Revenue Sharing Program, authorized under Pub. L. 92–512. At that time, the Census Bureau established a fee-paid program enabling entities with annexations to obtain updated decennial census population counts that reflected the population living in the boundary change areas. The Census Bureau also received funding from the U.S. Department of the Treasury to make those determinations for larger annexations that met prescribed criteria and for the new incorporations. The General Revenue Sharing Program ended on September 30, 1986, but the certification program continued into 1988 with support from the Census Bureau. The program was suspended to accommodate the taking of the 1990 decennial census and resumed in 1992. The Bureau of the Census supported the program through fiscal year 1995 for cities with large annexations and through fiscal year 1996 for newly incorporated places. The program was continued on a fee-paid basis only until June 1, 1998, at which time it was suspended for the 2000 decennial census (see the **Federal Register**, 63 FR 27706, May 20, 1998). In 2002, the program was resumed and has since been referred to as the Geographically Updated Population Certification Program or GUPCP (see the **Federal Register**, 67 FR 72095, December 4, 2002).

As with previous censuses, the Census Bureau is suspending the program for the two years immediately preceding and following the 2010 census to permit allocation of necessary resources to the decennial census. However, all requests for population and housing count updates received before January 1, 2008 will be considered. The Census Bureau will announce in the **Federal Register** the date that the program is resumed. The Census Bureau plans to resume the program in the year 2012, after 2010 census data become available, for those entities that desire the service, provided that any and all costs associated with this work are borne by the local governmental entity.

Authority to continue this program on a fee-for-service basis is contained in Title 13, United States Code, Section 8.

Dated: August 15, 2007.

Charles Louis Kincannon,

Director, Bureau of the Census.

[FR Doc. E7–16365 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 34–2007]

Foreign–Trade Zone 221 -- Mesa, Arizona, Application for Reorganization/Expansion

An application has been submitted to the Foreign–Trade Zones (FTZ) Board (the Board) by the City of Mesa, Arizona, grantee of FTZ 221, requesting authority to reorganize and expand its existing zone site to include additional acreage in or adjacent to the Williams

Gateway Airport Customs and Border Protection user–fee airport. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on August 8, 2007.

FTZ 221 was approved on April 25, 1997 (Board Order 883, 62 FR 25164, 5/8/97). The general–purpose zone currently consists of one site (3,020 acres) at the Williams Gateway Airport located at 6001 South Power Road in Mesa (Maricopa County).

The applicant is now requesting authority for a reorganization and expansion of the zone site: 1) Modify the existing site by deleting 1,609 acres at the airport; and, 2) Expand the existing site to include an additional 607 acres (3 parcels) at the Logistics Park Mesa (LPM) located adjacent to the airport. The proposal will result in an overall net decrease in total zone space. LPM is owned by Pecos Capital Group LLC, North Valley Corporate Center LLC and Crismon Capital Group LLC. The site will provide warehousing and distribution services to area businesses. No specific manufacturing authority is being requested at this time. Such requests would be made to the Board on a case–by-case basis.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is October 22, 2007. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15–day period to November 5, 2007.

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations: City of Mesa Economic Development/Mesa City Plaza, 20 East Main Street, Mesa, AZ 85201; and, Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, DC 20230.

For further information, contact Camille Evans at Camille__Evans@ita.doc.gov or at (202) 482–2350.

Dated: August 10, 2007.

Pierre V.Duy,

Acting Executive Secretary.

[FR Doc. E7–16444 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 36–2007]

Foreign–Trade Zone 75 -- Phoenix, Arizona, Application for Expansion

An application has been submitted to the Foreign–Trade Zones (FTZ) Board (the Board) by the City of Phoenix, Arizona, grantee of FTZ 75, requesting authority to expand its existing zone to include two additional sites within the Phoenix Customs and Border Protection port of entry. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on August 14, 2007.

FTZ 75 was approved on March 25, 1982 (Board Order 185, 47 FR 14931, 4/7/82), and was expanded on July 2, 1993 (Board Order 647, 58 FR 37907, 7/14/93). The general–purpose zone currently consists of two sites (356 acres total) in Phoenix: *Site 1* (338 acres)—within the 550–acre Phoenix Sky Harbor Center and Sky Harbor International Airport's air cargo terminal located at Papago Freeway (Interstate 10) and Buckeye Road; and, *Site 2* (18 acres)—within the central southwestern portion of the CC&F South Valley Industrial Center located near the intersection of 7th Street and Victory Street.

The applicant is now requesting authority to expand its zone to include two additional sites in Phoenix: *Proposed Site 3* (74 acres)—Riverside Industrial Center located at 4747 West Buckeye Road; and, *Proposed Site 4* (18 acres)—Santa Fe Business Park located between 47th Avenue and 45th Avenue. The sites are owned by K. T. Riverside I, LLC and Highland Industrial Center, LLC, respectively. The sites will provide warehousing and distribution space for area businesses. No specific manufacturing authority is being requested at this time. Such requests would be made to the Board on a case–by-case basis.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is October 22, 2007. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15–day period to November 5, 2007.

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations: Phoenix Export Assistance Center, 1700 West Washington Street, Suite 220, Phoenix, AZ 85007; and, Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, DC 20230.

For further information, contact Camille Evans at Camille__Evans@ita.doc.gov or at (202) 482–2350.

Dated: August 14, 2007.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E7–16446 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 35–2007]

Foreign–Trade Zone 39 -- Dallas/Fort Worth, Texas, Application for Reorganization/Expansion

An application has been submitted to the Foreign–Trade Zones (FTZ) Board (the Board) by the Dallas/Fort Worth International Airport Board, grantee of FTZ 39, requesting authority to reorganize and expand its existing zone in the Dallas area within the Dallas Customs and Border Protection port of entry. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on August 8, 2007.

FTZ 39 was approved on August 17, 1978 (Board Order 133, 43 FR 37478, 8/23/78), and expanded on: December 11, 1992 (Board Order 613, 57 FR 61046, 12/23/92); December 27, 1994 (Board Order 723, 60 FR 2377, 1/9/95); December 27, 1994 (Board Order 724, 60 FR 2376, 1/9/95); March 12, 1999 (Board Order 1028, 64 FR 14212, 3/24/99); and, March 29, 2002 (Board Order 1213, 67 FR 17049, 4/9/02).

The zone project currently consists of the following six sites (5,182 acres total): Site 1 (2,400 acres)—within the

18,000–acre Dallas/Fort Worth International Airport complex; Site 2 (754 acres)—Southport Centre Industrial Park, South Dallas; Site 3 (552 acres)—within the 1,100–acre Grayson County Airport Complex, Grayson County; Site 4 (644 acres, 3 parcels)—Railhead Fort Worth site, intersection of Loop 820 (the Jim Wright Freeway) and Blue Mound Road (FM 156), Fort Worth; Site 5 (280 acres)—within the 745–acre Meacham Airport complex, intersection of Loop 820 and Interstate 35, Fort Worth; and, Site 6 (552 acres)—within the 1,060–acre Redbird Airport complex, intersection of Loop 12 and Interstate 35, Dallas.

The applicant is now requesting authority to reorganize and expand existing Site 2 and to expand the zone to include six additional sites in the Dallas area: Site 2—modify the site by deleting 108 acres due to changed circumstances and expand the site to include an additional 1,303 acres within the larger 6,000–acre Dallas Logistics Hub (in which Site 2 will be renamed) located in the Cities of Hutchins, Wilmer, Lancaster and Dallas (new total acreage—1,949 acres); Proposed Site 7 (39 acres)—Duke Intermodal Park located at Interstate 45 and E. Wintergreen Road, Hutchins; Proposed Site 8 (434 acres)—within the 650–acre Sunridge Business Park, located at Interstate 45 and East Pleasant Road, Wilmer; Proposed Site 9 (356 acres)—Dalport Business Park, located at the southwest corner of Interstate 45 and Beltline Road, Wilmer; Proposed Site 10 (50 acres)—within the 307–acre Lancaster Municipal Airport Complex, Lancaster; Proposed Site 11 (175 acres)—ProLogis 20/35 Industrial Park, located near the intersection of Interstate 20 and N. Houston School Road, Lancaster; and, Proposed Site 12 (112 acres)—Crossroads Trade Center, located at Interstate 35E and Danieldale Road, DeSoto. The sites are owned by The Allen Group, Duke Realty LLP, Wilmer Pleasant Run L.P., Argent Property Co., City of Lancaster, ProLogis, and Hillwood LIT II LP, respectively. The sites will provide warehousing and distribution space for area businesses. No specific manufacturing authority is being requested at this time. Such requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is October 22, 2007. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15–day period to November 5, 2007.

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations: Fort Worth U.S. Export Assistance Center, 808 Throckmorton Street, Fort Worth, TX 76102; and, Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, DC 20230.

For further information, contact Camille Evans at *Camille__Evans@ita.doc.gov* or at (202) 482–2350.

Dated: August 10, 2007.

Pierre V. Duy,

Acting Executive Secretary.

[FR Doc. E7–16445 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–801]

Certain Frozen Fish Fillets from Vietnam: Notice of Initiation and Preliminary Results of Changed Circumstances Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''Department'') has received information sufficient to warrant initiation of a changed circumstances review of the antidumping duty order on certain frozen fish fillets from Vietnam. Based on a request filed by Vinh Hoan Co., Ltd. (''Vinh Hoan''), the Department is initiating a changed circumstances review and preliminarily determining that Vinh Hoan Corporation (''Vinh Hoan Corp.'') is the successor–in-interest to Vinh Hoan, a respondent in the original investigation and three recent administrative reviews.

EFFECTIVE DATE: August 21, 2007.

FOR FURTHER INFORMATION CONTACT: Javier Barrientos, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, DC 20230; telephone: 202–482–2243.

SUPPLEMENTARY INFORMATION:

Background

The antidumping duty order for certain frozen fish fillets from Vietnam was published on August 12, 2003. *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 47909 (August 12, 2003) (''*Vietnam Fish Order*''). As part of the antidumping duty order on certain frozen fish fillets from Vietnam, Vinh Hoan received an antidumping duty cash deposit rate of 37.94 percent. Id. Moreover, as part of the final results of the first administrative review, Vinh Hoan received a cash deposit rate of 6.81 percent. *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the First Administrative Review*, 71 FR 14170 (March 21, 2006). The Department initiated on Vinh Hoan in both the second and third administrative reviews; however, both reviews with regard to Vinh Hoan were subsequently rescinded. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Rescission, in Part, and Extension of Time Limit for Preliminary Results of the Second Antidumping Duty Administrative Review*, 71 FR 6266 (February 7, 2006); and *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Partial Rescission and Notice of Intent To Rescind, in Part, and Partial Extension of Time Limit for Preliminary Results of the Third Antidumping Duty Administrative Review*, 72 FR 10981 (March 12, 2007), respectively.

On June 26, 2007, Vinh Hoan filed a submission requesting that the Department conduct a changed circumstances review of the antidumping duty order on certain frozen fish fillets from Vietnam to confirm that Vinh Hoan Corp. is the successor–in-interest to Vinh Hoan.[1] In its submission, Vinh Hoan provided information on the events leading to the transition from Vinh Hoan to Vinh Hoan Corp. Vinh Hoan also provided documentation relating to its change from a limited liability company (LLC) to a joint stock company. In addition, Vinh Hoan provided documentation relating to the ownership structure and management, organizational structure, customer base, accounting processes, supplier relationships, and products. As part of its June 26, 2007, submission, Vinh Hoan requested that the

[1] See Letter from Vinh Hoan, to the Department, regarding *Request for Expedited Changed Circumstances Determination, Certain Frozen Fish Fillets from Vietnam* (Case No. A–552–801) (June 26, 2007) (''Vinh Hoan's CCR Request'').

Department conduct an expedited review.

Scope of Order

The product covered by this order is frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti, Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus*. Frozen fish fillets are lengthwise cuts of whole fish. The fillet products covered by the scope include boneless fillets with the belly flap intact (''regular'' fillets), boneless fillets with the belly flap removed (''shank'' fillets), boneless shank fillets cut into strips (''fillet strips/ finger''), which include fillets cut into strips, chunks, blocks, skewers, or any other shape. Specifically excluded from the scope are frozen whole fish (whether or not dressed), frozen steaks, and frozen belly–flap nuggets. Frozen whole dressed fish are deheaded, skinned, and eviscerated. Steaks are bone–in, cross-section cuts of dressed fish. Nuggets are the belly–flaps.

The subject merchandise will be hereinafter referred to as frozen ''basa'' and ''tra'' fillets, which are the Vietnamese common names for these species of fish. These products are classifiable under tariff article codes 1604.19.4000[2], 1604.19.5000[3], 0305.59.4000[4], 0304.29.6033[5] (Frozen Fish Fillets of the species *Pangasius* including basa and tra) of the Harmonized Tariff Schedule of the United States (''HTSUS'').[6] This order covers all frozen fish fillets meeting the above specification, regardless of tariff classification. Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Initiation of Changed Circumstances Review

Pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (''Act''), the Department will conduct a changed circumstances review upon receipt of information concerning, or a request from an interested party for a review of, an antidumping duty order which shows changed circumstances sufficient to warrant a review of the order. Additionally, section 751(b)(4) of the Act states that the Department shall not conduct a review less than 24 months after the date of publication of the less–than-fair–value determination, in the absence of good cause. As noted above, Vinh Hoan and Vinh Hoan Corp. filed their request for a changed circumstances review on June 26, 2007, well over 24 months after the publication of the order. *See Vietnam Fish Order*.

Preliminary Results of the Review

Pursuant to section 751(b) of the Act, and 19 CFR 351.216, we will conduct a changed circumstances review upon receipt of information concerning, or a request from an interested party for a review of, an antidumping duty finding or order that shows changed circumstances sufficient to warrant a review of the order. The information submitted by Vinh Hoan stating the change in the entity's legal status, from an LLC to a corporation, demonstrates changed circumstances sufficient to warrant a review. *See* 19 CFR 351.216(d).

As noted above in the ''Background'' section of this notice, in its request for a changed circumstances review, Vinh Hoan stated that it underwent a change in legal status. Vinh Hoan was converted from an LLC to a joint stock company and renamed Vinh Hoan Corp. Subsequent to the name change, the majority owner of Vinh Hoan and the controlling stock holder of Vinh Hoan Corp. remained the same (Ms. Trung Thi Le Khanh). In addition, Ms. Trung still controls Vinh Hoan Corp. as its general director.

In determining whether one company is the successor–in-interest to another for purposes of applying the antidumping duty law, the Department examines several factors including, but not limited to, changes in: (1) management; (2) production facilities; (3) supplier relationships; and (4) customer base. *See, e.g., Certain Warmwater Shrimp from the People's Republic of China: Notice of Initiation and Preliminary Results of Changed Circumstances Review*, 72 FR 24273 (May 2, 2007). While no single factor or combination of factors will necessarily provide a dispositive indication, the Department will generally consider the new company to be the successor–in-interest to the previous company if the resulting operation, with regard to the subject merchandise, is not materially dissimilar to that of its predecessor. *See, e.g., Industrial Phosphoric Acid from Israel; Final Results of Antidumping Duty Changed Circumstances Review*, 59 FR 6944, 6945 (February 14, 1994); and *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil*, 71 FR 2183 (January 13, 2006) and accompanying Issues and Decision Memorandum, at Comment 3. Thus, if the evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the former company, the Department will accord the new company the same antidumping duty treatment as its predecessor.

In our analysis, we first reviewed the management structure of Vinh Hoan Corp. Vinh Hoan reported that there has been no change in the company's management or management structure after becoming Vinh Hoan Corp. *See* Vinh Hoan's CCR Request at 4–5. Therefore, we find that the management structure has remained unchanged.

Second, we looked at the operational structure of Vinh Hoan Corp. Vinh Hoan explained that there have been no material changes to its operations or the way it sells subject merchandise. Additionally, Vinh Hoan provided a sales process flowchart, which demonstrates how products are ordered and sold, and stated that these processes are identical between Vinh Hoan and Vinh Hoan Corp. *See* Vinh Hoan's CCR Request at 5–6 and Exhibit 3. We find that Vinh Hoan's operational structure has not changed as a result of becoming Vinh Hoan Corp.

Third, we reviewed the supplier relationships of Vinh Hoan and Vinh Hoan Corp. Vinh Hoan stated that it has not had any significant or material changes to its supplier base (including its food–sized fish input). *See* Vinh Hoan's CCR Request at 6 and Exhibit 4. We find that Vinh Hoan's supplier relationships have not changed since becoming Vinh Hoan Corp.

Fourth, we reviewed the customer base of both Vinh Hoan and Vinh Hoan

[2] *See Memorandum to the File, from Cindy Robinson, Senior Case Analyst, Office 9, Import Administration, Subject: Frozen Fish Fillets: Third Addition of Harmonized Tariff Number*, (March 1, 2007). This HTS went into effect on March 1, 2007.

[3] *See Memorandum to the File, from Cindy Robinson, Senior Case Analyst, Office 9, Import Administration, Subject: Frozen Fish Fillets: Third Addition of Harmonized Tariff Number*, (March 1, 2007). This HTS went into effect on March 1, 2007.

[4] *See Memorandum to the File, from Cindy Robinson, Senior Case Analyst, Office 9, Import Administration, Subject: Frozen Fish Fillets: Second Addition of Harmonized Tariff Number*, (February 2, 2007). This HTS went into effect on February 1, 2007.

[5] *See Memorandum to the File, from Cindy Robinson, Senior Case Analyst, Office 9, Import Administration, Subject: Frozen Fish Fillets: Addition of Harmonized Tariff Number*, (January 30, 2007). This HTS went into effect on February 1, 2007.

[6] Until July 1, 2004, these products were classifiable under tariff article codes 0304.20.60.30 (Frozen Catfish Fillets), 0304.20.60.96 (Frozen Fish Fillets, NESOI), 0304.20.60.43 (Frozen Freshwater Fish Fillets) and 0304.20.60.57 (Frozen Sole Fillets) of the HTSUS. Until February 1, 2007, these products were classifiable under tariff article code 0304.20.60.33 (Frozen Fish Fillets of the species *Pangasius* including basa and tra) of the HTSUS.

Corp. Vinh Hoan explained that its, and subsequently, Vinh Hoan Corp.'s major U.S. customer remained the same. *See* Vinh Hoan's CCR Request at 6 and Exhibit 5. Accordingly, we find that Vinh Hoan's customer base has remained the same since becoming Vinh Hoan Corp.

In summary, Vinh Hoan reported that its conversion from Vinh Hoan to Vinh Hoan Corp. did not meaningfully affect the supplier relationships, customer base, management, marketing or sale of products and services. Moreover, there have been no material changes to Vinh Hoan's operations or the way it produces and sells subject merchandise resulting in the conversion from Vinh Hoan to Vinh Hoan Corp.

Based on evidence provided by Vinh Hoan regarding its change from an LLC to a joint stock company, and absent any other record evidence that would contradict Vinh Hoan's statements, we preliminarily determine, pursuant to section 351.221(c)(3)(ii) of the Department's regulations, that Vinh Hoan Corp. is the succesor–in-interest to Vinh Hoan. If the above preliminary results are affirmed in the Department's final results, the cash deposit rate most recently calculated for Vinh Hoan will apply to all entries of subject merchandise by Vinh Hoan Corp. entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this changed circumstances review. *See, e.g., Granular Polytetrafluoroethylene Resin from Italy; Final Results of Changed Circumstances Review*, 68 FR 25327 (May 12, 2003). This cash deposit rate, if imposed, shall remain in effect until further notice.

Public Comment

Any interested party may request a hearing within 30 days of publication of this notice in accordance with 19 CFR 351.310(c). Interested parties may submit case briefs no later than 30 days after the date of publication of this notice, in accordance with 19 CFR 351.309(c)(1)(ii). Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed no later than 5 days after the case briefs, in accordance with 19 CFR 351.309(d)(1). Any hearing, if requested, will normally be held two days after rebuttal briefs are due, in accordance with 19 CFR 351.310(d)(1).

The Department will issue its final results of review within 270 days after the date on which the changed circumstances review is initiated, or within 45 days if all parties to the proceeding agree to the outcome of the review, in accordance with 19 CFR 351.216(e), and will publish these results in the **Federal Register**.

The current requirement for a cash deposit of estimated antidumping duties on all subject merchandise will continue unless and until it is modified pursuant to the final results of this changed circumstances review.

This notice is published in accordance with sections 751(b)(1) and 777(i) of the Act and 19 CFR 351.216 of the Department's regulations.

Dated: August 10, 2007.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E7–16447 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–918]

Notice of Extension of the Deadline for Determining the Adequacy of the Antidumping Duty Petition: Steel Wire Garment Hangers from the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: August 21, 2007.

FOR FURTHER INFORMATION CONTACT: Irene Gorelik or Julia Hancock, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–6905 or (202) 482–1394, respectively.

SUPPLEMENTARY INFORMATION:

INITIATION OF INVESTIGATION

The Petition

On July 31, 2007, the Department of Commerce (''the Department'') received an antidumping duty petition (''petition'') filed by M&B Metal Products Company, Inc. (''Petitioner'') on behalf of the domestic industry producing steel wire garment hangers.

Determination of Industry Support for the Petition

Section 732(b)(1) of the Tariff Act of 1930, as amended (''Act''), requires that a petition be filed by or on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that the Department's industry support determination be based on whether a minimum percentage of the relevant industry supports the petition. A petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A), or (ii) if there is a large number of producers, determine industry support using a statistically valid sampling method to poll the industry.

Extension of Time

Section 732(c)(1)(A)(ii) of the Act provides that within 20 days of the filing of an antidumping duty petition, the Department will determine, *inter alia*, whether the petition has been filed by or on behalf of the U.S. industry producing the domestic like product. Section 732(c)(1)(B) of the Act provides that the deadline for the initiation determination, in exceptional circumstances, may be extended by 20 days in any case in which the Department must ''poll or otherwise determine support for the petition by the industry.'' Because it is not clear from the petition whether the industry support criteria have been met, the Department has determined to extend the time for initiating an investigation in order to poll the domestic industry. The Department will issue polling questionnaires to all known domestic producers of steel wire garment hangers identified in the petition. The questionnaires will be on file in the Central Records Unit in room B–099 of the main Department of Commerce building. The Department will request that each company complete the polling questionnaire and fax their responses to the Department.

The Department will need additional time to analyze the domestic producers' responses to this request for information. Therefore, it is necessary to extend the deadline in order to determine the adequacy of the petition for a period not to exceed 40 days from the filing of the petition. As a result, the initiation determination will now be due no later than September 10, 2007.[1]

[1] Twenty days from the original deadline is September 9, 2007. However, Department practice dictates that where a deadline falls on a weekend,

International Trade Commission Notification

The Department will contact the International Trade Commission (''ITC'') and will make this extension notice available to the ITC.

Dated: August 15, 2007.

Gary Taverman,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E7–16448 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

The President's Export Council: Meeting of the President's Export Council; Correction

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of a time change for an open meeting via teleconference.

SUMMARY: The President's Export Council will hold a meeting via teleconference to deliberate a draft letter of recommendation to the President. This meeting was announced in a **Federal Register** document published on August 13, 2007 (72 FR 45224). This notice corrects the time of that meeting.

Date: August 23, 2007.

Time: 1 p.m. (EDT); Correction.

For the Conference Call-In Number and Further Information, Contact: The President's Export Council Executive Secretariat, Room 4043, Washington, DC 20230 (Phone: 202–482–1124), or visit the PEC Web site, *http://www.ita.doc.gov/td/pec.*

Dated: August 16, 2007.

J. Marc Chittum,

Executive Secretary and Staff Director, President's Export Council.

[FR Doc. 07–4111 Filed 8–17–07; 9:33 am]

BILLING CODE 3510–DR–P

the appropriate deadline is the next business day. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Act*, 70 FR 24533 (May 10, 2005).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC04

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Amendment 29 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico

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

ACTION: Notice; intent to prepare a draft environmental impact statement (DEIS); scoping meetings; request for comments.

SUMMARY: NMFS, Southeast Region, in collaboration with the Gulf of Mexico Fishery Management Council (Council) intends to prepare a DEIS to describe and analyze management alternatives to be included in an amendment to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico. These alternatives will consider measures to rationalize effort and reduce overcapacity in the commercial grouper fishery to achieve and maintain optimum yield in the multi-species grouper fishery. The purpose of this notice of intent is to solicit public comments on the scope of issues to be addressed in the DEIS.

DATES: Written comments on the scope of issues to be addressed in the DEIS must be received by NMFS by September 20, 2007. Nine scoping meetings will be held in September 2007. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: Written comments on the scope of the DEIS, suggested alternatives and potential impacts, and requests for additional information on the amendment should be sent to Sarah DeVido, National Marine Fisheries Service, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701–5511; telephone (727) 824–5305; fax (727) 824–5308. Comments may also be sent by email to *Sarah.DeVido@noaa.gov*.

Requests for information packets and for sign language interpretation or other auxiliary aids should be directed to the Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: 813–348–1630; fax: 813–348–1711. Requests may also be sent by email to steven.atran@gulfcouncil.org.

FOR FURTHER INFORMATION CONTACT: Sarah DeVido; phone: (727) 824–5305; fax: (727) 824–5308; email: *Sarah.DeVido@noaa.gov*.

SUPPLEMENTARY INFORMATION: Current regulatory measures used in the management of the grouper complex include a license limitation system, quotas, trip limits, minimum size limits, area/gear restrictions, and season closures. Nonetheless, the commercial grouper fishery has become overcapitalized which means the collective harvest capacity of participants is in excess of that required to efficiently harvest the commercial share of the total allowable catch. The overcapitalization observed in the fishery has caused commercial grouper regulations to become increasingly restrictive over time, intensifying derby conditions under which fishermen race to harvest as many fish as possible before the quota is reached. The intensification of derby conditions has, in some years, led to premature closures of the fishery.

Incentives for overcapitalization and derby fishery conditions are expected to be maintained as long as the current management structure persists. Under this management structure, the commercial grouper fishery is expected to continue to be characterized by higher than necessary levels of capital investment, increased operating costs, increased likelihood of shortened seasons, reduced safety at-sea, wide fluctuations in grouper supply and depressed ex vessel prices. These conditions lead to deteriorating working conditions and profitability for participants.

Therefore, NMFS, in collaboration with the Council will develop a DEIS to describe and analyze management alternatives to rationalize effort and reduce overcapacity in the commercial grouper fishery in order to achieve and maintain optimum yield in this multi-species fishery. These alternatives include, but are not limited to: elimination of latent permits, a buyback or buyout program, permit endorsements, an individual fishing quota program, or an individual transferable effort quota program.

In accordance with NOAA's Administrative Order 216–6, Section 5.02(c), Scoping Process, NMFS in collaboration with the Council has identified preliminary environmental issues as a means to initiate discussion for scoping purposes only. These preliminary issues may not represent the full range of issues that eventually will be evaluated in the EIS.

NMFS, in collaboration with the Council, has scheduled the following nine scoping meetings to provide the

opportunity for additional public input: Biloxi, MS, on September 10, 2007; New Orleans, LA, on September 10, 2007; Orange Beach, AL, on September 11, 2007; Galveston, TX, on September 11, 2007; Panama City, FL, on September 12, 2007; Palacios, TX, on September 12, 2007; Corpus Christi, TX, on September 13, 2007; Madeira Beach, FL, on September 17, 2007; and Fort Myers Beach, FL, on September 18, 2007.

Copies of an information packet will be available at the meetings and are available prior to the meetings from the Council (see **ADDRESSES**).

All scoping meetings will begin at 7 p.m. The meetings will be physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council (see **ADDRESSES**).

Once the DEIS associated with Amendment 29 is completed, it will be filed with the Environmental Protection Agency (EPA). The EPA will publish a notice of availability of the DEIS for public comment in the **Federal Register**. The DEIS will have a 45-day comment period. This procedure is pursuant to regulations issued by the Council on Environmental Quality (CEQ) for implementing the procedural provisions of the National Environmental Policy Act (NEPA; 40 CFR parts 1500–1508) and to NOAA's Administrative Order 216–6 regarding NOAA's compliance with NEPA and the CEQ regulations.

NMFS will consider public comments received on the DEIS in developing the final environmental impact statement (FEIS) and before adopting final management measures for the amendment. NMFS will submit both the final amendment and the supporting FEIS to the Secretary of Commerce (Secretary) for review as per the Magnuson-Stevens Fishery Conservation and Management Act.

NMFS will announce, through a notice published in the **Federal Register**, the availability of the final amendment for public review during the Secretarial review period. During Secretarial review, NMFS will also file the FEIS with the EPA and the EPA will publish a notice of availability for the FEIS in the **Federal Register**. This comment period will be concurrent with the Secretarial review period and will end prior to final agency action to approve, disapprove, or partially approve the amendment.

NMFS will announce, through a notice published in the **Federal Register**, all public comment periods on the final amendment, its proposed implementing regulations, and the availability of its associated FEIS. NMFS will consider all public comments received during the Secretarial review period, whether they are on the final amendment, the proposed regulations, or the FEIS, prior to final agency action.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 14, 2007.

James P. Burgess,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E7–16359 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC10

Western Pacific Pelagic Fisheries, Hawaii-based Longline Swordfish Fishery; Scoping Process

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

ACTION: Notice of intent to prepare a supplemental environmental impact statement and notice of initiation of scoping process; request for comments.

SUMMARY: The Western Pacific Fishery Management Council (WPFMC) and NMFS announce their intent to prepare a Supplemental Environmental Impact Statement (SEIS) in accordance with the National Environmental Policy Act of 1969 (NEPA) on the federal management of the Hawaii-based shallow-set pelagic longline fishery in the western Pacific. The SEIS will supplement the March 30, 2001, Final EIS on the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region as well as the March 5, 2004, Final SEIS on Management Measures to Implement New Technologies for the Western Pacific Longline Fisheries.

DATES: The WPFMC and NMFS will discuss alternatives and take scoping comments at a public meeting on August 30, 2007, from 6–9 p.m.

Written scoping comments must be received by September 20, 2007.

ADDRESSES: The public meeting will be held at the Ala Moana Hotel, 410 Atkinson Dr., Honolulu, HI 96815.

Written comments may be submitted by any of the following methods:

- Mail: William L. Robinson, Regional Administrator, Pacific Islands Region, NMFS, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814. Please write on the envelope: ''Scoping Comments on HI Swordfish SEIS''; or
- E-mail: *HILonglineScoping@noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Kitty Simonds, Executive Director, WPFMC, (808) 522–8220, or William L. Robinson, Regional Administrator, NMFS, (808) 944–2200.

SUPPLEMENTARY INFORMATION: The SEIS will consider alternatives for modifying the current regulatory structure for the Hawaii-based shallow-set pelagic longline fishery (''the fishery'') to provide increased opportunities to harvest swordfish while continuing to avoid, to the extent practicable, the incidental catch of seabirds, marine mammals, and threatened and endangered sea turtles. Potential regulatory changes to be analyzed in the SEIS include: modifying or eliminating the existing limit on fishing effort; maintaining or eliminating longline ''set certificates'' that limit the amount of fishing effort in the fishery; retaining or eliminating hard ''caps'' (limits) on the incidental take of sea turtles which, if reached, close the fishery for the remainder of the year; the use of time and/or area restrictions in combination with caps on interactions with loggerhead and leatherback sea turtles; modifications to assessment methodologies; changes in observer coverage; and other management alternatives designed to increase incentives to avoid interactions with sea turtles and other protected resources. The SEIS will analyze the impacts of the range of reasonable alternatives on the affected human environment, including the No Action alternative, and the potential impacts on affected populations of sea turtles. The SEIS will include an update on the status of the biological and economic factors affecting the fishery, analysis of the impacts of regulatory measures currently in effect in the shallow-set fishery since 2004, summary of information on international conservation efforts, and a discussion of the potential transferred effects on both target- and incidentally-caught species to other national fishing fleets from regulatory restrictions in the domestic fishery.

Under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), the United States has exclusive management authority over all living marine resources found within the Exclusive Economic Zone (EEZ). Management of these marine resources, with the exception of seabirds and some marine mammals, is vested in the Secretary of Commerce (Secretary). Eight Regional Fishery Management Councils prepare fishery

management plans which are reviewed for approval and implementation by the Secretary. The WPFMC has the responsibility to prepare fishery management plans for fishery resources in the EEZ of the western Pacific.

Pelagic fisheries in the EEZ and on the high seas of the western Pacific have been managed under the Fishery Management Plan for the Pelagics Fisheries of the Western Pacific Region (FMP) and its amendments since 1986. Managed resources include both marketable (primarily billfishes and tunas), and non-marketable (primarily sharks) species. Fisheries managed under the FMP include pelagic longline, troll, handline, pole-and-line (bait boat), and charter-boat fisheries. Management measures include gear restrictions, vessel size limitations, time and area closures, access limitations, and other measures.

Longline fisheries of the western Pacific are further regulated under two classifications: (1) The ''shallow-set'' component that targets swordfish, and (2) the ''deep-set'' component that targets that targets tuna. The shallow-set component of the Hawaii-based longline fishery currently operates under the following regulations: an annual set limit of 2,120 shallow-sets (half of the 1994–99 historical average); mandatory night setting; the required use of 18/0 circle hooks or larger (with a 10 degree offset) and blue-dyed mackerel-type bait; closure of the fishery if sea turtle interaction limits are reached for loggerhead (17) or leatherback (16) sea turtles; and other measures. The sea turtle interaction limits were established based on a biological opinion issued by NMFS on February 23, 2004, associated with management measures to implement new technologies for the western Pacific longline fisheries. The biological opinion also requires 100 percent federal observer coverage in the shallow-set fishery.

In February 2007, the WPFMC and NMFS received a proposal from the Hawaii Longline Association (HLA) requesting an amendment to the Pelagics FMP and related MSA regulations concerning the Hawaii-based shallow-set longline fishery. The proposal requests that the WPFMC consider amending the Pelagics FMP to eliminate the existing annual fishing effort limit of 2,120 sets. The HLA proposal is premised on new information obtained since the implementation of the existing shallow-set fishery regime in early 2004 (Gilman and Kobayashi [1]). The new information pertains primarily to sea turtle interaction and mortality rates. The analysis done by Gilman and Kobayashi indicate a reduction in sea turtle capture rates and in the type of incidental hookings (lightly hooked vs. deeply hooked in the mouth or swallowed) observed during sea turtle interactions with longline gear. Combined sea turtle capture rates have declined by 89 percent in comparison to historical capture rates in the shallow-set fishery. Deep hooking (thought to result in sea turtle mortality) rates have also declined to 15 percent of all loggerhead sea turtle captures and zero percent of leatherback sea turtle captures. Prior to requiring the use of circle hooks and mackerel-type bait in the Hawaii-based longline shallow-set fishery, 51 percent of the sea turtles were believed to have been deeply hooked. No green or olive ridley sea turtles have been incidentally caught in the current shallow-set fishery.

The WPFMC and NMFS will consider a range of alternatives that may modify the current regulatory structure for the Hawaii-based pelagic longline shallow-set fishery. Preliminary alternatives that may be analyzed in the SEIS and considered by the WPFMC and NMFS include the following:

Longline Fishing Effort:
1. No action - keep 2120 set limit;
2. Allow 3,000 sets;
3. Allow 4,000 sets; and
4. Do not limit sets.

Time-Area Closures:
1. No action - no time-area closures;
2. Implement pre-season monthly closure of waters in designated sea turtle ''hot spots'' based on historical and contemporary sea surface temperature data; and
3. Implement in-season closure of waters based on analysis of sea surface temperature data.

Interaction Hard Cap for Loggerhead and Leatherback Sea Turtles:
1. No action - continue limitations of sea turtle interactions using caps set by NMFS; and
2. Discontinue limitations of sea turtle interactions using caps set by NMFS.

Fishery Participation:
1. No action - keep set certificates; and
2. Remove set certificates.

Assessment Methodology:
1. No action - annual (1 year) cap on interactions with loggerhead and leatherback turtles (numbers of sea turtle interactions to be determined by NMFS); and
2. Multi-year cap on interactions with loggerhead and leatherback turtles (numbers of sea turtle interactions to be determined by NMFS).

Sea Turtle Avoidance Incentives:
1. No action - do not implement individual vessel sea turtle interaction ''limits'';
2. Individual vessel ''limits'' for loggerhead and leatherback turtles will be available on an annual basis (calendar or fishing year) to individual vessels. These ''limits'' will be transferable among vessels; and
3. Any shallow-set vessel in the fleet that interacts with a certain (unspecified at this time) number of sea turtles during the calendar year or fishing year will be precluded from shallow-set fishing for a certain period (unspecified at this time).

Observer Coverage:
1. No action - 100 percent coverage;
2. A reduced level of observer coverage that achieves an appropriate extrapolation of interactions between sea turtles and the fishery;
3. NMFS covers costs for 100 percent coverage at current effort limit (2,120 longline sets), and fishing industry pays for observer costs for additional shallow-set effort beyond current limit; and
4. Fishing industry pays all on-board observer costs associated with monitoring of the Hawaii-based shallow-set longline fishery.

Public Involvement

Public scoping is an early and open process for determining the scope of issues to be addressed. A principal objective of the scoping and public involvement process is to identify a reasonable range of management alternatives that, with adequate analysis, will delineate critical issues and provide a clear basis for distinguishing between those alternatives and selecting a preferred alternative.

In addition to the public meeting (see **DATES** and **ADDRESSES**), other opportunities for public involvement will be available at WPFMC's Science and Statistical Committee meeting on September 25–27, 2007, at the WPFMC office, 1164 Bishop St, Suite 1400, Honolulu, HI 96813, and at the 139th WPFMC meeting on October 9–12, 2007, at the Ala Moana Hotel, 410 Atkinson Dr., Honolulu, HI 96815.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–

[1] Gilman, E., and D. Kobayashi. In press. Sea turtle interactions in the Hawaii-based swordfish fishery first quarter 2007 and comparison to previous periods.

8226 (fax), at least five days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 15, 2007.

James P. Burgess,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E7–16358 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC11

Marine Mammals; File No. 1128–1922

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Eduardo Mercado III, Ph.D, Department of Psychology, 350 Park Hall, University at Buffalo, SUNY, Buffalo, New York, 14260, has applied in due form for a permit to conduct research on humpback whales (*Megaptera novaeangliae*).

DATES: Written, telefaxed, or e-mail comments must be received on or before September 20, 2007.

ADDRESSES: The application and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 427–2521; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, Florida 33701; phone (727) 824–5301; fax (727) 824–5320.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301) 427–2521, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 1128–1922.

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Carrie Hubard, (301) 713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Dr. Mercado is requesting a five-year scientific research permit to expose humpback whales to playback sessions in the coastal waters of Puerto Rico. The purpose of this research is to develop methods for testing the hearing and auditory perceptual capabilities of humpback whales in order to better predict when anthropogenic sounds may interfere with social behaviors, particularly mating and group feeding. Up to 200 humpback whales would be harassed by playback experiments (active acoustics) and up to 30 additional humpbacks would be harassed by close approach during vessel surveys for passive acoustic recordings annually. In addition, up to 45 Stenellid dolphins (*Stenella* spp.), 45 bottlenose dolphins (*Tursiops truncatus*), 5 sperm whales (*Physeter macrocephalus*), and 5 Cuvier's beaked whales (*Ziphius cavirostris*) may be incidentally harassed annually during playback sessions.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: August 15, 2007.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E7–16462 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN XC06

U.S. Climate Change Science Program Synthesis and Assessment Product Draft Report 4.4: ''Preliminary Review of Adaptation Options for Climate-Sensitive Ecosystems and Resources''

AGENCY: National Oceanic and Atmospheric Administration (NOAA),Department of Commerce.

ACTION: Notice of availability and request for public comments.

SUMMARY: The National Oceanic and Atmospheric Administration publishes this notice to announce the availability for public comments for the draft document titled, U.S. Climate Change Science Program Synthesis and Assessment Product 4.4: ''Preliminary Review of Adaptation Options for Climate-Sensitive Ecosystems and Resources.'' This Synthesis and Assessment Product (SAP) analyzes information on the state of knowledge of adaptation options for key, representative ecosystems and resources that may be sensitive to climate variability and change.

This draft document is being released solely for the purpose of pre-dissemination peer review under applicable information quality guidelines. This document has not been formally disseminated by NOAA. It does not represent and should not be construed to represent any Agency policy or determination. Any public comments submitted in accordance with this notice will be considered when revising the document.

DATES: Comments must be received by October 5, 2007.

ADDRESSES: The draft of Synthesis and Assessment Product 4.4: ''Preliminary Review of Adaptation Options for Climate-Sensitive Ecosystems and Resources'' is posted on the CCSP Web site at:*www.climatescience.gov/Library/sap/sap4–4/default.php*

Detailed instructions for making comments on the draft Report is provided on the SAP 4.4 webpage (see link here). Comments should be prepared and submitted in accordance with these instructions.

FOR FURTHER INFORMATION CONTACT: Dr. Fabien Laurier, Climate Change Science Program Office, 1717 Pennsylvania Avenue NW, Suite 250, Washington, DC 20006, Telephone: (202) 419 3481.

SUPPLEMENTARY INFORMATION: The Climate Change Science Program (CCSP)

was established by the President in 2002 to coordinate and integrate scientific research on global change and climate change sponsored by 13 participating departments and agencies of the U.S. Government. The CCSP is charged with preparing information resources that promote climate-related discussions and decisions, including scientific synthesis and assessment analyses that support evaluation of important policy issues. This report has been prepared by a team of experts from academia, governmental and nongovernmental organizations, and the private sector in response to the mandate of the U.S. Climate Change Science Program's Strategic Plan (2003). SAP 4.4 reviews the state of knowledge of adaptation options for key, representative ecosystems and resources that may be sensitive to climate variability and change. It is designed to serve resource managers and decision makers interested in using science to inform adaptation to the impacts of climate variability and change. The report examines (1) the combined effects on ecosystems of climate changes and non-climate stressors, and consequent implications for achieving specific management goals; (2) adaptation approaches that reduce the risk of negative impacts on management goals; and (3) ways to overcome barriers or take advantage of opportunities to improve the likelihood of successful adaptation implementation.

Dated: August 14, 2007.

William J. Brennan,

Deputy Assistant Secretary of Commerce for International Affairs, and Acting Director, Climate Change Science Program.

[FR Doc. E7–16356 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–12–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN XC07

U.S. Climate Change Science Program Synthesis and Assessment Product Draft Report 3.3: ''Weather and Climate Extremes in a Changing Climate. Regions of Focus: North America, Hawaii, Caribbean, and U.S. Pacific Islands''

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of availability and request for public comments.

SUMMARY: The National Oceanic and Atmospheric Administration publishes this notice to announce the availability for public comments for the draft report titled, U.S. Climate Change Science Program Synthesis and Assessment Product 3.3: ''Weather and Climate Extremes in a Changing Climate. Regions of Focus: North America, Hawaii, Caribbean, and U.S. Pacific islands.''

This draft document is being released solely for the purpose of pre-dissemination peer review under applicable information quality guidelines. This document has not been formally disseminated by NOAA. It does not represent and should not be construed to represent any Agency policy or determination. After consideration of comments received on the draft Prospectus, the final Prospectus along with the comments received will be published on the CCSP web site.

DATES: Comments must be received by October 5, 2007.

ADDRESSES: The draft Synthesis and Assessment Product 3.3: ''Weather and Climate Extremes in a Changing Climate. Regions of Focus: North America, Hawaii, Caribbean, and U.S. Pacific island'' is posted on the CCSP Web site at:*www.climatescience.gov/Library/sap/sap3–3/default.php.* Detailed instructions for making comments on the draft Report is provided on the SAP 3.3 webpage (see link here). Comments should be prepared and submitted in accordance with these instructions.

FOR FURTHER INFORMATION CONTACT: Dr. Fabien Laurier, Climate Change Science Program Office, 1717 Pennsylvania Avenue NW, Suite 250, Washington, DC 20006, Telephone: (202) 419 3481.

SUPPLEMENTARY INFORMATION: The CCSP was established by the President in 2002 to coordinate and integrate scientific research on global change and climate change sponsored by 13 participating departments and agencies of the U.S. Government. The CCSP is charged with preparing information resources that promote climate-related discussions and decisions, including scientific synthesis and assessment analyses that support evaluation of important policy issues.

Dated: August 14, 2007.

William J. Brennan,

Deputy Assistant Secretary of Commerce for International Affairs, and Acting Director, Climate Change Science Program.

[FR Doc. E7–16369 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–12–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Solicitation of Public Comments Regarding Possible Safeguard Action on Imports from Honduras of Cotton, Wool, and Man-Made Fiber Socks

August 16, 2007.

AGENCY: The Committee for the Implementation of Textile Agreements (the Committee)

ACTION: Solicitation of public comments regarding possible safeguard action on imports from Honduras of cotton, wool, and man-made fiber socks (merged Category 332/432 and 632 part).

SUMMARY: The Committee has decided, on its own initiative, to consider whether imports of Honduran cotton, wool, and man-made fiber socks (merged Category 332/432 and 632 part) are being imported into the United States in such increased quantities, in absolute terms or relative to the domestic market for such socks, and under such conditions as to cause serious damage, or actual threat thereof, to the U.S. industry producing such socks. The Committee is soliciting public comments to assist it in considering this issue and in determining whether safeguard action is appropriate. Comments must be submitted by **September 20, 2007** to the Chairman, Committee for the Implementation of Textile Agreements, Room 3001A, United States Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: Sergio Botero, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4058.

SUPPLEMENTARY INFORMATION:

Authority: Authority: Title III, Subtitle B, Section 321 through Section 328 of the Dominican Republic-Central America-United States Free Trade Agreement (''CAFTA-DR'' or the ''Agreement'') Implementation Act; Article 3.23 of the Dominican Republic-Central America-United States Free Trade Agreement.

BACKGROUND:

The CAFTA-DR textile and apparel safeguard applies when, as a result of the elimination of a customs duty under the Agreement, a textile or apparel article of the Dominican Republic, El Salvador, Guatemala, Honduras, or Nicaragua (''CAFTA-DR country''), is being imported into the United States in such increased quantities, in absolute terms or relative to the domestic market for that article, and under such conditions as to cause serious damage,

or actual threat thereof, to a domestic industry producing an article that is like, or directly competitive with, the imported article. In making this determination, the Committee: (1) shall examine the effect of increased imports on the domestic industry as reflected in such relevant economic factors as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits, and investment, none of which is necessarily decisive; and (2) shall not consider changes in technology or consumer preference as factors supporting a determination of serious damage or actual threat thereof. If a determination is affirmative, the Committee will provide written notice of its decision to the specified CAFTA-DR country and will consult with said party upon its request. Consultations with the specified CAFTA-DR country will begin without delay and shall be completed within 60 days of the date of the receipt of the request for consultations. The Committee shall make a determination on whether to apply a safeguard measure within 30 days of completion of the consultations.

If the Committee makes a determination to apply a safeguard measure, the Committee may provide import tariff relief to the domestic industry to the extent necessary to remedy or prevent the serious damage or actual threat thereof and to facilitate adjustment by the domestic industry to import competition. Such relief would consist of an increase in the rate of duty on the article to a level that does not exceed the lesser of the applied U.S. normal trade relations (NTR)/most-favored-nation (MFN) duty rate for the article or the applied U.S. NTR (MFN) duty rate in effect on the day before the Agreement entered into force. The import tariff relief is effective beginning on the date that the Committee's affirmative determination is published in the Federal Register. The maximum period of import tariff relief shall be three years. However, if the initial period for import relief is less than three years, the Committee may extend the period of import tariff relief to the maximum three-year period if the Committee determines that the continuation is necessary to remedy or prevent serious damage or actual threat thereof by the domestic industry to import competition, and that the domestic industry is, in fact, making a positive adjustment to import competition. Import tariff relief may not be imposed for an aggregate period greater than three years.

Under Article 3.23.6 of the Agreement, if the United States provides relief to a domestic industry under the textile and apparel safeguard, it must provide the country whose good is subject to the measure ''mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional customs duties expected to result from the textile safeguard measure.'' Such concessions shall be limited to textile and apparel articles, unless the United States and the specified CAFTA-DR country agree otherwise. If the United States and the CAFTA-DR country are unable to agree on trade liberalizing compensation, that country may increase customs duties on any U.S. articles to achieve substantially equivalent trade effects. The obligation to provide compensation terminates upon termination of the safeguard relief.

In accordance with section 4 of its procedures for considering action under the CAFTA-DR textile and apparel safeguard, (71 FR 25157, April 28, 2006), the Committee has decided, on its own initiative, to consider whether imports of Honduran cotton, wool, and man-made fiber socks are being imported into the United States in such increased quantities, in absolute terms or relative to the domestic market for cotton, wool, and man-made fiber socks, and under such conditions as to cause serious damage, or actual threat thereof, to the U.S. industry producing these products.

The Committee is soliciting public comments on this matter, in particular with regard to whether imports of Honduran cotton, wool, and man-made fiber socks are causing serious damage, or actual threat thereof, to a domestic industry. It invites the public to provide information and analysis to assist the Committee in considering whether serious damage, or actual threat thereof, exists, and, if so, the role of imports of Honduran articles in causing that serious damage, or actual threat thereof. Such information may include the following: recent and historical data regarding the U.S. market for cotton, wool, and man-made fiber socks (including imports and U.S. production data); and a description of how, if at all, imports of Honduran cotton, wool, and man-made fiber socks will affect the domestic industry, as reflected in such relevant economic factors as changes in productivity, utilization of capacity, inventories, exports, wages, employment, domestic prices, profits, and investment, and any other information, relating to the existence of actual threat of serious damage. Any member of the public who provides information to the Committee should also indicate the sources from which information provided was obtained.

In providing comments, the public may wish to consider the following data:

U.S. IMPORTS OF COTTON, WOOL, AND MAN-MADE FIBER SOCKS, MERGED CATEGORY 332/432 AND 632 PART [1] (DOZEN PAIRS).

Period	Imports from the World	Imports from Honduras	Honduras' Share of Imports (%)
2005	219,195,035	10,946,828	5.0
2006	233,245,477	15,216,853	6.5
Year-to-date June 2006	111,395,689	7,421,253	6.7
Year-to-date June 2007	120,235,661	12,256,786	10.2
Year-ending June 2006	221,028,674	13,183,488	6.0
Year-ending June 2007	242,085,449	20,052,386	8.3

[1] The relevant product of Honduran origin is imports from Honduras in Category 332/432 and 632 part, which consists of twenty-three Harmonized Tariff Schedule of the United States (HTS) sub-headings: 6115.10.3000, 6115.10.4000, 6115.10.5500, 6115.91.0000, 6115.92.6000, 6115.92.9000, 6115.93.6010, 6115.93.6020, 6115.93.9010, 6115.93.9020, 6115.94.0000, 6115.95.6000, 6115.95.9000, 6115.96.6010, 6115.96.6020, 6115.96.9010, 6115.96.9020, 6115.99.1410, 6115.99.1420, 6115.99.1810, 6115.99.1820, 6115.99.1910 and 6115.99.1920.

U.S. PRODUCTION, IMPORTS, MARKET AND DOMESTIC MARKET SHARE OF COTTON, WOOL, AND MAN-MADE FIBER SOCKS, MERGED CATEGORY 332/432 AND 632 PART (DOZEN PAIRS)

Period	Production	World Imports	Market	Domestic Market Share (%)
2005	133,631,000	219,195,035	352,826,035	37.9
2006	116,003,000	233,245,477	349,248,477	33.2
Year-to-date March 2006	29,084,000	50,450,041	79,534,041	36.6
Year-to-date March 2007	23,458,000	57,017,494	80,475,494	29.1

Comments must be in English, and must be received no later than September 20, 2007. Comments must be submitted in writing and electronic mail.

(1)An electronic mail (''email'') version of the comments must be either in PDF, Word, or Word-Perfect format, and sent to *cafta-dr-safeguard@ita.doc.gov*. Comments must have a bolded heading stating ''Public Version'', and all business confidential information must be deleted and substituted with asterisks. No business confidential information should be submitted in the ''email'' version of the document.

(2)The original signed comments must be mailed to the Chairman, Committee for the Implementation of Textile Agreements, Room H3001A, U.S. Department of Commerce, 14th and Constitution Avenue N.W., Washington, DC 20230. Any business confidential information upon which an interested person wishes to rely must be included in the original signed comments only. Brackets must be placed around all business confidential information. Comments containing business confidential information must have a bolded heading stating ''Confidential Version.'' Attachments considered business confidential information must have a heading stating ''Business Confidential Information''. The Committee will protect from disclosure any business confidential information that is marked ''business confidential'' to the full extent permitted by law. Except for the inclusion of business confidential information, the two versions of comments should be identical.

(3) All comments submitted via ''email'' will be made available for public inspection at Import Administration's Central Records Unit, Room B-099, between the hours of 8:30 a.m. and 5:00 p.m. on business days. In addition, the ''email'' version of the comments will be posted for public review on the Office of Textile and Apparel (''OTEXA''), CAFTA–DR Free Trade Agreement website at *http://otexa.ita.doc.gov/tradeagree2007.htm*

If a comment alleges that there is no serious damage, or actual threat thereof, or that the reduction or elimination of the duty did not result in an increase in imports so as to cause serious damage, or actual threat thereof, the Committee will closely review any supporting information and documentation, such as information about domestic production or prices of like or directly competitive products. While we are taking comments from the public, particular consideration will be given to comments representing the views of actual producers in the United States of a like or directly competitive product.

Any interested party may submit information to rebut, clarify, or correct public comments submitted by any other interested party at any time prior to the close of the public comment period. If public comments are submitted less than 10 days before, or on, the applicable deadline for submission of such public comments, an interested party may submit information to rebut, clarify, or correct the public comments no later than 10 days after the applicable deadline for submission of public comments. Rebuttal comments must meet the requirements outlined in (1) through (2) of this Notice.

The Committee will make a determination within 60 calendar days of the close of the comment period as to whether the United States will request consultations with Honduras. If the Committee is unable to make a determination within 60 calendar days, it will cause to be published a notice in the Federal Register, including the date by which it will make a determination. If the Committee makes a negative determination, it will cause this determination and the reasons therefore to be published in the Federal Register. If the Committee makes an affirmative determination that, as a result of the reduction or elimination of a duty, Honduran cotton, wool, and man-made fiber socks, merged Category 332/432 and 632 part are being imported into the United States in such increased quantities, in absolute terms or relative to the domestic market for that article, and under such conditions as to cause serious damage, or actual threat thereof, to the U.S. industry producing cotton, wool, and man-made fiber socks, the United States will promptly notify Honduras in accordance with CAFTA-DR and will enter into consultations upon request.

R. Matthew Priest,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E7–16450 Filed 8–20–07; 8:45 am]

BILLING CODE 3510–DS–S

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request: Part 41, Relating to Security Futures Products

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the CFTC is planning to submit the following proposed Information Collection Request (ICR) to the Office of Management and Budget (OMB): Part 41, Relating to Security Futures Products; OMB Control Number 3038–0059. Before submitting the ICR to OMB for review and approval, the CFTC is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before October 22, 2007.

ADDRESSES: Comments may be mailed to David Van Wagner, Chief Counsel, Division of Market Oversight, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581.

FOR FURTHER INFORMATION CONTACT: David Van Wagner (202) 418–5481; Fax: (202) 418–5277; e-mail: *dvanwagner@cftc.gov.*

SUPPLEMENTARY INFORMATION:

Affected Entities: Entities potentially affected by this action are businesses and other for-profit institutions.

Title: Part 41, Relating to Security Futures Products.

Abstract: Section 4d(c) of the Commodity Exchange Act (CEA), 7 U.S.C. 6d(c), requires the CFTC to consult with the SEC and issue such rules, regulations, or orders as are necessary to avoid duplicative or conflicting regulations applicable to firms that are fully registered with the SEC as brokers or dealers (broker-dealers) and the CFTC as futures commission merchants (FCMs) involving provisions of the CEA that pertain to the treatment of customer funds. The CFTC, jointly with the SEC, issued regulations requiring such dually-registered firms to make choices as to how its customers' transactions in security futures products (SFP) will be treated, either as securities transactions held in a securities account or as futures transactions held in a futures account. How an account is treated is important in the unlikely event of the insolvency of the firm. Securities accounts receive insurance protection under provisions of the Securities Investor Protection Act. By contrast, futures accounts are subject to the protections provided by the segregations requirements of the CEA.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the CFTC's regulations were published on December 30, 1981. See 46 FR 63035 (Dec. 30, 1981). The OMB control number for the CFTC's rules relating to security futures products was published on August 23, 2001. See 66 FR 44490 (Aug. 23, 2001).

The Commission would like to solicit comments to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- Evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, usefulness, and clarity of the information to be collected; and
- Minimize the burden of collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

Burden Statement: The respondent burden for this collection is estimated to average .59 hours per response. These estimates include the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: 144.

Estimated number of responses: 2,739.

Estimated total annual burden on respondents: 1,620.48 hours.

Frequency of collection: On occasion.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of colleting, validating, and verifying information, processing and maintaining information and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; and transmit or otherwise disclose the information.

Dated: August 15, 2007.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 07–4092 Filed 8–20–07; 8:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–00XX]

Federal Acquisition Regulation; Submission for OMB Review; Online Procurement Services—Industry Outreach Feedback Survey and Online Procurement Services—Reverse Auction Service Providers Outreach Feedback Survey

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding a request for a new OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Office of Federal Procurement Policy's (OFPP) and the General Services Administration's (GSA) intention to initiate a new information collection to conduct two surveys on Online Procurement Services. The results from these surveys will be incorporated into a report to Congress. A request for public comments was published in the **Federal Register** at 72 FR 19884, on April 20, 2007. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before September 20, 2007.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VIR), 1800 F. Street, NW., Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT Ms. Julie Basile, Procurement Policy Analyst, Office of Management and Budget, Office of Federal Procurement Policy, 725 17th Street, NW., Room 9013, Washington, DC 20503 or via e-mail to *jbasile@omb.eop.gov* or via telephone on (202) 395–4821.

SUPPLEMENTARY INFORMATION:

A. Purpose

The National Defense Authorization Act for Fiscal Year 2006 (P. L. 109–360) requires OFPP, in consultation with the Federal Acquisition Regulatory Council, to review the use of online procurement services, such as reverse auction services, and identify types of commercial item procurements that are suitable for the use of such services; and features that should be provided by online procurement services that are used by Federal agencies. To conduct this review, a survey will be issued to the Government and industry buying activities and to reverse auction service

providers. The information collected through the surveys will be used to determine how the Government buying activities can most effectively use reverse auctions as a tool to support Government requiring activities and ensure that the U.S. taxpayer is best served. To view the two draft surveys entitled, Online Procurement Services—Government and Industry Outreach Feedback and Online Procurement Services—Reverse Auction Service Providers Outreach Feedback, visit *http://www.acquisition.gov*.

Title: Online Procurement Services—Government and Industry Outreach Feedback; and Online Procurement Services—Reverse Auction Service Providers Outreach Feedback.

OMB Number: Not Yet Assigned.

Expiration Date: Not yet determined.

Type of Request: New collection of information.

Abstract: The purpose of these two one-time surveys are to determine how Government buying activities can most effectively use reverse auctions as a tool to support Government requiring activities and to ensure the U.S. taxpayer is best served.

Affected Public: Two respondent groups are identified and will receive similar surveys on Online Procurement Services: Government and industry buying activities; and reverse auction service providers. However, for the purposes of this collection we are counting the industry buying activities and reverse auction service providers.

B. Annual Reporting Burden

Respondents: 580 (not to exceed 1000).

Responses Per Respondent: 1.

Annual Responses: 580 (not to exceed 1000).

Hours Per Response: 0.50.

Total Burden Hours: 290.

Estimated Number of Respondents: approximately 580 and not expected to exceed 1000. The estimated number of industry respondents to the Government and Industry Buying Activities Survey is 550. The estimated number of industry respondents to the Reverse Auction Survey is 30 based on the Government's latest market research. Estimated Number of Responses per Respondent: 1 per company. The number of responses per respondent is one for each of the two surveys. Each respondent will only be required to complete one survey once. Estimated Total Annual Responses: approximately 580 and not expected to exceed 1000 (580 x 1). Estimated Time per Response: 30 minutes (0.50 hours). The estimated average time for industry to respond to Government and Industry Buying Activity Survey is approximately 15 minutes (0.25 hours), based on a pre-test of the draft instrument by Government employees. The data collection instrument for the Reverse Auction Service Providers Survey was pre-tested on a support contractor, a related business sector. The Reverse Auction Service Providers Survey instrument is similar to the Government and Industry Buying Activity Survey; therefore, the pre-test results for the Government and Industry Buying Activity Survey are used to estimate average response time for the Reverse Auction Service Providers Survey, which is 15 minutes (0.25 hours). Estimated Total Annual Burden on Respondents: 290 hours (580 x 0.50).

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

C. Annual Review Burden and Cost

Responses: 580.

Review Time Per Response: .45.

Total Burden Hours: 261.

Cost Per Hour: $45.00.

Total Cost: $11,745.00.

OBTAINING COPIES OF PROPOSALS: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VIR), Room 4035, 1800 F. Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–00XX, Online Procurement Services—Industry Outreach Feedback Survey and Online.

Dated: August 14, 2007.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. 07–4065; Filed 8–20–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[IC07–80–001, FERC Form 80]

Commission Information Collection Activities, Proposed Collection; Comment Request; Extension

August 14, 2007.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507, the Federal Energy Regulatory Commission (Commission) has submitted the information collection described below to the Office of Management and Budget (OMB) for review and reinstatement of this information collection requirement. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission received comments from two commenters in response to an earlier **Federal Register** notice of April 16, 2007 (72 FR 18967–68) and has responded to those comments in the justification that it is submitting to OMB. Copies of this submission were also sent to the commenters.

DATES: Comments on the collection of information are due by September 21, 2007.

ADDRESSES: Address comments on the collection of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission Desk Officer. Comments to OMB should be filed electronically, c/o *oira_submission@omb.eop.gov* and include the OMB Control No. as a point of reference. The Desk Officer may be reached by telephone at 202–395–7345. A copy of the comments should also be sent to the Federal Energy Regulatory Commission, Office of the Executive Director, ED–34, Attention: Michael Miller, 888 First Street, NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those persons filing electronically do not need to make a paper filing. For paper filings an original and 14 copies of such comments should be submitted to the Secretary of the Commission, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and should refer to Docket No. IC07–80–001.

Documents filed electronically via the Internet must be prepared in WordPerfect, MS Word, Portable Document Format, or ASCII format. To file the document, access the Commission's Web site at *http://www.ferc.gov* and click on ''Make an E-Filing,'' and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments. User assistance for electronic filings is available at 202–502–8258 or by e-mail to *efiling@ferc.gov.* Comments should not be submitted to this e-mail address.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the ''eLibrary'' link. Enter the docket number excluding the last three digits in

the docket number field to access the document. For user assistance, contact *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 502–8415, by fax at (202) 273–0873, and by e-mail at *michael.miller@ferc.gov.*

SUPPLEMENTARY INFORMATION:

Description

The information collection submitted for OMB review contains the following:

1. *Collection of Information:* FERC Form 80 ''Licensed Hydropower Development Recreation Report''.

2. *Sponsor:* Federal Energy Regulatory Commission.

3. Control No. 1902–0106.

The Commission is now requesting that OMB approve and reinstate the information collection for an additional three years.

The FERC Form 80 has been revised to facilitate greater ease to respondents in providing the information. As initially proposed, FERC Form 80 was updated to eliminate data concerning the nearest city and population, since FERC staff can access the information from other sources. Second, FERC staff has clarified the definitions so respondents have a better understanding of the information to be provided. Third, resource data has been updated to include FERC approved recreational sites. Fourth, a new field has been added so that respondents can identify the method used for collecting the data.

In response to the 60-Day Notice of April 16, 2007, commenters proposed additional changes to the FERC Form 80. Specifically, commenters requested the following changes to the collection:

(a) To exclude recreational facilities that are not owned by the licensee even if they are within the project boundary;

(b) To change the report cycle from every six years to seven to 12 years;

(c) To add a trail count as a means to gauge recreation facility occupancy;

(d) To add attendance records as a means to estimate use and facility occupancy;

(e) To clarify in the instructions the types of recreation visits to include both public and private facilities;

(f) To clarify wildlife and hunting areas so that it's clear whether acres or areas are to be reported;

(g) To define the terms ''commercial'' and ''private'' use facilities;

(h) To report picnic sites and commercial boat mooring areas as two separate recreational resources; and

(i) To eliminate recreational resources that occurs infrequently, such as golf courses and playground facilities.

Additionally, commentors have questioned the need for the following data elements in the information collection:

(a) Whether FERC approved facilities should include third party resources within the project boundary that must be approved under the standard land use article;

(b) Whether total miles/acres of recreation areas are necessary;

(c) Whether informal/dispersed camp sites should be included; and

(d) Whether organizational camping areas within the project boundary should be included.

Both commentors questioned the Commission's estimate of 3 hours to complete the information collection.

Commission Proposal

The Commission proposes to adopt the following recommendations: A trail count as a means to gauge recreation facility occupancy and the addition of attendance records as a means to estimate use and facility occupancy.

With regard to the other recommendations, the Commission will not adopt them for the following reasons:

(a) The exclusion of recreational facilities that are not owned by the licensee even though they may be within the project boundary.

The goal of the Commission's policy on recreation is to develop the project area in a comprehensive manner. Therefore the data collection is designed to include information on all recreational facilities located within the project boundary, including those provided by other federal, state, and local agencies. Title 18 CFR Part 2.7 encourages licensees to cooperate with other entities to provide recreation opportunities. This cooperation and comprehensive approach to providing recreational access at licensed projects not only provides a better recreation experience, but also addresses impacts to environmental resources in the area by not overlapping an area. The proposed revision to the Form 80 includes a column that identifies which facilities are parts of an approved recreation plan for the project as opposed to those controlled by another entity.

(b) Change the reporting cycle from every six years to seven to twelve years. The FERC Form 80s are collected every 6 years to ensure that recreation facilities are meeting the needs of the public. The Form 80's are used on a regular basis as a tool to evaluate recreation at the projects and the Commission believes 6 years is an appropriate period of time to monitor use.

(c) To clarify in the instructions the types of recreation visits to include both public and private facilities.

The recreation visits should include all recreation days at projects at approved facilities, facilities provided by other entities, and general access areas. It does not include visits to private or residential docks or to facilities outside the project boundary.

(d) To clarify wildlife and hunting areas so that it's clear whether acres or areas are to be reported.

These are areas within the FERC project boundary that can be used for wildlife viewing and hunting.

(e) To define the terms ''commercial'' and ''private'' use facilities. The Commission does not distinguish between private and commercial recreation facilities.

(f) To report picnic sites and commercial boat mooring areas as two separate recreational resources.

We do not believe these types of resources need to be reported separately. If necessary during a project specific review, we will request these types of details from the licensee.

(g) To eliminate recreational resources that occurs infrequently, such as golf courses and playground facilities.

We have eliminated or combined some facilities over previous Form 80s. We believe the facilities currently reported on the Form 80 are representative of all recreational opportunities currently available at hydropower projects. For example, golf courses are an important recreational feature at projects throughout the southeast.

In response to commenters' concerns of whether the following information was necessary on the FERC Form 80, we provide the following:

(a) Whether FERC approved facilities should include third party resources within the project boundary that must be approved under the standard land use article.

FERC Approved Resources means those facilities that are required in an approved recreation plan or subsequent amendments or those identified in an Exhibit E filed with the license and approved. It does not include facilities approved as non-project uses of project lands and water.

(b) Whether total miles/acres of recreation areas are necessary.

We use total miles/acres to determine the need for additional facilities.

(c) Whether informal/dispersed camp sites should be included.

Informal/dispersed camping can be included in access areas.

(d) Whether organizational camping areas within the project boundary should be included.

All recreation areas should be reported, not just public recreation.

(e) Underestimation of the reporting burden. Both commenters believe the Commission has underestimated the amount of time it takes to complete the Form 80 (3 hours).

The Commission's estimate of the time to complete the Form 80s is an average of its licensees ranging from large complicated projects with extensive recreation to smaller less developed projects. In an effort to minimize the burden to licensees, we have eliminated some data fields where the information may be readily available from other sources. Data collection can take place in conjunction with other required monitoring or with other activities at the project such as water quality or dissolved oxygen sampling or general maintenance of the facilities.

4. Necessity of the Collection of Information: Submission of the information is necessary for the Commission to carry out its responsibilities in implementing the statutory provisions of the sections 4(a), 10(a), 301(a), 304 and 309 of the Federal Power Act (FPA). The authority for the Commission to collect this information comes from Section 10(a) of the FPA which requires the Commission to be responsible for ensuring those hydro projects subjects to its jurisdiction are consistent with the comprehensive development of the nation's waterway for recreation and other beneficial public uses.

In the interest of fulfilling these objectives, the Commission expects licensees subject to its jurisdiction, to recognize the resources that are affected by their activities and to play a role in protecting such resources. The information filed with the Commission is mandatory.

5. *Respondent Description:* The respondent universe currently comprises 400 entities (on average) subject to the Commission's jurisdiction.

6. *Estimated Burden: 1,200* total hours, 400 respondents (average), 1 response per respondent, and 3 hours per response (rounded off and average time).

7. *Estimated Cost Burden to respondents: 1,200* hours/2080 hours per years × $122,137 per year = $70,464. The cost per respondent is equal to $176 (rounded off).

Statutory Authority: Statutory provisions of sections 4(a), 10(a), 301(a), 304 and 309 of the Federal Power Act, 16 U.S.C. 797, 803, 825c and 825h.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–16386 Filed 8–20–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP07–430–000]

Kinder Morgan Interstate Gas Transmission LLC; Notice of Filing

August 14, 2007.

Take notice that on August 6, 2007, Kinder Morgan Interstate Gas Transmission LLC (Kinder Morgan) whose mailing address is P.O. Box 281304, Lakewood, Colorado 80228–8304, filed an application, pursuant to section 7(c) of the Natural Gas Act (NGA), and Part 157 of the Federal Energy Regulatory Commission's Regulations, requesting a certificate of public convenience and necessity authorizing the construction and operation of certain facilities referred to as the Colorado Lateral Expansion Project located in Weld County, Colorado (Project). The facilities for the Project are designed to deliver up to 55,000 Dth per day. The application is on file with the Commission and open for public inspection. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

The Project will comprise delivery meter stations and approximately 41.4 miles of 12-inch pipeline facilities extending from the Cheyenne to Greeley in Weld County, Colorado. The facilities are proposed in order to provide incremental firm transportation service to Atmos Energy Corporation (Atmos). Kinder Morgan has entered into a Precedent Agreement with Atmos for a primary term of ten years an initial volume of 47,000 Dth/day stepping-up to 55,000 Dth/day for years five through ten. The total estimated cost for the proposed facilities is $23,549,557.

Any questions regarding the application are to be directed to Skip George, Manager of Regulatory, Kinder Morgan Interstate Gas Transmission LLC, P.O. Box 281304, Lakewood, Colorado 80228–8304, phone (303) 914–4969.

Any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

Motions to intervene, protests and comments may be filed electronically via the Internet in lieu of paper, see, 18 CFR 385.2001 (a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: September 4, 2007.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–16390 Filed 8–20–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL07–82–000]

Pinnacle West Capital Corporation, Arizona Public Service Company, Pinnacle West Energy Corporation, APS Energy Services Company, Inc; Notice of Institution of Proceeding and Refund Effective Date

August 14, 2007.

On August 13, 2007, the Commission issued an order that instituted a proceeding in the above-referenced docket, pursuant to section 206 of the Federal Power Act (FPA) 16 U.S.C. 824e, to determine whether Pinnacle West Capital Corporation's, Arizona Public Service Company's, Pinnacle West Energy Corporation's and APS Energy Services Company, Inc.'s (collectively, Pinnacle) market-based

rate authority for the non-APS portion of the Phoenix Valley remains just and reasonable during the summer months. *Pinnacle West Capital Corporation,* 120 FERC ¶ 61,153 (2007).

The refund effective date in the above-docketed proceeding, established pursuant to section 2069(b) of the FPA, will be the date of publication in the **Federal Register**.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–16384 Filed 8–20–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL07–86–000]

Ameren Services Company, Northern Indiana Public Service Company, Complainants, v. Midwest Independent Transmission System Operator, Inc., Respondent; Notice of Complaint

August 14, 2007.

Take notice that on August 10, 2007, pursuant to Rule 206 of the Rules of Practice and Procedure and section 206 of the Federal Power Act, Ameren Services Company, on behalf of its affiliates, and Northern Indiana Public Service Company (Complainants) filed a formal complaint against Midwest Independent Transmission System Operator, Inc. (Respondent) alleging that the Revenue Sufficiency Guarantee charge allocation provisions of the Respondent's tariff are unjust, unreasonable and unduly discriminatory, and therefore must be revised. The Complainants request that the Federal Energy Regulatory Commission (Commission) establish the earliest possible refund effective date with respect to the necessary revisions.

The Complainants state that copies of the Complaint were served on the contacts for the Respondent as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on September 4, 2007.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–16385 Filed 8–20–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

August 14, 2007.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC07–124–000.

Applicants: J–POWER USA Generation, L.P.; Green Country Energy, LLC.

Description: J-Power USA Generation, LP and Green Country Energy, LLC submit its Joint Application for Authorization to Transfer Jurisdictional Facilities.

Filed Date: 08/06/2007.

Accession Number: 20070808–0158.

Comment Date: 5 p.m. Eastern Time on Monday, August 27, 2007.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER93–3–006.

Applicants: The United Illuminating Company.

Description: The United Illuminating Company's request for exemption from requirements applicable to Category 2 Seller as discussed in Order 697 and FERC's implementing regulations.

Filed Date: 08/08/2007.

Accession Number: 20070813–0074.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 29, 2007.

Docket Numbers: ER00–1026–015; ER99–2284–008; ER98–2185–013; ER99–1773–008; ER99–1761–004; ER98–2184–013; ER01–1315–004; ER01–2401–010; ER98–2186–014; ER00–33–010; ER05–442–002; ER98–4222–010; ER99–1228–006.

Applicants: Indianapolis Power & Light Company; AEE2, LLC; AES Alamitos, Inc.; AES Creative Resources, LP; EAS Eastern Energy LP; AES Huntington Beach, LLC; AES Ironwood, LLC; AES Red Oak, LLC; AES Redondo Beach, LLC; AES Placerita, Inc.; Condon Wind Power, LLC; Lake Benton Power Partners, LLC; Storm Lake Power Partners II LLC.

Description: AES Corp notifies FERC of a non-material change in status from the facts relied upon by granting market-based rate authority pursuant to Order 697.

Filed Date: 08/09/2007.

Accession Number: 20070813–0094.

Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER01–751–008; ER99–3197–004; ER99–3077–004; ER92–521–002; ER04–1027–002; ER05–698–006.

Applicants: BIV Generation Company, LLC.; Colorado Power Partners; Hartwell Energy Limited Partnership; Mountain View Power Partners, LLC; Rocky Mountain Power, Inc.; San Joaquin Cogen, LLC.

Description: BIV Generation Co, LLC et al submits a notice of change in status pursuant to requirements of Order 652.

Filed Date: 08/09/2007.

Accession Number: 20070813–0091.

Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER01–1807–026; ER01–2020–023.

Applicants: Carolina Power & Light Company; Florida Power Corporation.

Description: Energy Imbalance Revenues Refund Report of Carolina Power & Light Company.

Filed Date: 08/10/2007.

Accession Number: 20070810–5007.

Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER04–878–002; ER04–878–001.

Applicants: Equus Power I, L.P.

Description: Equus Power I, LP submits an amended triennial updated market power analysis.

Filed Date: 08/10/2007.

Accession Number: 20070813–0151.

Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER06–451–024.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool Inc submits a status and compliance report re its efforts relating to demand-side resources and certain issues that exist.
Filed Date: 08/01/2007.
Accession Number: 20070808–0156.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 22, 2007.

Docket Numbers: ER06–451–025; ER07–1255–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits this filing providing for revisions to its Open Access Transmission Tariff pursuant to Section 205 of the Federal Power Act, 16 U.S.C., Part 35 of FERC's Regulations.
Filed Date: 08/03/2007.
Accession Number: 20070808–0057.
Comment Date: 5 p.m. Eastern Time on Friday, August 24, 2007.

Docket Numbers: ER07–643–002.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits revised versions of the executed Meter Services Agreements that are consistent with the requirements of Order 614.
Filed Date: 08/09/2007.
Accession Number: 20070813–0093.
Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER07–671–001.
Applicants: Trigen-St. Louis Energy Corporation.
Description: Compliance Filing pursuant to Commission's 7/13/07 Order.
Filed Date: 08/13/2007.
Accession Number: 20070810–5083.
Comment Date: 5 p.m. Eastern Time on Tuesday, September 04, 2007.

Docket Numbers: ER07–671–002.
Applicants: Trigen-St. Louis Energy Corporation.
Description: Trigen-St. Louis Energy Corp submits its Refund Report in accordance with the Commission's 7/13/07 Order.
Filed Date: 08/09/2007.
Accession Number: 20070813–0092.
Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER07–812–001.
Applicants: Pacific Gas and Electric Company.
Description: Electric Refund Compliance Report of Pacific Gas & Electric Company.
Filed Date: 08/09/2007.
Accession Number: 20070809–5037.
Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER07–909–001.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits it response to FERC's request for additional information that identified deficiencies in their 5/18/07 filing.
Filed Date: 08/08/2007.
Accession Number: 20070809–0163.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 29, 2007.

Docket Numbers: ER07–995–001.
Applicants: New York Independent System Operator, Inc.
Description: New York Independent System Operator, Inc revises its 6/4/07 request for waiver of certain of the ''WEQ004'' coordinate interchange business practice standards.
Filed Date: 08/08/2007.
Accession Number: 20070813–0077.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 29, 2007.

Docket Numbers: ER07–1023–001.
Applicants: Baltimore Gas and Electric Company.
Description: Baltimore Gas and Electric Co submits its Substitute Second Revised Sheet 299 et al to FERC Electric Tariff, Sixth Revised Volume 1.
Filed Date: 08/06/2007.
Accession Number: 20070813–0153.
Comment Date: 5 p.m. Eastern Time on Monday, August 27, 2007.

Docket Numbers: ER07–1097–001.
Applicants: New England Power Pool Participants Committee.
Description: The New England Power Pool Participants Committee amends its 6/29/07 Membership Filing.
Filed Date: 08/10/2007.
Accession Number: 20070813–0152.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER07–1098–001.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits Exhibit I of the Service Agreement with a corrected signature page.
Filed Date: 08/09/2007.
Accession Number: 20070810–0001.
Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER07–1161–001.
Applicants: Public Power & Utility, Inc.
Description: Public Power & Utility, Inc submits a petition for acceptance of FERC Electric Tariff, Original Volume 1.
Filed Date: 08/08/2007.
Accession Number: 20070813–0075.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 29, 2007.

Docket Numbers: ER07–1180–001.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corp submits an errata to its 7/20/07 filing of a petition to waive sanctions for violation of Section 31.1.4.1 of its Tariff through 10/18/06.
Filed Date: 08/09/2007.
Accession Number: 20070813–0082.
Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER07–1256–000.
Applicants: Kansas Gas and Electric Company.
Description: Kansas Gas and Electric Co submits a revised Generating Municipal Electric Service Agreement with the City of Chanute, Kansas under ER07–1256.
Filed Date: 08/08/2007.
Accession Number: 20070813–0078.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 29, 2007.

Docket Numbers: ER07–1257–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corp submits its modifications to its market redesign and technology upgrade tariff and supplemented this filing on 8/10/07.
Filed Date: 08/03/2007; 08/10/07.
Accession Number: 20070810–0036; 20070813–0172.
Comment Date: 5 p.m. Eastern Time on Friday, August 24, 2007.

Docket Numbers: ER07–1258–000.
Applicants: Rocky Mountain Power, LLC.
Description: Rocky Mountain Power, LLC submits a Notice of Succession.
Filed Date: 08/09/2007.
Accession Number: 20070810–0002.
Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER07–1259–000.
Applicants: San Joaquin Cogen, LLC.
Description: San Joaquin Cogen, LLC submits a Notice of Succession.
Filed Date: 08/09/2007.
Accession Number: 20070810–0003.
Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER07–1260–000.
Applicants: American Electric Power Service Corp.
Description: Ohio Power Co submits a Notice of Cancellation of Original Service Agreement 462 under FERC Electric Tariff Second Revised Volume 6, agreement with Northwest Fuel Development, Inc.
Filed Date: 08/07/2007.

Accession Number: 20070813–0087.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 28, 2007.

Docket Numbers: ER07–1262–000.
Applicants: American Electric Power Service Corp.
Description: AEP Operating Companies submits an Interconnection and Local Delivery Service Agreement 1675 with the City of Jackson, Ohio.
Filed Date: 08/09/2007.
Accession Number: 20070813–0088.
Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER07–1263–000.
Applicants: High Sierra Power Marketing, LLC.
Description: Sierra Power Asset Marketing, LLC submits an application for acceptance of their proposed market based rate tariff, FERC Electric Tariff, Original Volume 1.
Filed Date: 08/09/2007.
Accession Number: 20070813–0007.
Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER07–1264–000.
Applicants: Sierra Power Asset Marketing, LLC.
Description: Sierra Power Asset Marketing, LLC submits an application for acceptance of their proposed market based rate tariff, FERC Electric Tariff, Original Volume 1.
Filed Date: 08/09/2007.
Accession Number: 20070813–0006.
Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER07–1265–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits an executed revised service agreement for Network Integration Transmission Service with Midwest Energy, Inc.
Filed Date: 08/09/2007.
Accession Number: 20070813–0005.
Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER07–1266–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits an executed revised service agreement for Network Integration Transmission Service with Midwest Energy, Inc.
Filed Date: 08/09/2007.
Accession Number: 20070813–0004.
Comment Date: 5 p.m. Eastern Time on Thursday, August 30, 2007.

Docket Numbers: ER07–1267–000.
Applicants: Arizona Public Service Company.
Description: Arizona Public Service Company submits a contract affecting transmission, an executed Transmission Operating and Maintenance Agreement with Southwest Transmission Coop, Inc.
Filed Date: 08/10/2007.
Accession Number: 20070813–0003.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER07–1268–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits Supplement 1 to the 1998 Facilities Agreement, executed 8/17/06 and Supplement 2 to the 1998 Facilities Agreement, executed 5/21/07.
Filed Date: 08/10/2007.
Accession Number: 20070813–0002.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER07–1269–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits First Revised Sheet 355 et al, FERC Electric Tariff, 7th Revised Volume 11 to its Open Access Transmission Tariff, reflecting updated load ratio share figures for 8/1/07–7/31/08.
Filed Date: 08/10/2007.
Accession Number: 20070813–0001.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER07–1270–000.
Applicants: Nevada Power Company.
Description: Nevada Power Co submits Rate Schedule 106—Power Purchase Agreement with Sierra Pacific Power Co.
Filed Date: 08/10/2007.
Accession Number: 20070813–0156.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Take notice that the Commission received the following open access transmission tariff filings:
Docket Numbers: OA07–2–001.
Applicants: Sierra Pacific Resources Operating Company.
Description: Sierra Pacific Resources Operating Companies Order No. 890 OATT Imbalance Penalty Revenues Distribution Compliance Filing.
Filed Date: 08/10/2007.
Accession Number: 20070810–5042.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: OA07–5–001.
Applicants: Avista Corporation.
Description: Avista Corporation Compliance Filing Re July 13, 2007 Order in Docket.
Filed Date: 07/20/2007.
Accession Number: 20070720–5038.
Comment Date: 5 p.m. Eastern Time on Friday, August 24, 2007.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

[FR Doc. E7–16335 Filed 8–20–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1.

August 15, 2007.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER01–48–009.
Applicants: Powerex Corp.
Description: Powerex Corp. submits a notice of non-material change status.
Filed Date: August 13, 2007.
Accession Number: 20070814–0120.
Comment Date: 5 p.m. Eastern Time on Tuesday, September 04, 2007.

Docket Numbers: ER02–2330–047.
Applicants: New England Power Pool.
Description: ISO New England, Inc. submits their Nineteenth Standard Market Design Quarterly Status Report.
Filed Date: June 11, 2007.
Accession Number: 20070614–0009.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 29, 2007.

Docket Numbers: ER07–705–002.
Applicants: GSG, LLC.
Description: Notice of Non-Material Change in Status.
Filed Date: July 30, 2007.
Accession Number: 20070730–5052.
Comment Date: 5:00 p.m. Eastern Time on Friday, August 24, 2007.

Docket Numbers: ER07–970–001.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. responds to the July 27, 2007 deficiency letter.
Filed Date: August 13, 2007.
Accession Number: 20070814–0121.
Comment Date: 5 p.m. Eastern Time on Tuesday, September 04, 2007.

Docket Numbers: ER07–1201–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits its executed Service Agreement for Network Integration Transmission Service with American Electric Power Service Corp.
Filed Date: July 26, 2007.
Accession Number: 20070813–0173.
Comment Date: 5 p.m. Eastern Time on Thursday, August 16, 2007.

Docket Numbers: ER07–1271–000.
Applicants: Nevada Power Company.
Description: Nevada Power Company submits changes to Rate Schedule 92 and Rate Schedule 93, Power Purchase Agreement with Sierra Pacific Power Company.
Filed Date: August 10, 2007.
Accession Number: 20070813–0154.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER07–1272–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits an executed large generator interconnection agreement with DTE Pontiac North, LLC.
Filed Date: August 10, 2007.
Accession Number: 20070813–0166.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER07–1273–000.
Applicants: Entergy Services, Inc.
Description: Entergy Services, Inc. on behalf of Entergy Mississippi, Inc. submits the First Amendment to the Interconnection Agreement with South Mississippi Electric Power. Association, as First Revised Rate Schedule FERC 251.
Filed Date: August 10, 2007.
Accession Number: 20070813–0167.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER07–1274–000.
Applicants: TransCanada Energy Marketing ULC.
Description: TransCanada Energy Marketing ULC submits a Notice of Succession and Revised Market-Based Rate Tariff.
Filed Date: August 10, 2007.
Accession Number: 20070813–0168.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER07–1275–000.
Applicants: New England Participating Transmission.
Description: Participating Transmission Owners Administrative Committee on behalf of New England's Participating Transmission Owners submit revised tariff sheets to correct immaterial errors in Implementation Rule for Attachment F.
Filed Date: August 10, 2007.
Accession Number: 20070813–0169.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER07–1276–000.
Applicants: Niagara Mohawk Power Corporation.
Description: Niagara Mohawk Power Corp submits Service Agreement 1156 with Western New York Wind Corp.
Filed Date: August 10, 2007.
Accession Number: 20070813–0170.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER07–1277–000.
Applicants: Entergy Services, Inc.
Description: Entergy Services, Inc, acting as agent for Entergy Operating Companies *et al.,* submits a mutually-executed Dynamic Transfer Operating Agreement with City of North Little Rock, AR.
Filed Date: August 10, 2007.
Accession Number: 20070813–0171.
Comment Date: 5 p.m. Eastern Time on Friday, August 31, 2007.

Docket Numbers: ER07–1278–000.
Applicants: Alpha Energy Master, Ltd.
Description: Alpha Energy Master, Ltd submits a Petition for Acceptance of Initial Rate Schedule, Waivers and Blanket Authority.
Filed Date: August 13, 2007.
Accession Number: 20070814–0122.
Comment Date: 5 p.m. Eastern Time on Tuesday, September 04, 2007.

Take notice that the Commission received the following open access transmission tariff filings:
Docket Numbers: OA07–17–001.
Applicants: Entergy Services Inc.
Description: Entergy Services Inc. on behalf of Entergy Operating Companies submits a compliance filing pursuant to FERC's July 13 Order.
Filed Date: August 13, 2007.
Accession Number: 20070814–0168.
Comment Date: 5 p.m. Eastern Time on Tuesday, September 04, 2007.

Docket Numbers: OA07–32–001.
Applicants: Entergy Services Inc.
Description: Entergy Services Inc on behalf of Entergy Operating Companies submits an amendment to its July 13, 2007 compliance filing pursuant to Order 890.
Filed Date: August 13, 2007.
Accession Number: 20070814–0167.
Comment Date: 5 p.m. Eastern Time on Tuesday, September 04, 2007.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies

of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

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Nathaniel J. Davis, Sr.,

Acting Deputy Secretary.

[FR Doc. E7–16422 Filed 8–20–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2277]

AmerenUE; Notice of Availability of Final Environmental Assessment

August 14, 2007.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission (Commission or FERC) regulations contained in the Code of Federal Regulations (CFR) (18 CFR Part 380), the Office of Energy Projects has prepared a Final Environmental Assessment (FEA) regarding AmerenUE's request to rebuild the upper reservoir of the Taum Sauk Pumped Storage Project (FERC No. 2277), located on the East Fork Black River, in Reynolds County, Missouri. The FEA analyzes the environmental effects of the reconstruction of the upper reservoir and contains measures to minimize those effects. The FEA concludes that the proposed reconstruction, with recommended mitigation measures, would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the FEA is available for review at the Commission in the Public Reference Room, or it may be viewed on the Commission's Web site at *http://www.ferc.gov* using the e-Library link. Enter the docket number ''P–2277'' in the docket number field to access the document. For assistance, call (202) 502–8222 or (202) 502–8659 (for TTY).

For further information regarding this notice, please contact Thomas LoVullo at (202) 502–8900.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–16389 Filed 8–20–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF07–4–000]

Midcontinent Express Pipeline, LLC; Supplemental Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Midcontinent Express Project, Request for Comments on Environmental Issues, and Notice of Public Site Visit

August 14, 2007.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental impact statement (EIS) that will identify and address the environmental impacts that could result from the construction and operation of the Midcontinent Express Pipeline Project (Project) proposed by Midcontinent Express Pipeline, LLC (MEP). On June 25, 2007, MEP filed draft Resource Reports that identified a modification to the Project in Richland and Madison Parishes, Louisiana, consisting of an approximately 4.2-mile-long lateral pipeline (CenterPoint Lateral). MEP subsequently filed additional information clarifying the location of the Project facilities associated with the CenterPoint Lateral on August 3, 2007.

On April 27, 2007, the FERC issued a ''Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Midcontinent Express Pipeline Project, Request for Comments on Environmental Issues and Notice of Public Scoping Meetings'' (NOI). The NOI was published in the **Federal Register** and was also mailed to interested parties, including Federal, state and local officials, agency representatives, conservation organizations; Native American groups; local libraries and newspapers; and property owners affected by the proposed facilities. This notice is being issued because the CenterPoint Lateral was not identified in the NOI, and landowners potentially affected by that facility were therefore not included on the environmental mailing list for that correspondence.

In order to assist staff with the identification of environmental issues associated with the modified facilities and to comply with the requirements of the National Environmental Policy Act of 1969 (NEPA), a 30-day scoping period has been opened to receive comments on the proposed Project, as modified by the addition of the CenterPoint Lateral. Please note that the scoping period for this project will close on September 10, 2007.

Comments on the Project and the issues that should be addressed in the EIS may be submitted in written form. Further details on how to submit written comments are provided in the Public Participation section of this notice. Additionally, as part of the scoping process, we will sponsor a public site visit of the proposed CenterPoint Lateral, as described below. Please note that attendees at the site visit must obtain their own transportation for the site visit.

Date and time	Location
Tuesday, August 28, 2007, 9 am (CST).	Delhi Municipal Airport (parking lot), Airport Road/Louisiana Highway 17, Delhi, Louisiana 71232

This notice is being sent to landowners affected by the CenterPoint Lateral, as well as those that previously requested to remain on the Project environmental mailing list; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers; all of which are encouraged to submit comments on the proposed Project. Details on how to submit comments are provided in the Public Participation section of this notice.

If you are a landowner receiving this notice, you may be contacted by an MEP representative about the acquisition of an easement to construct, operate, and maintain the proposed project facilities. The pipeline company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the FERC, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility on My Land? What Do I Need To Know?'' is available for viewing on

the FERC Internet Web site (*www.ferc.gov*). This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the FERC's proceedings.

Summary of the Proposed Project

MEP proposes to construct, own and operate approximately 495 miles of new 30-, 36-, and 42-inch-diameter interstate natural gas transmission pipeline, a total of approximately 111,720 horsepower (hp) of compression at one booster and four new mainline compressor stations, and related appurtenant facilities located in portions of Oklahoma, northeast Texas, northern Louisiana, central Mississippi, and Alabama. The proposed pipeline route identified by MEP would extend from a receipt point with existing pipeline infrastructure near Bennington in Bryan County, Oklahoma, to an interconnect with the existing Transcontinental Gas Pipe Line Corporation system near Butler in Choctaw County, Alabama. The general location of the proposed pipeline is shown in the figure included as Appendix 1.[1]

In addition, as part of the Midcontinent Express Pipeline Project, MEP proposes to construct, own, and operate the approximately 4.2-mile-long, 16-inch-diameter CenterPoint Lateral in Richland and Madison Parishes, Louisiana.

Specifically, the MEP Project facilities under FERC jurisdiction would include the following:

- Approximately 40 miles of 30-inch-diameter pipeline in Bryan County, Oklahoma, and Lamar County, Texas;
- Approximately 262 miles of 42-inch-diameter pipeline in Lamar, Red River, Franklin, Titus, Morris, and Cass Counties, Texas, and Caddo, Bossier, Webster, Claiborne, Lincoln, Union, Ouachita, Morehouse, Richland, and Madison Parishes, Louisiana;
- Approximately 193 miles of 36-inch-diameter pipeline in Madison Parish, Louisiana, and Warren, Hinds, Rankin, Simpson, Smith, Jasper, and Clarke Counties, Mississippi, and Choctaw County, Alabama;
- The newly proposed, approximately 4.2-mile-long, 16-inch-diameter lateral pipeline, which would extend from an interconnect with the Project mainline pipeline in Madison Parish, Louisiana, to the Delhi Booster Station and an interconnect with a CenterPoint Energy Gas Transmission Company pipeline in Richland Parish, Louisiana;
- Four new mainline and one booster, natural gas-fired compressor stations, including:
  - —The 38,555-hp Lamar Compressor Station at Milepost (MP) TX 28.5 in Lamar County, Texas;
  - —The 12,270-hp Atlanta Compressor Station at MP TX 117.4 in Cass County, Texas;
  - —The 32,720-hp Perryville Compressor Station at MP LA 109.0 in Union Parish, Louisiana;
  - —The 18,405-hp Vicksburg Compressor Station at MP MS 11.8 in Warren County, Mississippi;
  - —The 9,470-hp Delhi Booster Station, which would be located along the CenterPoint Lateral in Richland Parish, Louisiana;
- Meter stations at up to 13 interconnects with existing pipeline infrastructure in Bryan County, Oklahoma; Lamar and Cass Counties, Texas; Ouachita, Richland, and Madison Parishes, Louisiana; Hinds, Smith, Jasper, and Clarke Counties, Mississippi; and Choctaw County, Alabama;
- Various pig[2] launching and receiving facilities; and
- 29 mainline valves.

MEP indicates that the proposed Project facilities would provide long-haul takeaway capacity to facilitate the transport of natural gas from production areas in Texas, Oklahoma, and Arkansas to markets in the Southeast, Northeast and Midwest regions of the United States that can be accessed through interconnects with existing pipeline infrastructure. The Project would consist of two capacity zones. The initial transport capacity of Zone 1, which would include the 30- and 42-inch-diameter portions of the pipeline facilities, would be 1.4 billion cubic feet of natural gas per day (Bcf/d). However, additional supporting contracts could provide for expansion of the Zone 1 transport capacity to 1.5 Bcf/d. Zone 2, which would include the balance of the pipeline facilities, would have an initial transport capacity of 1.0 Bcf/d, with the potential for expansion to 1.2 Bcf/d.

MEP proposes to place the first 40 miles of 30-inch-diameter pipeline in service by October 31, 2008, with the remainder of the pipeline constructed and operational by February 2009.

Land Requirements for Construction

As proposed, the typical construction right-of-way width for the 30-, 36-, and 42-inch-diameter sections of Project pipeline would be 100, 110, and 125 feet, respectively. The typical construction right-of-way width for the CenterPoint Lateral would be 75 feet. Following construction, MEP would generally retain a 50-foot-wide permanent right-of-way for operation of the Project, though MEP proposes to expand the maintained permanent right-of-way width to 60 feet in limited areas based on site-specific conditions. Additionally, temporary extra workspaces beyond the typical construction right-of-way limits would also be required at certain feature crossings (e.g., roads, railroads, wetlands, or waterbodies), in areas with steep side slopes, in association with special construction techniques, or at pipe storage and contractor yards. In residential areas, wetlands, and other sensitive areas, the construction right-of-way width would be reduced as necessary to protect homeowners and environmental resources. Following construction, all temporary workspaces (including the temporary construction rights-of-way and extra workspaces) would be restored and allowed to revert to its former use.

The EIS Process

NEPA requires the Commission to take into account the environmental impacts that could result from the approval of an interstate natural gas pipeline. The FERC will use the EIS to consider the environmental impact that could result if the Midcontinent Express Pipeline Project is authorized under Section 7 of the Natural Gas Act.

NEPA also requires us to discover and address concerns the public may have about proposals to be considered by the Commission. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EIS on the important environmental issues. With this NOI, the Commission staff is requesting public comments on the scope of the issues to be addressed in the EIS. All comments received will be considered during preparation of the EIS.

In the EIS we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- Water resources;
- Wetlands and vegetation;
- Fish and wildlife;
- Threatened and endangered species;

[1] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices, other than Appendix 1 (maps), are available on the Commission's Web site at the ''eLibrary'' link or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary refer to the Public Participation section of this notice. Copies of the appendices were sent to all those receiving this notice in the mail. Requests for detailed maps of the proposed facilities should be made directly to MEP.

[2] A pig is a mechanical tool used to clean and inspect the interior of a pipeline.

- Land use, recreation, and visual resources;
- Air quality and noise;
- Cultural resources;
- Socioeconomics;
- Reliability and safety; and
- Cumulative environmental impacts.

In the EIS, we will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on affected resources.

Our independent analysis of the issues will be included in a draft EIS. The draft EIS will be mailed to federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; affected landowners; commentors; other interested parties; local libraries and newspapers; and the FERC's official service list for this proceeding. A 45-day comment period will be allotted for review of the draft EIS. We will consider all comments on the draft EIS and revise the document, as necessary, before issuing a final EIS. We will consider all comments on the final EIS before we make our recommendations to the Commission. To ensure that your comments are considered, please follow the instructions in the Public Participation section of this notice.

With this notice, we are asking federal, state, and local governmental agencies with jurisdiction and/or special expertise with respect to environmental issues, to express their interest in becoming cooperating agencies for the preparation of the EIS. These agencies may choose to participate once they have evaluated the proposal relative to their responsibilities.

Currently Identified Environmental Issues

The EIS will discuss impacts that could occur as a result of the construction and operation of the proposed project. We have already identified several issues that we think deserve attention based on a preliminary review of the project site, comments filed in response to the April 27, 2007 NOI, and the facility information provided by MEP. This preliminary list of issues may be changed based on your comments and our analysis.

- Potential impacts to water resources, including groundwater and ephemeral, intermittent, and perennial waterbodies.
- Evaluation of temporary and permanent impacts on wetlands and development of appropriate mitigation.
- Potential impacts to fish and wildlife habitat, including potential impacts to federal and state-listed threatened and endangered species.
- Potential impacts to natural vegetative communities, including native prairie and forestland.
- Potential effects on prime farmland soils and soils with a high potential for compaction or erosion.
- Potential impacts to existing land uses, including agricultural and managed forested lands.
- Potential impacts to recreation and special interest areas, including Wetland Reserve Program lands and the Natchez Trace Parkway.
- Potential impacts to residential areas, planned developments, and property values.
- Potential disruption to area businesses associated with construction.
- Potential visual effects of the pipeline easement and aboveground facilities on surrounding areas.
- Potential impacts to local air and noise quality associated with construction and operation.
- Potential impacts to cultural resources and Native American lands.
- Public safety and hazards associated with the transport of natural gas.
- Alternative alignments for the pipeline route and alternative sites for the compressor stations.
- Assessment of the effect of the proposed Project when combined with other past, present, or reasonably foreseeable future actions in the Project area, including the potential cumulative effect of collocating multiple utility rights-of-way.
- Use of the existing and proposed rights-of-way to minimize the need for additional temporary construction workspace and/or reduce the width of the permanent easement.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the proposed project. By becoming a commenter, your concerns will be addressed in the EIS and considered by the Commission. Your comments should focus on the potential environmental effects, reasonable alternatives (including alternative facility sites and pipeline routes), and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please carefully follow these instructions:

- Send an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.
- Label one copy of your comments for the attention of Gas Branch 3, DG2E.
- Reference Docket No. PF07–4–000 on the original and both copies.
- Mail your comments so that they will be received in Washington, DC on or before September 10, 2007.

Please note that we are continuing to experience delays in mail deliveries from the U.S. Postal Service. As a result, we will include all comments that we receive within a reasonable time frame in our environmental analysis of this project. The Commission strongly encourages electronic filing of any comments in response to this Notice of Intent. For information on electronically filing comments, please see the instructions on the Commission's Web site at *www.ferc.gov*.

Once MEP formally files its application with the Commission, you may want to become an official party to the proceeding known as an ''intervenor.'' Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in a Commission proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the ''e-filing'' link on the Commission's Web site. Please note that you may not request intervenor status at this time. You must wait until a formal application is filed with the Commission.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed Project. This includes all landowners along the CenterPoint Lateral who are potential right-of-way grantors, whose property may be used temporarily for Project purposes, or who own property within distances defined in the Commission's regulations of certain aboveground facilities. In addition, this notice is also being sent to potentially affected landowners along other portions of the Project that previously requested to remain on the Project environmental mailing list.

If you received this notice, you are on the environmental mailing list for this project. If you do not want to send comments at this time, but still want to remain on our mailing list, please return the Information Request (Appendix 2). If you do not return the Information Request, you will be removed from the

Commission's environmental mailing list. Please note that interested individuals who previously responded to the April 27, 2007 NOI with a request to stay on the environmental mailing list need not reply again.

Availability of Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC (3372). Additional information can also be found on the Internet at *www.ferc.gov*. The ''eLibrary link'' on the FERC Web site provides access to documents submitted to and issued by the Commission, such as comments, orders, notices and rulemakings. Once on the FERC Web site, click on the ''eLibrary link,'' select ''General Search'' and in the ''Docket Number'' field enter the project docket number excluding the last three digits (*i.e.*, PF07–4). When researching information be sure to select an appropriate date range. In addition, the FERC now offers a free e-mail service called eSubscription that allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. To register for this service, go to *www.ferc.gov/esubscribenow.htm*. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or TTY, contact 1–202–502–8659.

Public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx)* along with other related information.

Finally, MEP has established an Internet Web site for this Project at *www.midcontinentexpress.com*. The Web site includes a description of the Project, a map of the proposed pipeline route, and answers to frequently asked questions. You can also request additional information or provide comments directly to MEP at 1–877–327–5515 or *pipelineinfo@midcontinentexpress.com*.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–16383 Filed 8–20–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12769–000]

Ice House Partners, Inc.; Notice of Application Ready for Environmental Analysis, and Soliciting Comments, Terms and Conditions, Recommendations, and Prescriptions

August 14, 2007.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Exemption from Licensing.

b. *Project No.:* 12769–000.

c. *Date Filed:* January 22, 2007.

d. *Applicant:* Ice House Partners, Inc.

e. *Name of Project:* Ice House Power Project.

f. *Location:* On the Nashua River in the Town of Ayer, Middlesex County, Massachusetts. The project would occupy United States land administered by the U.S. Fish and Wildlife Service.

g. *Filed Pursuant to:* Public Utility Regulatory Policies Act of 1978, 16 U.S.C. Sections 2705 and 2708.

h. *Applicant Contact:* Liisa Dowd, Ice House Partners, Inc., 323 West Main Street, Ayer, MA 01432, (978) 772–3303.

i. *FERC Contact:* Tom Dean, (202) 502–6041.

j. *Deadline for Filing Comments, Recommendations, Terms and Conditions, and Prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Comments, recommendations, terms and conditions, and prescriptions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''eFiling'' link.

k. This application has been accepted and is now ready for environmental analysis at this time.

l. *Description of Project:* The Ice House Power Project would consist of: (1) The existing 190-foot-long, 12-foot-high Ice House dam and spillway topped with 24-inch-high flashboards impounding; (2) the existing 965-acre-foot reservoir with a normal full pond elevation of 216.45 feet National Geodetic Vertical Datum; (3) the existing headgate structure equipped with four 8-foot-high, 10-foot-wide gates of which two are operational and two are stationary leading to; (4) the existing 50-foot-wide, 109-foot-long power canal connected to; (5) a restored powerhouse containing two generating units with a total installed capacity of 280 kilowatts discharging flow to; (6) the existing 50-foot-wide, 365-foot-long tailrace; (7) the existing 480-volt, 100-foot-long underground transmission cable; and (8) appurtenant facilities.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

All filings must: (1) Bear in all capital letters the title ''COMMENTS'', ''REPLY COMMENTS'', ''RECOMMENDATIONS'', ''TERMS AND CONDITIONS'', or ''PRESCRIPTIONS''; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via

e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Procedural Schedule:* The Commission staff proposes to issue a single Environmental Assessment (EA) rather than issuing a draft and final EA. Staff intends to allow 30 days for entities to comment on the EA, and will take into consideration all comments received on the EA before final action is taken on the exemption application. The application will be processed according to the schedule, but revisions to the schedule may be made as appropriate:

Action: Notice of the availability of the EA.

Date: January 2008

o. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–16387 Filed 8–20–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12804–000]

Public Utility District No. 1 of Oklahoma County; Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests and Comments

August 14, 2007.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12804–000.

c. *Date filed:* May 17, 2007.

d. *Applicant:* Public Utility District No. 1 of Okanogan County.

e. *Name of Project:* Shanker's Bend Hydroelectric Project.

f. *Location:* The proposed project would be located on the Similkameen River in Okanogan County, Washington. A portion of the reservoir would be located in British Columbia, Canada.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Dan Boettger, Director, Regulatory and Environmental Affairs, Public Utility District No. 1 of Okanogan County, 1331 Second Avenue N., Post Office Box 912, Okanogan, WA 98840, (509) 422–8425.

i. *FERC Contact:* Patricia W. Gillis at (202) 502–8735.

j. Deadline for filing comments, protests, and motions to intervene: 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–12804–000) on any comments, protests, or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Project:* The proposed project would consist of: (1) A proposed 260-feet-high, 1,200-feet-long dam; (2) a proposed 18,000 acre impoundment with an average depth of 1,289 feet, and gross storage capacity of 1.7-million acre-feet; (3) a proposed penstock; (4) an existing 1,700 foot-long railroad tunnel enlarged to 20-feet-diameter; (5) a proposed powerhouse containing two generating units with an installed capacity of 42-megawatts; (6) a proposed 7.5-mile-long, 115 kV transmission line; and (7) appurtenant facilities. The proposed project would have an estimated annual generation of approximately 280,000 megawatts-hours. The applicant plans to sell the generated energy.

l. *Location of Application:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Competing Preliminary Permit:* Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30 and 4.36.

o. *Competing Development Application:* Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30 and 4.36.

p. *Notice of Intent:* A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

q. *Proposed Scope of Studies under Permit:* A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

r. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the

requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

s. *Filing and Service of Responsive Documents:* Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', ''MOTION TO INTERVENE'', ''NOTICE OF INTENT'', or ''COMPETING APPLICATION'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

t. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

u. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001 (a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–16388 Filed 8–20–07; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2006–0861; FRL–8457–8]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Compliance Requirement for Child-Resistant Packaging; EPA ICR No. 0616.09, OMB Control No. 2070–0052

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before September 20, 2007.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OPP–2006–0861, to (1) EPA online using *www.regulations.gov* (our preferred method), by e-mail to *opp.ncic@epa.gov*, or by mail to: OPP Regulatory Public Docket (7502P), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Joseph Hogue, Field and External Affairs Division (7506–P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9072; fax number: (703) 305–5884; e-mail address: *hogue.joe@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On March 21, 2007 (72 FR 13274), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received one comment during the comment period, which is addressed in the ICR. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OPP–2006–0861, which is available for online viewing at *www.regulations.gov*, or in person viewing at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Building), 2777 S. Crystal Drive, Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

Use EPA's electronic docket and comment system at *www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov*.

Title: Compliance Requirement for Child-Resistant Packaging.

ICR numbers: EPA ICR No. 0616.09, OMB Control No. 2070–0052.

ICR Status: This ICR is scheduled to expire on August 31, 2007. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This ICR is designed to provide the EPA with assurances that the packaging of pesticide products sold and distributed to the general public in the United States meets standards set forth by the Agency pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Unless a pesticide product qualifies for an exemption, if the product meets certain

criteria regarding toxicity and use, it must be sold and distributed in child-resistant packaging. Section 25(c)(3) of FIFRA authorizes EPA to establish standards for packaging of pesticide products and pesticidal devices to protect children and adults from serious illness or injury resulting from accidental ingestion or contact. The law requires that these standards are designed to be consistent with those under the Poison Prevention Packaging Act, administered by the Consumer Product Safety Commission (CPSC). Pesticide registrants must certify to the Agency that the packaging or device meets these standards. EPA reviews a registrant's child-resistant packaging (CRP) certification to determine if there are human safety/health risk concerns. Exemption requests are reviewed to ascertain if there is a health risk, and if CRP is technically feasible, practicable, and appropriate.

Responses to this collection of information are mandatory under authority of 40 CFR 157.34. Although submission of confidential information is not required as a part of this information collection, there has been at least one instance where confidential data have been submitted voluntarily as supporting material for an exemption request from CRP compliance requirements. When any trade secret or Confidential Business Information (CBI) is provided to EPA, such information is protected from disclosure under section 10 of FIFRA. Data submitted to EPA is handled strictly in accordance with the provisions of the FIFRA Confidential Business Information Manual.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 4.9 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: All registrants of pesticide products meeting the use criteria which trigger Child-Resistant Packaging (CRP) requirements.

Estimated Number of Respondents: 2,109.

Frequency of Response: On occasion.

Estimated Total Annual Hour Burden: 3,473.

Estimated Total Annual Cost: $193,567.

Changes in the Estimates: There is an increase of 1,364 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase is an adjustment to the burden estimate. Neither the number of responses nor the average burden estimate for each response type has changed. However, the distribution of those responses among the four response types has changed, with a net shift from less-burdensome to more-burdensome type responses.

Dated: August 14, 2007

Sara Hisel-McCoy,

Acting Director, Collection Strategies Division.

[FR Doc. E7–16439 Filed 8–20–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8457–9]

Agency Information Collection Activities OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the Office of Management and Budget's (OMB) responses to Agency Clearance requests, in compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et. seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Susan Auby (202) 566–1672, or e-mail at *auby.susan@epa.gov* and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency Clearance Requests

OMB Approvals

EPA ICR No. 1604.08; NSPS for Secondary Brass/Bronze Production, Primary Copper/Zinc/Lead Smelters, Primary Aluminum Reduction Plants and Ferroalloy Production Facilities (Renewal); in 40 CFR part 60, subparts M, P, Q, R, S, Z; was approved 07/23/2007; OMB number 2060–0110; expires 07/31/2010.

EPA ICR No. 2080.03; Motor Vehicle and Engine Compliance Program Fees; in 40 CFR 85.2405–85.2408; was approved 07/26/2007; OMB Number 2060–0545; expires 07/31/2010.

EPA ICR No. 2079.03; NESHAP for Metal Can Manufacturing Surface Coating (Renewal); in 40 CFR part 63, subpart KKKK; was approved 07/30/2007; OMB Number 2060–0541; expires 07/31/2010.

EPA ICR No. 1058.09; NSPS for Incinerators (Renewal); in 40 CFR part 60, subpart E; was approved 07/30/2007; OMB Number 2060–0040; expires 07/31/2010.

EPA ICR No. 0657.09; New Source Performance Standards for Graphic Arts Industry (Renewal); in 40 CFR part 60, subpart QQ; was approved 07/30/2007; OMB Number 2060–0105; expires 07/31/2010.

EPA ICR No. 1717.05; NESHAP for Off-Site Waste and Recovery Operations (Renewal); in 40 CFR part 63, subpart DD; was approved 07/30/2007; OMB Number 2060–0313; expires 07/31/2010.

EPA ICR No. 1907.04; Recordkeeping and Reporting Requirements Regarding the Sulfur Content of Motor Vehicle Gasoline under the Tier 2 Rule (Renewal); in 40 CFR part 80, subpart H; was approved 07/30/2007; OMB Number 2060–0437; expires 07/31/2010.

EPA ICR No. 0282.14; Emission Defect Information Reports and Voluntary Emission Recall Reports (Renewal); was approved 07/30/2007; OMB Number 2060–0048; expires 07/30/2010.

EPA ICR No. 1663.05; Compliance Assurance Monitoring Program (Renewal); in 40 CFR part 64; was approved 07/31/2007; OMB Number 2060–0376; expires 07/31/2010.

EPA ICR No. 0309.12; Registration of Fuels and Fuel Additives; Requirements for Manufacturers (Renewal); was approved 07/23/2007; OMB Number 2060–0150; expires 07/31/2010.

EPA ICR No. 0010.11; Importation Requirements for Importation of Nonconforming Vehicles (Renewal); was approved 07/23/2007; OMB Number 2060–0095; expires 07/31/2010.

EPA ICR No. 1781.04; NESHAP for Pharmaceutical Production (Renewal); in 40 CFR part 63, subpart GGG; was approved 07/19/2007; OMB Number 2060–0358; expires 07/31/2010.

EPA ICR No. 1774.04; Mobile Air Conditioner Retrofitting Program (Renewal); was approved 07/19/2007; OMB Number 2060–0350; expires 07/31/2010.

EPA ICR No. 1135.09; NSPS for Magnetic Tape Coating Facilities (Renewal); in 40 CFR part 60, subpart SSS; was approved 07/19/2007; OMB number 2060–0171; expires 07/31/2010.

EPA ICR No. 1659.06; NESHAP for Gasoline Distribution Facilities (Renewal); in 40 CFR part 63, subpart R; was approved 08/07/2007; OMB Number 2060–0325; expires 08/31/2010.

EPA ICR No. 2242.02; Renewable Fuels Standards (RFS) Program (Final Rule); in 40 CFR 80.1150; was approved 08/08/2007; OMB Number 2060–0600; expires 08/31/2010.

EPA ICR No. 1664.06; The National Oil and Hazardous Substances Pollution Contingency Plan (Renewal); in 40 CFR 300.900, subpart J; was approved 08/09/2007; expires 08/31/2010.

EPA ICR No. 2060.03; Cooling Water Intake Structures Phase II Exiting Facility (Renewal); was approved 8/13/2007; OMB Number 2040–0257; expires 08/31/2010.

Comment Filed

EPA ICR No. 1800.04; Information Requirements for Locomotives and Locomotive Engines (Proposed Rule); OMB Number 2060–0392; OMB filed comment on 07/31/2007.

EPA ICR No. 1361.11; Expanding the Comparable Fuels Exclusion under RCRA (Proposed Rule); OMB Number 2050–0073; OMB filed a comment on 07/30/2007.

Dated: August 14, 2007.

Sara Hisel-McCoy,

Acting Director, Collection Strategies Division.

[FR Doc. E7–16440 Filed 8–20–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2007–0595; FRL–8458–1]

Agency Information Collection Activities; Continuing Collection; Comment Request; Detergent Gasoline; EPA ICR No. 1655.06, OMB Control No. 2060–0275

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on January 31, 2008. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before October 22, 2007.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2007–0595 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *a-and-r-Docket@epa.gov.*
- Fax: (202) 566–9744.
- Mail: Environmental Protection Agency, EPA Docket Center (EPA/DC), Air and Radiation Docket, Docket ID No. EPA–HQ–OAR–2007–0595, Mailcode: 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- Hand Delivery: EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2007–0595. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

FOR FURTHER INFORMATION CONTACT: Jaimee Dong, Office of Transportation and Air Quality, Mailcode: 6406J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9672; fax number: (202) 343–2802; e-mail address: *dong.jaimee@epa.gov.*

SUPPLEMENTARY INFORMATION:

How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2007–0595, which is available for online viewing at *www.regulations.gov,* or in person viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m. EST, Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air and Radiation Docket is 202–566–1742.

Use *www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) enhance the quality, utility, and clarity of the information to be collected; and

(iv) minimize the burden of the collection of information on those who are to respond, including through the

use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES**.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What Information Collection Activity or ICR Does This Apply to?

Affected entities: Entities potentially affected by this action are those who (1) manufacture gasoline, post-refinery component, or detergent additives, (2) blend detergent additives into gasoline or post-refinery component, or (3) transport or receive a detergent additive, gasoline, or post-refinery component.

Title: Detergent Gasoline: Certification Requirements for Manufacturers of Detergent Additives; Requirements for Transferors and Transferees of Detergent Additives; Requirements for Blenders of Detergents into Gasoline or Post-refinery Component; Requirements for Manufacturers, Transferors, and Transferees of Gasoline or Post-refinery Component (40 CFR 80—Subpart G).

ICR numbers: EPA ICR No. 1655.06, OMB Control No. 2060–0275.

ICR status: This ICR is currently scheduled to expire on January 31, 2008. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Gasoline combustion results in the formation of engine deposits that contribute to increased emissions. Detergent additives deter deposit formation. The Clean Air Act requires gasoline to contain a detergent additive. The regulations at 40 CFR part 80—Subpart G specify certification requirements for manufacturers of detergent additives, recordkeeping or reporting requirements for blenders of detergents into gasoline or post-refinery component (any gasoline blending stock or any oxygenate which is blended with gasoline subsequent to the gasoline refining process), and reporting or recordkeeping requirements for manufacturers, transferors, or transferees of detergents, gasoline, or post-refinery component (PRC). These requirements ensure that (1) a detergent is effective before it is certified by EPA, (2) a certified detergent, at the minimum concentration necessary to be effective (known as the lowest additive concentration (LAC)), is blended into gasoline, and (3) only gasoline which contains a certified detergent at its LAC is delivered to the consumer. The EPA maintains a list of certified gasoline detergents, which is publicly available. As of June 2007 there were 393 certified detergents and 18 detergent manufacturers.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 60 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

EPA estimates that the average burden for detergent certification is 60 hours and $4,104, and that there will be approximately 10 applications for detergent certification each year for the next three years. Thus, the annual certification burden is estimated at 600 hours and $41,040. Most of the burden is incurred by the blenders of detergent into gasoline or PRC. The regulations require that they generate and maintain records of the amount of detergent blended and the amount of gasoline into which it is blended. These records are known as volumetric additive reconciliation (VAR) records and must demonstrate that the proper amount of a certified detergent has been used. For blenders with automated equipment, the annual burden is estimated at 150 hours and $10,344. There are approximately 1300 blenders that use automated equipment. Thus, the annual burden is 195,000 hours and $13.5 million. For blenders with non-automated equipment, the annual burden is estimated at 500 hours and $34,480. There are about 50 blenders in this category, for an annual burden of 25,000 hours and $1,724,000.

There are no capital or start-up costs beyond those incurred by industry at the program's inception in 1995. Operating and maintenance (O&M) costs are in three categories. First, the on-road engine testing to demonstrate that the detergent meets the deposit-control standards is performed at contractor facilities. However, just about all detergent certifications are able to rely on previous testing, so new testing is only performed about once a year at a cost of $200,000. The second O&M cost is for copying and postage for the estimated 10 submissions annually for detergent certification and 8 submissions annually for research notification. At an estimated $10 per submission, the annual cost is $180. The third O&M cost is for the storage of the VAR records at the 1300 automated detergent blending facilities and 50 non-automated detergent blending facilities. The estimated annual cost per facility is $100, for a total of $135,000. The total annual estimated burden for industry is 220,608 hours and $15.5 million. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and

maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Are There Changes in the Estimates From the Last Approval?

The previous clearance consisted of 221,808 hours and $13,277,604 in total costs. The small changes are due to a decrease in annual certification applications, from 30 to 10, and an update in labor costs.

What Is the Next Step in the Process for This ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: August 15, 2007.

Christopher Grundler,

Acting Director, Office of Transportation and Air Quality.

[FR Doc. E7–16449 Filed 8–20–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8457–7]

Meeting of the Total Coliform Rule Distribution System Advisory Committee—Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Under Section 10(a)(2) of the Federal Advisory Committee Act, the United States Environmental Protection Agency (EPA) is giving notice of a meeting of the Total Coliform Rule Distribution System Advisory Committee (TCRDSAC). The purpose of this meeting is to discuss the purpose, efficacy, applicability, and implementation of the Total Coliform Rule (TCR), a range of information that can be used to characterize and potentially revise the Rule, what distribution system issues affect water quality, and criteria for prioritizing distribution system issues.

The TCRDSAC advises and makes recommendations to the Agency on revisions to the Total Coliform Rule (TCR), and on what information about distribution systems is needed to better understand the public health impact from the degradation of drinking water quality in distribution systems. The Committee's activities include efforts to utilize available information for revisions to the TCR and to determine what further information is needed to characterize and address potential public health risks in the distribution systems.

Topics to be discussed in the meeting include: The framework for the existing TCR, which may include rule objectives, indicators used, and other related topics; summary of TCR issues; how utilities and States implement the TCR; a preview of information to be discussed in future Advisory Committee meetings; and distribution system elements that impact water quality and criteria for prioritization.

DATES: The public meeting will be held on Tuesday, September 18, 2007 (8:30 a.m. to 6 p.m., Eastern Daylight Time (EDT)) and Wednesday, September 19, 2007 (8 a.m. to 3 p.m. EDT). Attendees should register for the meeting by calling Jason Peller at (202) 965–6387 or by e-mail to *jpeller@resolv.org* no later than September 14, 2007.

ADDRESSES: The meeting will be held at RESOLVE, 1255 Twenty-Third St., NW., Suite 275, Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: For general information, contact Jason Peller of RESOLVE at (202) 965–6387. For technical inquiries, contact Tom Grubbs (*grubbs.thomas@epa.gov*, (202) 564–5262) or Ken Rotert (*rotert.kenneth@epa.gov*, (202) 564–5280), Standards and Risk Management Division, Office of Ground Water and Drinking Water (MC 4607M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; fax number: (202) 564–3767.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The Committee encourages the public's input and will take public comment at 5:15 p.m. on September 18, 2007, for this purpose. It is preferred that only one person present the statement on behalf of a group or organization. To ensure adequate time for public involvement, individuals interested in presenting an oral statement may notify Jini Mohanty by telephone at 202–564–5269 no later than September 14, 2007. Any person who wishes to file a written statement can do so before or after a Committee meeting. Written statements received by September 14, 2007 will be distributed to all members before any final discussion or vote is completed. Any statements received September 17, 2007 or after the meeting will become part of the permanent meeting file and will be forwarded to the members for their information.

Special Accommodations

For information on access or services for individuals with disabilities, please contact Jini Mohanty at 202–564–5269 or by e-mail at *mohanty.jini@epa.gov*. To request accommodation of a disability, please contact Jini Mohanty, preferably at least 10 days prior to the meeting to give EPA as much time to process your request.

Dated: August 13, 2007.

Nanci Gelb,

Acting Director, Office of Ground Water and Drinking Water.

[FR Doc. E7–16451 Filed 8–20–07; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Announcement of Establishment of the Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020 and Solicitation of Nominations for Membership

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science.

ACTION: Notice.

Authority: 42 U.S.C. 217a, section 222 of the Public Health Service Act, as amended. The Committee is governed by the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

SUMMARY: The U.S. Department of Health and Human Services (HHS) announces the establishment of the Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020 and invites nominations for membership for the Committee.

DATES: Nominations for membership on the Committee must be submitted by close of business on September 20, 2007.

ADDRESSES: Nominations may be submitted by electronic mail to *HP2020@hhs.gov*. Alternatively, nominations may be sent to the

following address: Emmeline Ochiai, HHS, Office of Disease Prevention and Health Promotion, Office of Public Health and Science, Room LL–100, 1101 Wootton Parkway, Rockville, MD 20852, (240) 453–8259 (telephone), (240) 453–8281 (fax).

FOR FURTHER INFORMATION CONTACT: Emmeline Ochiai, Designated Federal Official, Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020, HHS, Office of Disease Prevention and Health Promotion, Office of Public Health and Science, Room LL–100, 1101 Wootton Parkway, Rockville, MD 20852, 240/453–8259 (telephone), 240/453–8281 (fax). Additional information is available on the Internet at *http://www.healthypeople.gov.*

SUPPLEMENTARY INFORMATION: Each decade since 1979, the U.S. Department of Health and Human Services (HHS) has published a comprehensive set of national public health objectives. Known as *Healthy People,* this initiative has been grounded in the notion that setting objectives and monitoring progress can motivate action. As it prepares to produce objectives for the next decade, HHS seeks to ensure that they are scientifically valid, relevant, and sustainable. The objectives should be produced though a process that fosters the cooperation and commitment of both the public and private sectors.

The Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020 is established to provide advice and assistance to the Secretary and HHS in the development of health promotion and disease prevention objectives to improve the health of Americans by 2020. The Committee shall advise the Secretary regarding national health promotion and disease prevention initiatives, in particular the work to develop goals and objectives to improve the health status and reduce health risks for Americans. The Committee shall be charged to: Provide to the Secretary advice and consultation to facilitate the process of developing and implementing national health promotion and disease prevention goals and objectives; and provide advice to the Secretary about the initiatives to occur during the initial implementation phase of the goals and objectives.

The Committee will convene to meet, at a minimum, one time per year. It is expected to begin meeting by December 2007. Pursuant to the requirements of the Federal Advisory Committee Act, the meetings will be open to the public except as determined otherwise by the Secretary or designee, in keeping with the guidelines under Government in the Sunshine Act, 5 U.S.C. 552b(c).

Individuals selected for appointment to the Committee shall be appointed to serve for the duration of the Committee. Unless renewed, the Committee will terminate two years from the date the Committee charter is filed. Committee members will be paid travel and per diem expenses in accordance with standard travel regulations, but will not receive compensation for their service.

Prospective members of the Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020 should be knowledgeable of current scientific research in health promotion, disease prevention, and public health benchmarking and be respected experts in their fields. They should be familiar with the purpose and use of Healthy People or similar indicator sets and have demonstrated interest in the public's health and well-being through their work, research, and/or educational endeavors. Expertise is sought in specific specialty areas related to health promotion or disease prevention, including but not limited to: Health policy, state and local public health, business, outcomes research, health economics, health communications, special populations, biostatistics, international health, and epidemiology from a variety of public, private, foundation, and academic settings.

Nominations: HHS will consider nominations for Committee membership of individuals qualified to carry out the above-mentioned tasks. The following information should be included in the package of material submitted for each individual being nominated for consideration: (1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (i.e., specific attributes which qualify the nominee for service in this capacity), and a statement that the nominee is willing to serve as a member of the Committee; (2) the nominator's name, address, daytime telephone number, and electronic mail address, and the address, daytime telephone number, and electronic mail address of the individual being nominated; and (3) a current copy of the nominee's curriculum vitae. The names of Federal employees should not be nominated for consideration of appointment to this Committee.

Individuals can nominate themselves for consideration of appointment to the Committee. All nominations must include the required information. Incomplete nominations will not be processed for consideration.

Equal opportunity practices, in line with HHS policies, will be followed in all membership appointments to the Committee. To ensure that recommendations of the Committee take into account the needs of the diverse groups served by HHS, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

The Standards of Ethical Conduct for Employees of the Executive Branch are applicable to individuals who are appointed as members of Federal advisory committees. Individuals appointed to serve as members of Federal advisory committees are classified as special Government employees (SGEs). SGEs are Government employees for the purposes of the conflict of interest laws. Therefore, individuals appointed to serve as members of the Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020 are subject to an ethics review. The ethics review is conducted to determine if the individual has any interest and/or activities in the private sector that may conflict with performance of their official duties as a member of the Committee. Individuals appointed to serve as members of the Committee will be required to disclose information regarding financial holdings, consultancies and research grants and/or contracts.

Dated: August 16, 2007.

Penelope Slade Royall,

Deputy Assistant Secretary for Health (Disease Prevention and Health Promotion), Department of Health and Human Services.

[FR Doc. E7–16471 Filed 8–20–07; 8:45 am]

BILLING CODE 4150–32–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 16th meeting of the American Health Information Community in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.) The American Health Information Community will advise the Secretary and recommend specific actions to achieve a common interoperability framework for health information technology (IT).

DATES: September 18, 2007, from 8:30 a.m. to 2 p.m. (EDT).

ADDRESSES: Hubert H. Humphrey Building (200 Independence Avenue, SW., Washington, DC 20201), Conference Room 800.

FOR FURTHER INFORMATION: Visit *http://www.hhs.gov/healthit./ahic.html.*

SUPPLEMENTARY INFORMATION: The meeting will include a presentation by the Population Health/Clinical Care Connections Workgroup on Recommendations; an update on the Nationwide Health Information Network Trial Implementation; a presentation from the State Alliance/National Governors Association; and a report from the AHIC Standing Committee of the Whole on the AHIC Successor.

A Web cast of the Community meeting will be available on the NIH Web site at: *http://www.videocast.nih.gov/.*

If you have special needs for the meeting, please contact (202) 690–7151.

Dated: August 15, 2007.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 07–4085 Filed 8–20–07; 8:45 am]

BILLING CODE 4150–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect, (NTFFASFAE)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announce the following meeting for the aforementioned committee:

Times and Dates: 9 a.m.–5 p.m., September 12, 2007. 9 a.m.–12:30 p.m., September 13, 2007.

Place: CDC, 1600 Clifton Road, NE., Global Communications Center, Building 19, Room 232, Auditorium B, Atlanta, Georgia 30333.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 80 people.

Purpose: The Secretary is authorized by the Public Health Service Act, section 399G, (42 U.S.C. 280f, as added by Pub. L. 105–392) to establish a National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect to: (1) Foster coordination among all governmental agencies, academic bodies and community groups that conduct or support Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effect (FAE) research, programs and surveillance; and (2) to otherwise meet the general needs of populations actually or potentially impacted by FAS and FAE.

Matters To Be Discussed: Agenda items include: Deliberations on two Task Force products: (1) Report on effective strategies to prevent alcohol-exposed pregnancies and (2) Research and Policy report on Fetal Alcohol Spectrum Disorders; discussions regarding the dissemination of Task Force products; updates from the Interagency Coordinating Committee on Fetal Alcohol Syndrome, the CDC and other Federal agencies, and liaison representatives; and discussion of possible collaborative activities after the Task Force sunsets in October 2007.

Agenda items are subject to change as priorities dictate.

Additional Information: In order to expedite the security clearance process at the CDC Roybal Campus located on Clifton Road, attendees are required to register online at *http://www.cdc.gov/ncbddd/fas/taskforce.htm.* Please complete all required fields before submitting your registration and submit no later than September 3, 2007.

Please Note: Non-U.S. citizens are required to complete the registration form online, as described above, and also to complete the ''Access Request Form'' no later than August 29, 2007. To receive an access request form, send an e-mail to Ms. Vowell at *jvowell@cdc.gov.*

For Further Information Contact: Mary Kate Weber, M.P.H., Designated Federal Official, National Center on Birth Defects and Developmental Disabilities, CDC, 1600 Clifton Road, NE., M/S E86, Atlanta, Georgia 30333, Telephone 404/498–3926, Fax 404/498–3550.

The Director, Management Analysis and Services Office, has been delegated the authority to sign Federal Register notices pertaining to announcements of meetings and other committee management activities for both the CDC and the Agency for Toxic Substance and Disease Registry.

Dated: August 14, 2007.

Elaine L. Baker,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. E7–16292 Filed 8–20–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Proposed Projects

Title: DHHS/ACF/ASPE/DOL Enhanced Services for the Hard-to-Employ Demonstration and Evaluation: Rhode Island 36-Month Data Collection.

OMB No.: New Collection.

Description: The Enhanced Services for the Hard-to-Employ Demonstration and Evaluation Project (HtE) seeks to learn what services improve the employment prospects of low-income persons who face serious obstacles to steady work. The project is sponsored by the Office of Planning, Research and Evaluation (OPRE) within the Administration for Children and Families (ACF) and the Office of the Assistant Secretary for Planning and Evaluation (ASPE), both within the U.S. Department of Health and Human Services (HHS), and the U.S. Department of Labor (DOL).

The HtE project is a multi-year, multi-site evaluation that employs and experimental longitudinal research design to test four strategies aimed at promoting employment among hard-to-employ populations. The four include: (1) Intensive care management and job services program for Rhode Island Medicaid recipients with serious depression; (2) job readiness training, worksite placements, job coaching, job development and other training opportunities for recent parolees in New York City; (3) pre-employment services and transitional employment for long-term participants receiving Temporary Assistance for Needy Families (TANF); and (4) two-generational Early Head Start (EHS) services providing enhanced self-sufficiency services for parents, parent skills training, and high-quality child care for children in low-income families in Kansas and Missouri.

The purpose of this document is to request public comment on the proposed 36-month participant survey in Rhode Island for participating parents and their children.

The follow-up survey and direct child assessments at the 36-month follow-up in Rhode Island will be used for the following purposes: Detecting the long-term effects of a telephonic care management intervention on parents' depression and general health, as well as their employment, income, and earnings; detecting effects of a telephonic care management intervention for parents' depression on parents' parenting and on children's health, behavior, and development over time, and determining the extent to which long-term intervention effects on children's development can be attributed to changes in their parents' depressive symptomatology that result from the intervention.

Respondents: The respondents to these follow-up surveys will be low-income parents from the Rhode Island site currently participating in the HtE Project, and some of their children.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
RI 36-month, parent survey	400	1	.75	300.00
RI 36-month, youth survey	298	1	.75	223.50
RI 36-month, direct child assessment	164	1	.75	123.00

Estimated Total Annual Burden Hours: 646.50.

Additional Information

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of informatino between 30 and 60 days after publication of this document in the **Federal Register.** Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–6974, Attn: Desk Officer for the Administration for Children and Families.

Dated: August 15, 2007.

Brendan Kelly,

OPRE Reports Clearance Officer.

[FR Doc. 07–4062 Filed 8–20–07; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Communities Empowering Youth (CEY) Program Evaluation.

OMB No.: New Collection.

Description: This proposed information collection activity is to obtain information from Communities Empowering Youth (CEY) grantee agencies and the faith-based and community organizations working in partnership with them. The CEY evaluation is an important opportunity to examine the outcomes achieved through this component of the Compassion Capital Fund in meeting its objective of improving the capacity of faith-based and community organizations and the partnerships they form to increase positive youth development and address youth violence, gang involvement, and child abuse/neglect. The evaluation will be designed to assess changes and improvements in the structure and functioning of the partnership and the organizational capacity of each participating organization.

Respondents: CEY grantees and the faith-based and community organizations that are a part of the partnership approved under the CEY grant.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Indicators of Organizations Capacity Survey	800	1	.75	600

Estimated Total Annual Burden Hours: 600.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All request should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov*.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, FAX: 202–395–6974, Attn: Desk Officer for ACF.

Dated: August 15, 2007.

Brendan Kelly,

Reports Clearance Officer.

[FR Doc. 07–4063 Filed 8–20–07; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Proposed Projects

Title: DHHS/ACF/ASPE/DOL Enhanced Services for the Hard-to-Employ Demonstration and Evaluation: Philadelphia 36-Month Data Collection.

OMB No.: New Collection.

Description: The Enhanced Services for the Hard-to-Employ Demonstration and Evaluation Project (HtE) seeks to learn what services improve the employment prospects of low-income persons who face serious obstacles to steady work. The project is sponsored by the Office of Planning, Research and

Evaluation (OPRE) within the Administration for Children and Families (ACF) and the Office of the Assistant Secretary for Planning and Evaluation (ASPE), both within the U.S. Department of Health and Human Services (HHS), and the U.S. Department of Labor (DOL).

The HtE project is a multi-year, multi-site evaluation that employs an experimental longitudinal research design to test four strategies aimed at promoting employment among hard-to-employ populations. The four include: (1) Intensive care management and job services program for Rhode Island Medicaid recipients with serious depression; (2) job readiness training, worksite placements, job coaching, job development and other training opportunities for recent parolees in New York City; (3) pre-employment services and transitional employment for long-term participants receiving Temporary Assistance for Needy Families (TANF); and (4) two-generational Early Head Start (EHS) services providing enhanced self-sufficiency services for parents, parent skills training, and high-quality child care for children in low-income families in Kansas and Missouri.

The purpose of the current document is to request public comment on the 36-month participant survey in Philadelphia. The research team plans to collect participant-reported surveys assessing participants' employment, education and economic outcomes, participation in employment and training services, receipt of benefits and services such as food stamps and mental health services, housing and household information, health and health care coverage, child care, and child outcomes.

The follow-up survey at the 36-month follow-up in Philadelphia will be used for the following purposes: To study the extent to which pre-employment services and transitional employment affect employment, earnings, income, and welfare dependence of low-income TANF recipients; to examine the impacts of these services on participants' health, receipt of benefits such as food stamps, Medicaid, and child-care subsidies, and participation in services such as substance abuse treatment and mental health services; and to collect data on a wider range of outcomes measures than is available through welfare, Medicaid, Food Stamps, Social Security, and Unemployment Insurance records.

The 36-month data collection effort draws heavily from the 15-month survey conducted in this site. Materials for the 15-month data collection effort were previously submitted to OMB and were approved (OMB Control No. 0970-0276).

Respondents: TANF recipients without a high school diploma and/or recipients who have received TANF for at least 12 months.

The fielded sample of the 36-month data collection effort will be all 1,944 participants in the two program groups and the control group of the HtE project in Philadelphia. The burden estimates below assume an 80 percent response rate of the fielded sample.

The annual burden estimates are detailed below, and the substantive content of each component will be detailed in the supporting statement attached to this 30-day notice.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Philadelphia 36-month participant survey	1,555	1	.75	1,116

Estimated Total Annual Burden Hours: 1,116.

Additional Information

Copies of the proposed collection of information may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–6974, Attn: Desk Officer for the Administration for Children and Families.

Dated: August 15, 2007.

Brendan Kelly,

OPRE Reports Clearance Officer.

[FR Doc. 07–4064 Filed 8–20–07; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: State Plan for Child Support under Title IV–D of the Social Security Act (OCSE–100 and OCSE–21–U4).

OMB No.: 0970–0017.

Description: The State plan preprint pages and amendments serve as a contract between the Office of Child Support Enforcement and State and Territory IV–D agencies. These State plan preprint pages and amendments outline the activities States and Territories will perform as required by law, in Section 454 of the Social Security Act, in order for States and Territories to receive Federal funds to meet the costs of child support enforcement.

Respondents: State and Territory IV–D Agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
State Plan (OCSE–100)	54	8	.5	216
State Plan Transmittal (OCSE–21–U4)	54	8	.25	108

Estimated Total Annual Burden Hours: 324.

SUPPLEMENTARY INFORMATION: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register.** Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–6974, Attn: Desk Officer for the Administration for Children and Families.

Dated: August 15, 2007.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 07–4081 Filed 8–20–07; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Low Income Home Energy Assistance Program (LIHEAP) Grantee Survey.

OMB No.: 0970–0076.

Description: The LIHEAP Grantee Survey is an annual data collection activity, which is sent to grantees of the 50 states and the District of Columbia administering the Low Income Home Energy Assistance Program (LIHEAP). The survey is mandatory in order that national estimates of the sources and uses of LIHEAP funds can be calculated in a timely manner; a range can be calculated of State average LIHEAP benefits; and maximum income cutoffs for four-person households can be obtained for estimating the number of low-income households that are income eligible for LIHEAP under the State income standards.

The need for the above information is to provide the Administration and Congress with fiscal estimates in time for hearings about LIHEAP appropriations and program performance. The information also is included in the Department's annual LIHEAP Report to Congress. Survey information also will be posted on the Office of Community Services' LIHEAP website for access by grantees and other interested parties.

Respondents: 50 States and the District of Columbia.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
LIHEAP Grantee Survey	51	1	3.5	178.50

Estimated Total Annual Burden Hours: 178.50.

SUPPLEMENTARY INFORMATION: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register.** Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–6974, Attn: Desk Officer for the Administration for Children and Families.

Dated: August 15, 2007.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 07–4082 Filed 8–20–07; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2007N–0317]

Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance for Industry on Pharmacogenomic Data Submissions; Extension

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the

PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection resulting from recommendations to sponsors submitting or holding investigational new drugs (INDs), new drug applications (NDAs), or biologic licensing applications (BLAs) on what pharmacogenomic data should be submitted to the agency during the drug development process.

DATES: Submit written or electronic comments on the collection of information by October 22, 2007.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.fda.gov/dockets/ecomments* or *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of the Chief Information Officer (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (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 on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Guidance for Industry on Pharmacogenomic Data Submissions (OMB Control Number 0910–0557—Extension)

The guidance provides recommendations to sponsors submitting or holding INDs, NDAs, or BLAs on what pharmacogenomic data should be submitted to the agency during the drug development process. Sponsors holding and applicants submitting INDs, NDAs, or BLAs are subject to FDA requirements for submitting to the agency data relevant to drug safety and efficacy (§§ 312.22, 312.23, 312.31, 312.33, 314.50, 314.81, 601.2, and 601.12).

Description of Respondents: Sponsors submitting or holding INDs, NDAs, or BLAs for human drugs and biologics.

Burden Estimate: The guidance interprets FDA regulations for IND, NDA, or BLA submissions, clarifying when the regulations require pharmacogenomics data to be submitted and when the submission of such data is voluntary. The pharmacogenomic data submissions described in the guidance that are required to be submitted to an IND, NDA, BLA, or annual report are covered by the information collection requirements under parts 312, 314, and 601 (21 CFR parts 312, 314, and 601) and are approved by OMB under control numbers 0910–0014 (part 312—INDs); 0910–0001 (part 314—NDAs and annual reports); and 0910–0338 (part 601—BLAs).

The guidance distinguishes between pharmacogenomic tests that may be considered valid biomarkers appropriate for regulatory decisionmaking, and other, less well developed exploratory tests. The submission of exploratory pharmacogenomic data is not required under the regulations, although the agency encourages the voluntary submission of such data.

The guidance describes the voluntary genomic data submission (VGDS) that can be used for such a voluntary submission. The guidance does not recommend a specific format for the VGDS, except that such a voluntary submission be designated as a VGDS. The data submitted in a VGDS and the level of detail should be sufficient for FDA to be able to interpret the information and independently analyze the data, verify results, and explore possible genotype-phenotype correlations across studies. FDA does not want the VGDS to be overly burdensome and time-consuming for the sponsor.

FDA has estimated the burden of preparing a voluntary submission described in the guidance that should be designated as a VGDS. Based on FDA's experience with this guidance over the past few years, and on FDA's familiarity with sponsors' interest in submitting pharmacogenomic data during the drug development process, FDA estimates that approximately 8 sponsors will submit approximately 10 VGDSs and that, on average, each VGDS will take approximately 50 hours to prepare and submit to FDA.

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

	Number of Respondents	Number of Responses per Respondent	Total Annual Responses	Hours per Response	Total Hours
Voluntary Genomic Data Submissions	8	1.25	10	50	500

[1] There are no capital costs or operating and maintenance costs associated with this collection.

Dated: August 15, 2007.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E7–16470 Filed 8–20–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Medical Devices 101: An Educational Forum; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

SUMMARY: The Food and Drug Administration (FDA), Office of Regulatory Affairs (ORA), Southwest Regional Office (SWRO), in cosponsorship with the FDA Medical Device Industry Coalition (FMDIC), is announcing a public workshop entitled ''Medical Devices 101: An Educational Forum.'' This public workshop, presented previously on February 9, 2007, is intended to provide an overview on FDA's medical device requirements to entrepreneurs, startup companies, and small businesses.

Date and Time: The public workshop will be held on October 26, 2007, from 8 a.m. to 5 p.m.

Location: The public workshop will be held at the FDA SWRO, 4040 North Central Expressway, 9th floor conference room, Dallas, TX.

Contact Person: David Arvelo, Food and Drug Administration, 4040 North Central Expressway, suite 900, Dallas, TX 75204, 214–253–4952, FAX: 214–253–4970, e-mail: *oraswrsbr@fda.hhs.gov*.

Registration: FMDIC has a $75 early registration fee. The early registration fee for government officials is $50 and for students is $25 with positive identification. Early registration ends October 12, 2007. After October 12, 2007, registration is $100 for the public at large, $75 for government officials, and $50 for students with positive identification. To register online, please visit *http://www.fmdic.org/*. As an alternative, you may mail your registration information including name, title, organization or company name, physical address, telephone and fax numbers, and e-mail address, along with a check or money order for the appropriate amount payable to the FMDIC, to William Hyman, Texas A&M University, Department of Biomedical Engineering, 3120 TAMU, College Station, TX 75843–3120. The available space will be filled in order of receipt of registration with appropriate fees. Seats are very limited; please submit registration as soon as possible. Those accepted into the course will receive confirmation. Registration will close after the course is filled. Registration at the site may be available based on space availability on the day of the public workshop beginning at 8 a.m. The cost of registration at the site is $99 payable to FMDIC. The registration fee will be used to offset expenses associated with this event including lunch, refreshments, and course materials.

If you require special accommodations due to a disability, please contact David Arvelo (see *Contact Person*) at least 21 days in advance.

Transcripts: Transcripts of the public workshop will not be available due to the format of this workshop. Course handouts may be requested in writing from the Freedom of Information Office (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm. 6–30, Rockville, MD 20857, approximately 15 working days after the public workshop at an estimated cost of 10 cents per page.

SUPPLEMENTARY INFORMATION: The workshop, previously presented on February 9, 2007 (72 FR 968, January 9, 2007), is being held in response to the interest in the topics discussed from small medical device entrepreneurs and startup manufacturers in the Dallas District area. FDA presents this workshop in cosponsorship with FMDIC to help achieve objectives set forth in section 406 of the Food and Drug Administration Modernization Act of 1997 (21 U.S.C. 393), which include working closely with stakeholders and maximizing the availability and clarity of information to stakeholders and the public. This is also consistent with the purposes of FDA's Regional Small Business Program, which are in part to respond to industry inquiries, develop educational materials, and sponsor workshops and conferences to provide firms, particularly small businesses, with firsthand working knowledge of FDA's requirements and compliance policies. This workshop is also consistent with the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), as an outreach activity by Government agencies to small businesses.

The goal of the workshop is to present information that will enable manufacturers and regulated industry to better comply with the Medical Device Quality System Regulation. The following topics will be broadly covered at the workshop: (1) Medical device classification; (2) establishment registration; (3) device listing; (4) premarket notification; (5) premarket approval; (6) quality system regulation; (7) labeling; (8) recalls, removals, and corrections; (9) medical device reporting; (10) tracking; and (11) postmarket surveillance.

Dated: August 15, 2007.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E7–16375 Filed 8–20–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget, in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). To request a copy of the clearance requests submitted to OMB for review, call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

Proposed Project: Data Collection Tool for the Black Lung Clinics Program: (OMB No. 0915–0292) Revision

The Office of Rural Health Policy (ORHP), Health Resources and Services Administration, conducts an annual data collection of user information for the Black Lung Clinics Program. The purpose of the Black Lung Clinics Program is to improve the health status of coal workers by providing services to minimize the effects of respiratory and pulmonary impairments of coal miners. Grantees provide specific diagnostic and treatment procedures required in the management of problems associated with black lung disease which improves the quality of life of the miner and reduces economic costs associated with morbidity and mortality arising from pulmonary diseases. The purpose of collecting this data is to provide HRSA with information on how well each grantee is meeting the needs of active and retired miners in the funded communities.

Data from the annual report will provide quantitative information about

the programs, specifically: (a) The characteristics of the patients they serve (gender, age, disability level, occupation type); (b) the characteristics of services provided (medical, non-medical, or counseling); (c) number of patients served and visits conducted (encounters); and (d) the improvement in pulmonary function of patients (pulmonary rehabilitation). This assessment will provide data useful to the program and will enable HRSA to provide data required by Congress under the Government Performance and Results Act of 1993. It will also ensure that the organizations funded have demonstrated a need for services in their communities and that funds are being effectively used to provide services to meet those needs.

The estimated burden is as follows:

Form name	Number of respondents	Hours per response	Total burden hours
Database	15	20	300

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to the desk officer for HRSA, either by e-mail to *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. Please direct all correspondence to the ''attention of the desk officer for HRSA.''

Dated: August 15, 2007.

Alexandra Huttinger,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. E7–16368 Filed 8–20–07; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Correction of total burden hours.

SUMMARY: The Health Resources and Services Administration published an Agency Information Collection document in the **Federal Register** of July 31, 2007 (FR Doc. E7–14680), on page 41759, regarding Bureau of Primary Health Care (BPHC) Uniform Data System (OMB No. 0915–0193). In the burden table, the total burden hours published are incorrect.

Correction

In the **Federal Register** issue of July 31, 2007, FR Doc. E7–14680), on page 41759, correct the Total Burden Hours as follows:

Type of report	Total burden hours
Universal report	58,104
Grant report	2,700
Total	60,804

Dated: August 15, 2007.

Alexandra Huttinger,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. E7–16370 Filed 8–20–07; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget (OMB), in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). To request a copy of the clearance requests submitted to OMB for review, call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

Proposed Project: National Practitioner Data Bank and Healthcare Integrity and Protection Data Bank Market Surveys and Survey of Use of Data Bank Information by Queriers: NEW

The purpose of these surveys is to conduct a follow-up study to the National Practitioner Data Bank (NPDB) User and Non-User Surveys of 2001. In addition, Healthcare Integrity and Protection Data Bank (HIPDB) users and non-sers will be included in this study. The study will evaluate the effectiveness of the NPDB and the HIPDB as flagging systems, sources of information, and decisionmaking tools. It will also determine user satisfaction with the process, use, and information provided by the NPDB and HIPDB.

Surveys will be administered to entities that report to and/or query the NPDB and HIPDB, including users who query either the NPDB and/or HIPDB and who receive a ''match'', i.e. copies of adverse actions concerning a queried practitioner. A sample of Queriers who received a matched response will be surveyed about the information received. NPDB and HIPDB non-users will also be surveyed. Eligible NPDB and HIPDB users will be asked to complete a Web-based Internet survey or a computer-assisted telephone interview (CATI). NPDB and HIPDB non-users will complete either a Web or CATI, or will be transferred to an interactive voice response (IVR) system during the CATI to complete the survey.

Data gathered from the survey will be compared with similar information from previous surveys of users and non-users and will provide HRSA with the information necessary to improve the usability of the NPDB and HIPDB.

The estimate of burden is as follows:

Respondents	Respondent description	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden (hours)
NPDB Users Group Survey	Malpractice Payers	228	1	228	.25	57
	Licensing Boards	90	1	90	.25	22.5
	Hospitals (Reporting)	466	1	466	.25	116.5
	Hospitals (Querying)	994	1	994	.25	248.5
	MCOs	900	1	900	.25	225

Respondents	Respondent description	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden (hours)
	Other HCEs (Reporting)	57	1	57	.25	14.25
	Other HCEs (Querying)	976	1	976	.25	244
HIPDB Users Group Survey.	Licensing Boards	231	1	231	.25	57.75
	Government Hospitals	390	1	390	.25	97.5
	MCOs	580	1	580	.25	145
	Other HCEs	260	1	260	.25	65
NPDB Matched Response Survey.	Licensing Boards	55	3	165	.1	16.5
	Hospitals	984	3	2952	.1	295.2
	MCOs	848	3	2544	.1	254.4
	Other HCEs	904	3	2712	.1	271.2
HIPDB Matched Response Survey.	Licensing Boards	43	3	129	.1	12.9
	Hospitals	202	3	606	.1	60.6
	MCOs	432	3	1296	.1	129.6
	Other HCEs	87	3	261	.1	26.1
NPDB Non-User Survey	Licensing Boards	213	1	213	.16	34.1
	MCOs	341	1	341	.16	54.6
	Other HCEs	881	1	881	.16	141
HIPDB Non-User Survey	Licensing Boards	30	1	30	.16	4.8
	MCOs	411	1	411	.16	76.3
	Other HCEs	974	1	974	.16	155.8
Total		11,577		18,687		2,826.1

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to the desk officer for HRSA, either by e-mail to *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. Please direct all correspondence to the ''attention of the desk officer for HRSA.''

Dated: August 15, 2007.

Alexandra Huttinger,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. E7–16371 Filed 8–20–07; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Council on Graduate Medical Education; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92–463), notice is hereby given of the following meeting:

Name: Council on Graduate Medical Education (COGME).

Dates and Times: September 18, 2007, 8:30 a.m.–5:15 p.m.; and September 19, 2007, 8:30 a.m.–3:15 p.m.

Place: Crowne Plaza Silver Spring, 8777 Georgia Avenue, Silver Spring, Maryland 20910.

Status: The Meeting Will Be Open to the Public.

Agenda: On The Morning Of September 18, Following The Welcoming Remarks From The Cogme Chair, the Executive Secretary of COGME, and Health Resources and Services Administration senior management, there will be presentations of comments and thoughts from selected Associations on COGME's two draft reports, *Enhancing GME Flexibility* and *New Paradigms for Physician Training for Improving Access to Healthcare.* Following Council discussions, at 1:30 p.m. there will be a breakout of Council members into the two draft writing groups for further report revisions. At 3:30 p.m., Barbara Chang, M.D. and Earl Reisdorff, M.D., the writing group chairs, will give their reports to the Council. There will be further discussion on writing group activities and reports. There will also be a discussion of further steps for producing reports.

On September 19, there will be a presentation on a George Washington University physician workforce planning initiative. There will be a panel presentation of activities of three advisory committees staffed within the Bureau of Health Professions; the Advisory Committee on Primary Care Medicine and Dentistry, the Advisory Committee on Interdisciplinary, Community Based Linkages, and the National Advisory Council on Nurse Education and Practice. Following will be an overview presentation on State Physician Workforce/GME Planning. The Council will conclude with a discussion of new issues/identification for future reports.

Agenda items are subject to change as priorities dictate.

For Further Information Contact: Jerald M. Katzoff, Executive Secretary, COGME, Division of Medicine and Dentistry, Bureau of Health Professions, Parklawn Building, Room 9A–21, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–6785.

Dated: August 15, 2007.

Alexandra Huttinger,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. E7–16373 Filed 8–20–07; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Multi-Ethnic Study of Atherosclerosis (Mesa) Event Surveillance

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Heart, Lung, and Blood Institute (NHLBI), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: Multi-Ethnic Study of Atherosclerosis (MESA) Event Surveillance. *Type of Information Request:* Renewal (OMB No. 0925–0493). *Need and Use of Information Collection:* The study, MESA, is identifying and quantifying factors associated with the presence and progression of subclinical cardiovascular disease (CVD)—that is, atherosclerosis and other forms of CVD that have not produced signs and symptoms. The findings provide important information on subclinical CVD in individuals of different ethnic backgrounds and provide information for studies on new interventions to prevent CVD. The aspects of the study that concern direct participant evaluation received a clinical exemption from OMB clearance (CE–99–11–08) in

April 2000. OMB clearance is being sought for the contact of physicians and participant proxies to obtain information about clinical CVD events that participants experience during the follow-up period. *Frequency of Response:* Once per CVD event. *Affected Public:* Individuals. *Types of Respondents:* Physicians and selected proxies of individuals recruited for MESA. The annual reporting burden is as follows: *Estimated Number of Respondents:* 550; *Estimated Number of Responses per Respondent:* 1.0; *and Estimated Total Annual Burden Hours Requested:* 36.7.

There are no capital, operating, or maintenance costs to report.

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Physicians	250	1.0	0.20	16.7
Participant proxies	300	1.0	0.20	20
Total	550	1.0	0.20	36.7

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information will have practical utility; (2) The accuracy of the agency's estimate of burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of data collection plans and instruments, contact Dr. Jean Olson, Division of Prevention and Population Sciences, NHLBI, NIH, II Rockledge Centre, 6701 Rockledge Drive, Suite 10018, MSC # 7936, Bethesda, MD 20892–7936, or call non-toll-free number 301–435–0397, or e-mail your request, including your address to: *olsonj@nhlbi.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: August 9, 2007.

Michael Lauer,

Chief, Division of Prevention and Population Sciences, NHLBI, National Institutes of Health.

Approved: August 9, 2007.

Suzanne Freeman,

NHLBI Project Clearance Officer, National Institutes of Health.

[FR Doc. E7–16402 Filed 8–20–07; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Prophylactic Vaccines and Therapeutic Monoclonal Antibodies Against Influenza

Description of Technology: This technology describes development of H5N1 influenza vaccine candidates in which mutations have been introduced to increase affinity of the hemagglutinin (HA) for the sialic acid receptor found in humans, which have a different sialic acid linkage than the corresponding avian receptor. These mutations could therefore result in a higher immune response in vaccines, producing a more robust response than other H5N1 vaccine candidates that retain their avian receptor preferences. These mutations also changed antibody-sensitivity of the vaccine candidates. The H5 modifications can be expressed from DNA or adenoviral vectors, or the proteins themselves can be administered. Additionally, these mutated HAs can be used to develop therapeutic monoclonal antibodies. The technology describes three (3) unique monoclonal antibodies that react with wild-type H5, wild-type H5 and mutant HA equivalently, and the mutant HA, respectively.

Applications: Prophylactic influenza vaccine; Therapeutic antibodies.

Inventors: Gary J. Nabel *et al.* (VRC/NIAID).

Patent Status: U.S. Patent Application No. 60/850,761 filed 10 Oct 2006 (HHS Reference No. E–306–2006/0–US–01).

U.S. Patent Application No. 60/860,301 filed 20 Nov 2006 (HHS Reference No. E–306–2006/1–US–01).

U.S. Patent Application No. 60/920,874 filed 30 Mar 2007 (HHS Reference No. E–306–2006/2–US–01).

U.S. Patent Application No. 60/921,669 filed 02 Apr 2007 (HHS Reference No. E–306–2006/3–US–01).

Development Status: Animal (mouse) data available.

Licensing Status: Available for licensing.

Licensing Contact: Susan Ano, Ph.D.; 301/435–5515; *anos@mail.nih.gov.*

Antiviral Compounds With Broad Neutralization Capabilities

Description of Technology: The NIH is pleased to announce as available for licensing a technology that provides for novel antiviral compounds effective against a broad spectrum of viruses. The compounds utilize soluble phospholipases, exemplified by PLA_2–X and others, either alone or as a fusion protein with a viral binding polypeptide. These compositions are able to inactivate viruses through enzymatic degradation of the viral membrane without affecting target cells

of infection. The potential broad application of these compounds could address a significant health need for effective antivirals.

Applications: This technology provides compositions and methods for the treatment of viral infection and has human and veterinary applications.

Advantages: The compounds described by the current technology are not necessarily specific for a type of virus or viral strain like many currently available antiviral compounds, and therefore have broad therapeutic antiviral applications. Further, virions resistant to damage by antibody and complement have been shown to be lysed by compounds of the invention suggesting antiviral surveillance independent of a humoral immune response.

Development Status: Proof of concept in vitro studies using human cells have shown antiviral activity with viruses pseudotyped with envelope proteins from Ebola, HIV, Marburg and MoMuLV.

Inventors: Gary Nabel and Jae-Ouk Kim (VRC/NIAID).

Publication: J-O Kim *et al.* Lysis of human immunodeficiency virus type 1 by a specific secreted human phospholipase A_2. J Virol. 2007 Feb;81(3):1444–1450.

Patent Status: PCT Application No. PCT/US2007/004471 filed 21 Feb 2007 (HHS Reference No. E–013–2006/1–PCT–01).

Licensing Status: Available for exclusive or non-exclusive licensing.

Licensing Contact: Susan Ano, Ph.D.; 301/435–5515; *AnoS@mail.nih.gov*

Design of Multi-Functional RNA Nanoparticles and Nanotubes

Description of Invention: The characteristic function of nanoparticles is their ability to deliver drug across biological barriers to the target site while protecting the drugs from the biological environment until they reach the target site. The present invention provides polyvalent RNA nanostructures comprising RNA I inverse (RNA Ii) or RNA II inverse (RNA IIi) like motifs that have multiple positions available for conjugation of therapeutic, diagnostic or delivery agents. The nanoparticles of the invention do not induce significant immune response by themselves and are smaller than currently available nanoparticles and therefore allow for increased efficiency of administration. The nanoparticles of this invention have the ability to deliver one or more different therapeutic agents in a single particle. Further, the RNA nanoparticles are also capable of self-assembly into nanotubes of various shapes which offer potentially broad uses in medical implants, gene therapy, nanocircuits, scaffolds and medical testing.

Applications:

1. Use as diagnostic tool.
2. Use as drug delivery composition to treat various diseases or conditions.
3. Use in screening or identifying potential chemotherapeutic agents.
4. Use in riboswitch aptamers, ribozymes or beacons.
5. Use in nanocircuits, medical implants, gene therapy, scaffolds and medical testing.

Market: Broad application in various fields, such as therapeutics, drug delivery, diagnostics, provides a wide market potential.

Development Status: Early stage.

Inventors: Bruce A. Shapiro and Yaroslava G. Yingling (NCI).

Publication: YG Yingling and BA Shapiro. Computational Design of an RNA Hexagonal Nanoring and an RNA Nanotube. Nano Lett. 2007 Jul 6. Epub ahead of print,.doi 10.1021/nl070984r.

Patent Status: U.S. Provisional Application No. 60/810,283 filed 02 Jun 2006 (HHS Reference No. E–233–2006/0–US–01).

U.S. Provisional Application No. 60/918,181 filed 14 Mar 2007 (HHS Reference No. E–233–2006/1–US–01).

Licensing Status: Available for exclusive and non-exclusive licensing.

Licensing Contact: Robert M. Joynes J.D., M.S.; 301/594–6565; *joynesr@mail.nih.gov.*

Collaborative Research Opportunity: The National Cancer Institute's Nanobiology Program (*http://www-lecb.ncifcrf.gov/bshapiro/index.html*) is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize RNA nanostructures. Please contact John D. Hewes, Ph.D. at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

Methods for Preparing Complex Multivalent Immunogenic Conjugates

Description of Technology: Claimed in this application are novel methods for preparing complex multivalent immunogenic conjugates and conjugate vaccines. The multivalent conjugates and conjugate vaccines are synthesized by conjugating mixtures of more than one polysaccharide at a desired ratio of the component polysaccharides to at least one carrier protein using hydrazide chemistry. Because of the high efficiency of hydrazide chemistry in conjugation, the polysaccharides are effectively conjugated to the carrier protein(s) so that the resulting complex synthesized vaccine conjugate products, without requiring tedious and complicated purification procedures such as chromatography and/or ammonium sulfate precipitation, are efficacious in inducing antibodies in mice against each component polysaccharide. The methods claimed in this application simplify the preparation of multivalent conjugate vaccines by utilizing simultaneous conjugation reactions in a single reaction mixture or batch that includes at least two immunogenic-distinct polysaccharides. This single-batch simultaneous reaction eliminates the need for multiple parallel synthesis processes for each polysaccharide vaccine conjugate component as employed in conventional methods for making multivalent conjugate vaccines.

Application: Cost effective and efficient manufacturing of conjugate vaccines.

Inventors: Che-Hung Robert Lee (CBER/FDA).

Patent Status: PCT Application No. PCT/US2007/006627 filed 16 Mar 2007 (HHS Reference No. E–085–2005/0–PCT–02).

Licensing Status: Available for exclusive or non-exclusive licensing. The technology is not available for licensing in the field of use of multivalent meningitis vaccines.

Licensing Contact: Peter A. Soukas, J.D.; 301/435–4646; *soukasp@mail.nih.gov*.

Dated: August 13, 2007.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E7–16400 Filed 8–20–07; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

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for companies and may also be available for licensing.

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Methods of Glycosylation and Bioconjugation

Description of Technology: Eukaryotic cells express several classes of oligosaccharides attached to proteins or lipids. Animal glycans can be N-linked via beta-GlcNAc to Asn (N-glycans), O-linked via -GalNAc to Ser/Thr (O-glycans), or can connect the carboxyl end of a protein to a phosphatidylinositol unit (GPI-anchors) via a common core glycan structure. Beta (1,4)-galactosyltransferase I catalyzes the transfer of galactose from the donor, UDP-galactose, to an acceptor, N-acetylglucosamine, to form a galactose-beta (1,4)-N-acetylglucosamine bond, and allows galactose to be linked to an N-acetylglucosamine that may itself be linked to a variety of other molecules. Examples of these molecules include other sugars and proteins. The reaction can be used to make many types of molecules having great biological significance. For example, galactose-beta (1,4)-N-acetylglucosamine linkages are important for many recognition events that control how cells interact with each other in the body, and how cells interact with pathogens. In addition, numerous other linkages of this type are also very important for cellular recognition and binding events as well as cellular interactions with pathogens, such as viruses. Therefore, methods to synthesize these types of bonds have many applications in research and medicine to develop pharmaceutical agents and improved vaccines that can be used to treat disease.

The invention provides *in vitro* folding method for a polypeptidyl-alpha-N-acetylgalactosaminyltransferase (pp-GalNAc-T) that transfers GalNAc to Ser/Thr residue on a protein. The application claims that this *in vitro*-folded recombinant ppGalNAc-T enzyme transfers modified sugar with a chemical handle to a specific site in the designed C-terminal polypeptide tag fused to a protein. The invention provides methods for engineering a glycoprotein from a biological substrate, and methods for glycosylating a biological substrate for use in glycoconjugation. Also included in the invention are diagnostic and therapeutic uses.

Application: Enzymes and methods are provided that can be used to promote the chemical linkage of biologically important molecules that have previously been difficult to link.

Developmental Status: Enzymes have been synthesized and characterization studies have been performed.

Inventors: Pradman Qasba and Boopathy Ramakrishnan (NCI/SAIC).

Patent Status: U.S. Provisional Application No. 60/930,294 filed 14 May 2007 (HHS Reference No. E–204–2007/0–US–01).

Licensing Status: Available for exclusive or non-exclusive licensing.

Licensing Contact: Peter A. Soukas, J.D.; 301/435–4646; *soukasp@mail.nih.gov.*

Collaborative Research Opportunity: The National Cancer Institute is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize this technology. Please contact John D. Hewes, Ph.D. at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

Improved Bacterial Host for Production of Anthrax Toxin Proteins and Vaccines: *Bacillus anthracis* BH450

Description of Invention: Anthrax toxin has previously been made from various avirulent strains of *Bacillus anthracis*. The inventors have genetically engineered a new strain of *B. anthracis* with improved properties. The strain, designated BH450, is totally deficient in the ability to make spores and to produce a major extracellular protease designated Peptidase M4. The genetic lesions introduced are defined, true deletions, so there is no possibility of reversion. Inability to make spores assures that laboratories growing the strain will not become contaminated with the very stable anthrax spores. Inability to make peptidase M4 increases the stability of proteins such as anthrax toxin that are secreted to the culture medium.

Applications and Modality: B. anthracis vaccine/prophylactic and therapeutic studies.

Market: Research tool useful for biodefense/therapeutic studies.

Development Status: The technology is a research tool.

Inventors: Andrei Pomerantsev, Dana Hsu, Ramakrishnan Sitaraman, Craig Galloway, Violetta Kivovich, Stephen Leppla (NIAID).

Publication: AP Pomerantsev *et al.* Genome engineering in *Bacillus anthracis* using Cre recombinase. Infect Immun. 2006 Jan;74(1):682–693.

Patent Status: HHS Reference No. E–127–2007/0—Research Tool.

Licensing Status: This technology is not patented. The strain will be transferred through a Biological Materials License.

Licensing Contact: Peter A. Soukas, J.D.; 301/435–4646; *soukasp@mail.nih.gov.*

Collaborative Research Opportunity: The National Institute of Allergy and Infectious Diseases, Laboratory of Bacterial Diseases, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize *Bacillus anthracis* BH450 strain. Please contact Dr. Andrei P. Pomerantsev at phone 301–451–9817 and/or e-mail *apomerantsev@niaid.nih.gov* for more information.

Compositions and Methods for Increasing Recombinant Protein Yields Through the Modification of Cellular Properties

Description of Technology: This technology relates to compositions and methods for improving the growth characteristics of cells engineered to produce biologically active products such as antibodies or glycosylated proteins. Featured is a method that uses gene candidates (e.g., cdkl3, siat7e, or lama4), or their expressed or inhibited products in cell lines, such as Human Embryonic Kidney (including HEK–293), HeLa, or Chinese Hamster Ovary (CHO). The gene expression modulates growth characteristics, such as adhesion properties, of the cell lines thereby increasing recombinant protein yields and reducing product production costs.

Applications: This technology may be used to improve production of therapeutic and/or diagnostic compounds, including therapeutic proteins or monoclonal antibodies from mammalian cells. Optimization of mammalian cells for use as expression systems in the production of biologically active products is very difficult. For certain applications, anchorage-independent cell lines may be preferred, whereas for other applications, a cell line that adheres to a surface, e.g. is anchorage-dependent, may be preferable. This technology provides a method for identifying a gene whose expression modulates such cellular adhesion characteristics. This method thus leads to an increase in the

expression or yield of polypeptides, including therapeutic biologicals, such as antibodies, cytokines, growth factors, enzymes, immunomodulators, thrombolytics, glycosylated proteins, secreted proteins, and DNA sequences encoding such polypeptides and a reduction in the associated costs of such biological products.

Advantages: This technology offers the ability to improve yields and reduce the cost associated with the production of recombinant protein products through the selection of cell lines having: altered growth characteristics; altered adhesion characteristics; altered rate of proliferation; improvement in cell density growth; improvement in recombinant protein expression level.

Market: Biopharmaceuticals, including recombinant therapeutic proteins and monoclonal antibody-based products used for in vivo medical purposes and nucleic acid based medicinal products now represent approximately one in every four new pharmaceuticals on the market. The market size has been estimated at $33 billion in 2004 and is projected to reach $70 billion by the end of the decade. The list of approved biopharmaceuticals includes recombinant hormones and growth factors, mAB-based products and therapeutic enzymes as well as recombinant vaccines and nucleic acid based products.

Mammalian cells are widely used expression systems for the production of biopharmaceuticals. Human embryo kidney (including HEK–293) and Chinese hamster ovary (CHO) are host cell of choice. The genes identified in this technology (e.g., cdkl3, sia7e, or lama4) can be used to modify these important cell based systems.

This technology is ready for use in drug/vaccine discovery, production and development. The technology provides methods for identification of specific gene targets useful for altering the production properties of either existing cell lines to improve yields or with new cell lines for the production of therapeutic and or diagnostic compounds from mammalian cells.

Companies that are actively seeking production platforms based on mammalian cell lines that offer high efficiency, high throughput systems for protein production or analysis at lower cost and ease of scale-up would be potential licensors of this technology.

Development Status: Late Stage—Ready for Production.

Inventors: Joseph Shiloach (NIDDK), Pratik Jaluria (NIDDK).

Related Publication: P. Jaluria *et al.* Application of microarrays to identify and characterize genes involved in attachment dependence in HeLa cells. Metab Eng. 2006 Dec 13, Epub ahead of print, doi:10.1016/j.ymben.2006.12.001.

Patent Status: U.S. Provisional Application No. 60/840,381 filed 24 Aug 2006 (HHS Reference No. E–149–2006/0–US–01).

Licensing Status: Available for exclusive or non-exclusive licensing.

Licensing Contact: Peter A. Soukas, J.D.; 301/435–4646; *soukasp@mail.nih.gov*.

Collaborative Research Opportunity: The National Institute of Diabetes and Digestive and Kidney Diseases, Biotechnology Core Laboratory, is seeking parties interested in collaborative research projects directed toward the use of this technology with cells for drug and vaccine production and development, including growth optimization, production and product recovery processes. For more information, please contact Dr. Joseph Shiloach, *josephs@intra.niddk.nih.gov*, or Rochelle S. Blaustein at *Rochelle.Blaustein@nih.gov*.

Methods for Conjugation of Oligosaccharides or Polysaccharides to Protein Carriers Through Oxime Linkages Via 3-Deoxy-D-Manno-Octulsonic Acid

Description of Technology: This technology comprises new methods for the conjugation of O-specific polysaccharides/oligosaccharides (O-SP/OS) derived from bacterial lipooligosaccharides/lipopolysaccharides (LOS/LPS), after their cleavage from Lipid A, to carrier proteins, to serve as potential vaccines. Conjugation is performed between the carbonyl group on the terminal reducing end of the saccharide and the aminooxy group of a bifunctional linker bound further to the protein.

The inventors have carried out the reaction under mild conditions and in a short time resulting in binding 3-deoxy-D-manno-octulosonic acid (KDO) on the saccharide to the protein. These conjugates preserve the external non-reducing end of the saccharide, are recognized by antisera, and induce immune responses in mice to both conjugate components (i.e., the OS and the associated carrier protein).

Application: Cost effective and efficient manufacturing of conjugate vaccines.

Inventors: Joanna Kubler-Kielb (NICHD), Vince Pozsgay (NICHD), Gil Ben-Menachem (NICHD), Rachel Schneerson (NICHD), *et al.*

Patent Status: U.S. Provisional Application No. 60/832,448 filed 21 Jul 2006 (HHS Reference No. E–183–2005/0–US–01); PCT Patent Application filed 21 Jul 2007 (HHS Reference No. E–183–2005/0–PCT–02).

Licensing Status: Available for exclusive or non-exclusive licensing.

Licensing Contact: Peter A. Soukas, J.D.; 301/435–4646; *soukasp@mail.nih.gov.*

In Vitro Model for Hepatitis C Virion Production

Description of Technology: This invention provides an in vitro hepatitis C virus (HCV) replication system that is capable of producing viral particles in a culture medium. Hepatitis C is a major public health problem, the development of therapeutics for which has been hampered by a lack of a robust model system to study the complete viral life cycle. This invention provides a new model system for the complete replication cycle of hepatitis C virus and virion production, assembly and release. The model is useful for screening antiviral agents against HCV.

A full length HCV construct, CG1b of genotype 1b which is known to be infectious, was placed between two ribozymes designed to generate the exact 5′ and 3′ ends of HCV when cleaved. Using this system, HCV proteins and positive and negative RNA strands have been shown to reproduce intracellularly, and viral particles that resemble authentic HCV virions are produced and secreted into the culture medium.

The patent application includes claims directed toward the following: A construct comprising specific nucleic acid sequences including HCV genotype 1b, genotype 1a, genotype 2a or potentially other genotypes; a method for identifying a cell line that is permissive for infection with HCV; a method for propagating HCV in vitro; a method for screening agents capable of modulating HCV replication or activity; a method for testing the level of HCV replication or activity; a HCV vaccine comprising HCV virus particles.

Applications: The model offers a novel method for investigating the entire HCV life cycle including replication and pathogenesis and is useful for high-throughput antiviral screening. This technique may also be useful for making infectious particles that are useful in the production of HCV vaccines.

Advantages: This system provides a new, stable and efficient cell culture model to further study the life cycle and biology of HCV, and to test potential therapeutic targets for hepatitis C. This model has also been used to generate in cell culture HCV strains infectious for chimpanzees, the only experimental animal susceptible to infection with the

hepatitis C virus, a critical step in the development of new vaccines for Hepatitis C.

Market: Hepatitis C virus (HCV) chronically infects approximately 200 million people worldwide and increases the risk of developing cirrhosis and hepatocellular carcinoma. This technology would be useful for studying the HCV life cycle, screening for therapeutic agents against multiple HCV strains, including Genotype 1a, 1b and 2a, and the development of HCV vaccines. HCV genotypes 1 and 2 are the major genotypes with worldwide distribution; they are known to be associated with different clinical profiles and therapeutic responses. Hence, the model may be used to screen for varying levels of effectiveness of therapeutics against the major HCV genotypes.

Development Status: This technology is available for use in diagnostics, drug/vaccine discovery, production and development. Current work is directed toward studies into the HCV life cycle and replication and the pathogenesis of HCV screening for antiviral agents against multiple HCV strains. This model has been used to generate in cell culture HCV strains infectious for chimpanzees, the only experimental animal susceptible to infection with the hepatitis C virus, a critical step in the development of new vaccines for Hepatitis C. Future work may be directed toward the use of this system for development of vaccine candidates against HCV.

Inventors: T. Jake Liang and Theo Heller (NIDDK).

Related Publications:

1. Z. Hu *et al.* Altered proteolysis and global gene expression in hepatitis B virus X transgenic mouse liver. J Virol. 2006 Feb;80(3):1405–1413.

2. T. Heller *et al.* An *in vitro* model of hepatitis C virion production. Proc Natl Acad Sci USA. 2005 Feb 15;102(7):2579–2583.

Patent Status: PCT Application No. PCT/US2005/035487 filed 30 Sep 2005 (HHS Reference No. E–324–2004/3–PCT–01), based on: U.S. Provisional Application No. 60/615,301 filed 30 Sep 2004 (HHS Reference No. E–324–2004/0–US–01), now abandoned; U.S. Provisional Application No. 60/642,210 filed 06 Jan 2005 (HHS Reference No. E–324–2004/1–US–01), now abandoned; U.S. Provisional Application No. 60/720,692 filed 26 Sep 2005 (HHS Reference No. E–324–2004/2–US–01), now abandoned.

Licensing Status: Available for exclusive or non-exclusive licensing.

Licensing Contact: Peter A. Soukas, J.D.; 301/435–4646; *soukasp@mail.nih.gov*.

Collaborative Research Opportunity: The National Institute of Diabetes and Digestive and Kidney Diseases, Liver Diseases Branch, is seeking parties interested in collaborative research directed toward molecular strategies for vaccine and antiviral development, and animal models of viral hepatitis C. Please contact Dr. T. Jake Liang at 301–496–1721, *jliang@nih.gov* or Rochelle S. Blaustein at *Rochelle.Blaustein@nih.gov* for more information.

Monoclonal Antibodies Against Orthopoxviruses

Description of Invention: Concerns that variola (smallpox) virus might be used as a biological weapon have led to the recommendation of widespread vaccination with vaccinia virus. While vaccination is generally safe and effective for prevention of smallpox, it is well documented that various adverse reactions in individuals have been caused by vaccination with existing licensed vaccines. Vaccinia immune globulin (VIG) prepared from vaccinated humans has historically been used to treat adverse reactions arising from vaccinia immunization. However, VIG lots may have different potencies and carry the potential to transmit other viral agents.

Chimpanzee Fabs against the B5 and A33 outer extracellular membrane proteins of vaccinia virus were isolated and converted into complete mAbs with human gamma1 heavy chain constant regions. The two mAbs displayed high binding affinities to B5 and A33. The mAbs inhibited the spread of vaccinia virus as well as variola virus (the causative agent of smallpox) *in vitro,* protected mice from subsequent intranasal challenge with virulent vaccinia virus, protected mice when administered 2 days after challenge, and provided significantly greater protection than that afforded by VIG.

Application: Prophylactics or therapeutics against orthopoxviruses.

Developmental Status: Preclinical studies have been performed.

Inventors: Zhaochun Chen, Robert Purcell, Suzanne Emerson, Patricia Earl, Bernard Moss (NIAID).

Publications:

1. Z. Chen *et al.* Chimpanzee/human mAbs to vaccinia virus B5 protein neutralize vaccinia and smallpox viruses and protect mice against vaccinia virus. Proc Natl Acad Sci USA. 2006 Feb 7;103(6):1882–1887. Epub 2006 Jan 25.

2. Z. Chen *et al.* Characterization of chimpanzee/human monoclonal antibodies to the vaccinia A33 glycoprotein and its variola virus homolog in vitro and in a vaccinia mouse protection model. J Virol. 2007 Jun 20; Epub ahead of print, doi 10.1128/JVI.00906–07.

Patent Status: PCT Patent Application No. PCT/US2006/048832 filed 22 Dec 2006 (HHS Reference No. E–145–2004/3–PCT–01); PCT Patent Application No. PCT/US2006/048833 filed 22 Dec 2006 (HHS Reference No. E–145–2004/4–PCT–01).

Licensing Status: Available for exclusive or non-exclusive licensing.

Licensing Contact: Peter A. Soukas, J.D.; 301/435–4646; *soukasp@mail.nih.gov*

Collaborative Research Opportunity: The National Institute of Allergy and Infectious Diseases, Laboratory of Infectious Diseases, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize Chimpanzee/human neutralizing monoclonal antibodies against orthopoxviruses. Please contact Dr. Robert Purcell at 301–496 5090 for more information.

A Method With Increased Yield for Production of Polysaccharide-Protein Conjugate Vaccines Using Hydrazide Chemistry

Description of Technology: Current methods for synthesis and manufacturing of polysaccharide-protein conjugate vaccines employ conjugation reactions with low efficiency (about twenty percent). This means that up to eighty percent of the added activated polysaccharide (PS) is lost. In addition, inclusion of a chromatographic process for purification of the conjugates from unconjugated PS is required.

The present invention utilizes the characteristic chemical property of hydrazide groups on one reactant to react with aldehyde groups or cyanate esters on the other reactant with an improved conjugate yield of at least sixty percent. With this conjugation efficiency the leftover unconjugated protein and polysaccharide would not need to be removed and thus the purification process of the conjugate product can be limited to diafiltration to remove the by-products of small molecules. The new conjugation reaction can be carried out within one or two days with reactant concentrations between 1 and 25 mg/mL at PS/protein ratios from 1:2 to 3:1, at temperatures between 4 and 40 degrees Centigrade, and in a pH range of 5.5 to 7.4, optimal conditions varying from PS to PS.

Application: Cost effective and efficient manufacturing of conjugate vaccines.

Inventors: Che-Hung Robert Lee and Carl E. Frasch (CBER/FDA).

Patent Status: U.S. Patent Application No. 10/566,899 filed 01 Feb 2006, claiming priority to 06 Aug 2003 (HHS Reference No. E–301–2003/0–US–10); U.S. Patent Application No. 10/566,898 filed 01 Feb 2006, claiming priority to 06 Aug 2003 (HHS Reference No. E–301–2003/1–US–02); International rights available.

Licensing Status: Available for non-exclusive licensing.

Licensing Contact: Peter A. Soukas, J.D.; 301/435–4646; *soukasp@mail.nih.gov*.

Neutralizing Monoclonal Antibodies to Respiratory Syncytial Virus

Description of Technology: Respiratory syncytial virus (RSV) is the most common cause of bronchiolitis and pneumonia among infants and children under 1 year of age. Illness begins most frequently with fever, runny nose, cough, and sometimes wheezing. During their first RSV infection, between 25% and 40% of infants and young children have signs or symptoms of bronchiolitis or pneumonia, and 0.5% to 2% require hospitalization. Most children recover from illness in 8 to 15 days. The majority of children hospitalized for RSV infection are under 6 months of age. RSV also causes repeated infections throughout life, usually associated with moderate-to-severe cold-like symptoms; however, severe lower respiratory tract disease may occur at any age, especially among the elderly or among those with compromised cardiac, pulmonary, or immune systems.

This invention is a human monoclonal antibody fragment (Fab) discovered utilizing phage display technology. The neutralizing monoclonal antibody was isolated and its binding site was identified. Fab F2–5 is a broadly reactive fusion (F) protein-specific recombinant Fab generated by antigen selection from a random combinatorial library displayed on the surface of filamentous phage. In an in vitro plaque-reduction test, the Fab RSVF2–5 neutralized the infectivity of a variety of field isolates representing viruses of both RSV subgroups A and B. The Fab recognized an antigenic determinant that differed from the only other human anti-F monoclonal antibody (RSV Fab 19) described thus far. A single dose of 4.0 mg of Fab RSVF2–5/kg of body weight administered by inhalation was sufficient to achieve a 2000-fold reduction in pulmonary virus titer in RSV-infected mice. The antigen-binding domain of Fab RSVF2–5 offers promise as part of a prophylactic regimen for RSV infection in humans.

Application: Respiratory Syncytial Virus prophylaxis/therapeutic.

Development Stage: The antibodies have been synthesized and preclinical studies have been performed.

Inventors: Brian Murphy (NIAID), Robert Chanock (NIAID), James Crowe (NIAID), *et al.*

Publication: JE Crowe *et al.* Isolation of a second recombinant human respiratory syncytial virus monoclonal antibody fragment (Fab RSVF2–5) that exhibits therapeutic efficacy in vivo. J Infect Dis. 1998 Apr;177(4):1073–1076.

Patent Status: HHS Reference No. E–001–1996/0—U.S. and Foreign Rights Available.

Licensing Status: Available for exclusive or non-exclusive licensing.

Licensing Contact: Peter A. Soukas, JD; 301/435–4646; *soukasp@mail.nih.gov*.

Human Neutralizing Monoclonal Antibodies to Respiratory Syncytial Virus and Human Neutralizing Antibodies to Respiratory Syncytial Virus

Description of Technology: This invention is a human monoclonal antibody fragment (Fab) discovered utilizing phage display technology. It is described in Crowe *et al.*, Proc Natl Acad Sci USA. 1994 Feb 15;91(4):1386–1390 and Barbas *et al.*, Proc Natl Acad Sci USA. 1992 Nov 1;89(21):10164–10168. This MAb binds an epitope on the RSV F glycoprotein at amino acid 266 with an affinity of approximately 10^9 M^{-1}. This MAb neutralized each of 10 subgroup A and 9 subgroup B RSV strains with high efficiency. It was effective in reducing the amount of RSV in lungs of RSV-infected cotton rats 24 hours after treatment, and successive treatments caused an even greater reduction in the amount of RSV detected.

Applications: Research and drug development for treatment of respiratory syncytial virus.

Inventors: Robert M. Chanock (NIAID), Brian R. Murphy (NIAID), James E. Crowe Jr. (NIAID), *et al.*

Patent Status: U.S. Patent 5,762,905 issued 09 June 1998 (HHS Reference No. E–032–1993/1–US–01); U.S. Patent 6,685,942 issued 03 February 2004 (HHS Reference No. E–032–1993/1–US–02); U.S. Patent Application No. 10/768,952 filed 29 January 2004 (HHS Reference No. E–032–1993/1–US–03).

Licensing Status: Available for non-exclusive licensing.

Licensing Contact: Peter A. Soukas, JD; 301/435–4646; *soukasp@mail.nih.gov.*

Murine Monoclonal Antibodies Effective To Treat Respiratory Syncytial Virus

Description of Technology: Available for licensing through a Biological Materials License Agreement are the murine MAbs described in Beeler *et al.,* ''Neutralization epitopes of the F glycoprotein of respiratory syncytial virus: effect of mutation upon fusion function,'' J Virol. 1989 July;63(7):2941–2950. The MAbs that are available for licensing are the following: 1129, 1153, 1142, 1200, 1214, 1237, 1112, 1269, and 1243. One of these MAbs, 1129, is the basis for a humanized murine MAb (see U.S. Patent 5,824,307 to humanized 1129 owned by MedImmune, Inc.), recently approved for marketing in the United States. MAbs in the panel reported by Beeler *et al.* have been shown to be effective therapeutically when administered into the lungs of cotton rats by small-particle aerosol. Among these MAbs several exhibited a high affinity (approximately 10^9 M^{-1}) for the RSV F glycoprotein and are directed at epitopes encompassing amino acids 262, 272, 275, 276 or 389. These epitopes are separate, nonoverlapping and distinct from the epitope recognized by the human Fab of U.S. Patent 5,762,905 owned by The Scripps Research Institute.

Applications: Research and drug development for treatment of respiratory syncytial virus.

Inventors: Robert M. Chanock, Brian R. Murphy, Judith A. Beeler, and Kathleen L. van Wyke Coelingh (NIAID).

Patent Status: HHS Reference No. B–056–1994/1—Research Tool.

Licensing Status: Available for non-exclusive licensing under a Biological Materials License Agreement.

Licensing Contact: Peter A. Soukas, JD; 301/435–4646; *soukasp@mail.nih.gov*.

Dated: August 13, 2007.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E7–16401 Filed 8–20–07; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group, Subcommittee J—Population and Patient-Oriented Training.

Date: October 29–30, 2007.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin Arlington Gateway, 801 North Glebe Road, Arlington, VA 22203.

Contact Person: Ilda M. McKenna, PhD., Scientific Review Administrator, Research Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8111, Bethesda, MD 20892, 301–496–7481, *mckennai@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: August 13, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–4067 Filed 8–20–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Institute Special Emphasis Panel, September 26, 2007, 8 a.m. to September 27, 2007, 5 p.m., Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD, 20814 which was published in the **Federal Register** on July 31, 2007, 72 FR 41760.

The meeting notice is amended to reflect the change in the name of the committee from ''SPORE in Lymphoma, Prostate, Breast & Skin Cancers'' to ''SPORE in Lymphoma, Prostate, Breast, Skin, Leukemia & GI Cancers''. The meeting is closed to the public.

Dated: August 13, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–4068 Filed 8–20–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group, Subcommittee G—Education.

Date: September 11–12, 2007.

Time: 8 a.m. to 4:45 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Marriott Washingtonian Center, 204 Boardwalk Place, Gaithersburg, MD 20878.

Contact Person: Sonya Roberson, PhD., Scientific Review Administrator, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 8109, Bethesda, MD 20892, 301–594–1182, *robersos@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, R25 Special Emphasis Panel (SEP).

Date: September 11, 2007.

Time: 5 p.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Marriott Washingtonian Center, 204 Boardwalk Place, Gaithersburg, MD 20878.

Contact Person: Jeannette F. Korczak, PhD., Scientific Review Administrator, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Room 8115, Bethesda, MD 20892, 301–496–9767, *korczakj@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, Oral Bioavailability Enhancement.

Date: September 18, 2007.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6130 Executive Blvd., Conference Room C, Rockville, MD 20852. (Telephone Conference Call).

Contact Person: Thomas M. Vollberg, PhD., Scientific Review Administrator, Special Review And Logistics Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 7142, Bethesda, MD 20892, 301–594–9582, *vollbert@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, Clinical Studies SEP.

Date: October 3–4, 2007.

Time: 8 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Majed M. Hamawy, PhD., MBA, Scientific Review Administrator, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 8135, Bethesda, MD 20852, 301–496–7565, *mh101v@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, Clinical SEP 2.

Date: October 4, 2007.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Peter J. Wirth, PhD., Scientific Review Administrator, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8131, Bethesda, MD 20892–8328, 301–496–7565, *pw2q@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS).

Dated: August 13, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–4069 Filed 8–20–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Comprehensive Sickle Cell Center Review.

Date: September 5–7, 2007.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Crystal City Marriott, 1999 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Rina Das, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7200, Bethesda, MD 20892–7924, 301–435–0297, *dasr2@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: August 13, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–4071 Filed 8–20–07; 8:45am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, Methods Preventing and Shielding Long Life.

Date: September 12, 2007.

Time: 12 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway bldg. rm. 2c212, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Bita Nakhai, Ph.D., Scientific Review Administrator, Scientific Review Office, National Institute on Aging, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7701, *nakhaib@nia.nih.gov.*

Name of Committee: National Institute on Aging Initial Review Group, Biological Aging Review Committee, NIA–B Committee Review Meeting.

Date: October 10–11, 2007.

Time: 5 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Bita Nakhai, Ph.D., Scientific Review Administrator, Scientific Review Office, National Institute on Aging, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7701, *nakhaib@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel, Effect of Damage Autophagy and Aging.

Date: October 15–16, 2007.

Time: 5 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Bita Nakhai, Ph.D., Scientific Review Administrator, Scientific Review Office, National Institute on Aging, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7701, *nakhaib@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 13, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–4070 Filed 8–20–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Shared Instrumentation Grants for Microscopy.

Date: September 6, 2007.

Time: 11 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Avenue, NW., Washington, DC 20037.

Contact Person: Noni Byrnes, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5130, MSC 7840, Bethesda, MD 20892, 301–435–1023, *byrnesn@csr.nih.gov.*

Name of Committee: Oncological Sciences Integrated Review Group, Molecular Oncogenesis Study Section.

Date: September 24–25, 2007.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Miyako Hotel, 1625 Post Street, San Francisco, CA 94115.

Contact Person: Joanna M. Watson, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6208, MSC 7804, Bethesda, MD 20892, 301–435–1048, *watsonjo@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Anterior Eye Disease Member Conflicts.

Date: September 26, 2007.

Time: 2 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Biao Tian, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3166, MSC 7848, Bethesda, MD 20892, 301–402–4411, *tianbi@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS).

Dated: August 13, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–4072 Filed 8–20–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2411–07; DHS Docket No. USCIS–2007–0028]

RIN 1615–ZA50

Extension of the Designation of El Salvador for Temporary Protected Status; Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice of extension of temporary protected status designation of El Salvador.

SUMMARY: This Notice announces that the designation of El Salvador for Temporary Protected Status (TPS) has been extended for 18 months to March 9, 2009, from its current expiration date of September 9, 2007. This Notice also sets forth procedures necessary for nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) with TPS to re-register and to apply for an extension of their Employment Authorization Documents (EADs) for the additional 18-month period. Re-registration is limited to persons who have previously registered for TPS under the designation of El Salvador and whose application has been granted or remains pending. Certain nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.

Given the timeframes involved with processing TPS re-registrants, the Department of Homeland Security (DHS) recognizes that re-registrants may not receive a new EAD until after their current EAD expires on September 9, 2007. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of El Salvador for 6 months, through March 9, 2008, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended. New EADs with the March 9, 2009 expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for an EAD.

DATES: The extension of the TPS designation of El Salvador is effective September 10, 2007, and will remain in effect until 11:59 p.m. on March 9, 2009. The 60-day re-registration period begins August 21, 2007, and will remain in effect until October 22, 2007. To facilitate processing of applications, applicants are strongly encouraged to file as soon as possible after the start of the 60-day re-registration period beginning on August 21, 2007.

FOR FURTHER INFORMATION CONTACT: Shelly Hock, Status and Family Branch, Office of Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529, telephone (202) 272–1533. This is not a toll-free call. Further information will also be available at local USCIS offices upon publication of this Notice and on the USCIS Web site at *http://www.uscis.gov*. Note: the phone number provided here is solely for questions regarding this notice and the information contained herein. It is not for individual case status inquiries. Applicants seeking information about the status of their individual case can look up their case in Case Status Online available at the USCIS Web site listed above, or applicants may call the USCIS National Customer Service Center at 1–800–375–5283 (TTY 1–800–767–1833).

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

Act—Immigration and Nationality Act.
ASC—USCIS Application Support Center.
DHS—Department of Homeland Security.
DOS—Department of State.
EAD—Employment Authorization Document.
Secretary—Secretary of Homeland Security.
TPS—Temporary Protected Status.
USCIS—U.S. Citizenship and Immigration Services.

What authority does the Secretary of Homeland Security have to extend the designation of El Salvador for TPS?

Section 244(b)(1) of the Immigration and Nationality Act (Act), 8 U.S.C. 1254a(b)(1), authorizes the Secretary of Homeland Security (Secretary), after consultation with appropriate agencies of the Government, to designate a foreign state (or part thereof) for TPS. The Secretary may then grant TPS to eligible nationals of that foreign state (or aliens having no nationality who last habitually resided in that state). 8 U.S.C. 1254a(a)(1)(A).

At least 60 days before the expiration of the TPS designation, or any extension thereof, the Secretary, after consultations with appropriate agencies of the Government, must review the conditions in a foreign state designated for TPS to determine whether the conditions for the TPS designation continue to be met and, if so, the length of an extension. 8 U.S.C. 1254a(b)(3)(A), (C). If the Secretary determines that the foreign state no longer meets the conditions for the TPS designation, he must terminate the designation. 8 U.S.C. 1254a(b)(3)(B).

Why did the Secretary decide to extend the TPS designation of El Salvador?

On March 19, 2001, the Attorney General published a Notice in the **Federal Register**, at 66 FR 14214, designating El Salvador for TPS due to the devastation caused by a series of severe earthquakes. Subsequent to that date, the Attorney General and the Secretary have extended TPS for El Salvador four times, determining in each instance that the conditions warranting the designation continued to be met. 67 FR 46000 (July 11, 2002); 68 FR 42071 (July 16, 2003); 70 FR 1450 (Jan. 7, 2005); 71 FR 34637 (June 15, 2006). The most recent extension became effective on September 9, 2006, and is due to expire on September 9, 2007.

On February 1, 2007, the Government of El Salvador requested an extension of the TPS designation of El Salvador. Over the past year, DHS and the Department of State (DOS) have continued to review conditions in El Salvador. Based on this review, the Secretary has concluded that an 18-month extension is warranted because there continues to be a substantial, but temporary, disruption in living conditions in El Salvador resulting from

the earthquakes that struck the country in 2001, and El Salvador remains unable, temporarily, to adequately handle the return of its nationals, as is required for TPS designations based on environmental disasters. 8 U.S.C. 1254a(b)(1)(B).

There has been a great deal of reconstruction, and significant recovery has been realized in repairing the more than 2,300 kilometers of major roads and highways that were severely damaged by the earthquakes. By the end of July 2004, it was reported that all major roads appeared to have been reconstructed and were functioning. However, despite this progress, current conditions in El Salvador still reflect much of the destruction caused by the earthquakes, and other critical infrastructure remains damaged or destroyed, particularly in the area of health care.

In 2006, the Salvadoran government released its final assessment that 276,594 houses were affected by the 2001 earthquakes (166,529 destroyed and 110,065 damaged). At the end of 2004, USAID completed its earthquake reconstruction program, including the construction of 26,872 houses, and in February 2005, it was reported that in San Vicente and Cuscatlán, two of the most affected departments, 80 percent and 85 percent, respectively, of the damaged housing had been reconstructed. As of February 2007, the Salvadoran government stated that nearly 50 percent of the total number of houses destroyed or damaged by the earthquakes (136,988 houses), had been reconstructed or repaired. A housing program funded by the European Union, which was started in 2004 (5,500 houses), was almost complete, and a housing program funded by the Inter-American Development Bank (3,500 houses) was still underway, with a target date for completion set later in 2007.

Eight hospitals and 113 of the 361 health facilities, representing 55 percent of the country's capacity to deliver health services, were severely damaged by the earthquakes. Although the Ministry of Health reported that 95 percent of community health centers damaged or destroyed by the earthquakes had been rebuilt, reconstruction of damaged hospitals has faced repeated delays. As of February 2007, reconstruction of two of the country's seven main hospitals had begun, with reconstruction of the other five still in either the design or bidding stages. Completion of the reconstruction of these seven facilities is targeted for 2009.

Based upon this review, the Secretary finds, after consultation with the appropriate Government agencies, that the conditions that prompted the designation of El Salvador for TPS continue to be met. *See* 8 U.S.C. 1254a(b)(3)(A). There continues to be a substantial, but temporary, disruption in living conditions in El Salvador as the result of an environmental disaster, and El Salvador continues to be unable, temporarily, to handle adequately the return of its nationals. *See* 8 U.S.C. 1254a(b)(1)(B). The Secretary also finds that it is not contrary to the national interest of the United States to permit aliens who meet the eligibility requirements of TPS to remain in the United States temporarily. *See* 8 U.S.C. 1254a(b)(1)(C). On the basis of these findings, the Secretary concludes that the designation of El Salvador for TPS should be extended for an additional 18-month period. *See* 8 U.S.C. 1254a(b)(3)(C).

Notice of Extension of the TPS Designation of El Salvador

By the authority vested in me as Secretary of Homeland Security under section 244 of the Act, 8 U.S.C. 1254a, I have determined, after consultation with the appropriate Government agencies, that the conditions that prompted designation of El Salvador for TPS in March 2001 continue to be met. *See* 8 U.S.C 1254a(b)(3)(A). There are approximately 234,000 nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) who have been granted TPS and who may be eligible for re-registration. Accordingly, I am extending the TPS designation of El Salvador for 18 months from September 10, 2007 to March 9, 2009. For instructions on this extension, please refer to the following attachments, which include filing and eligibility requirements for Temporary Protected Status and Employment Authorization Documents.

Michael Chertoff,

Secretary.

Temporary Protected Status Filing Guidelines

Do I need to re-register for TPS if I currently have benefits through the designation of El Salvador for TPS, and would like to maintain them?

Yes. If you already have received TPS benefits through the TPS designation of El Salvador, your benefits will expire at 11:59 p.m. on September 9, 2007. All TPS beneficiaries must comply with the re-registration requirements described in this Notice in order to maintain TPS benefits through March 9, 2009. TPS benefits include temporary protection against removal from the United States and employment authorization during the TPS designation period. 8 U.S.C. 1254a(a)(1). Failure to re-register without good cause will result in the withdrawal of your temporary protected status and possibly your removal from the United States. 8 U.S.C. 1254a(c)(3)(C).

If I am currently registered for TPS or have a pending application for TPS, how do I re-register to renew my benefits for the duration of the extension period?

Please submit the proper forms and fees according to Table 1 below. All applicants are strongly encouraged to pay close and careful attention when filling out the required forms to help ensure that their dates of birth, alien registration numbers, spelling of their names, and other required information is correctly entered to the forms. Aliens who have previously registered for TPS, but whose applications remain pending, should follow these instructions if they wish to renew their TPS benefits. All TPS re-registration applications submitted without the required fees will be returned to the applicant. All fee waiver requests should be filed in accordance with 8 CFR 244.20. If you received an EAD during the most recent registration period, please submit a photocopy of the front and back of your EAD.

TABLE 1.—APPLICATION FORMS AND APPLICATION FEES

If	And	Then
You are re-registering for TPS	You are applying for an extension of your EAD valid through March 9, 2009.	You must complete and file the Form I–765, Application for Employment Authorization, with the fee of $340 or a fee waiver request. You must also submit Form I–821, Application for Temporary Protected Status, with no fee.

TABLE 1.—APPLICATION FORMS AND APPLICATION FEES—Continued

If	And	Then
You are re-registering for TPS	You are NOT applying for renewal of your EAD.	You must complete and file the Form I–765 with no fee and Form I–821 with no fee. Note: DO NOT check any box for the question "I am applying for" listed on Form I–765, as you are NOT requesting an EAD benefit.
You are applying for TPS as a late initial registrant and you are between the ages of 14 and 65 (inclusive).	You are applying for a TPS-related EAD	You must complete and file Form I–821 with the $50 fee or fee waiver request and Form I–765 with the fee of $340 or a fee waiver request.
You are applying for TPS as a late initial registrant and are under age 14 or over age 65.	You are applying for a TPS-related EAD	You must complete and file Form I–821 with the $50 fee or fee waiver request. You must also submit Form I–765 with no fee.
You are applying for TPS as a late initial registrant, regardless of age.	You are NOT applying for an EAD	You must complete and file Form I–821 with the $50 fee or fee waiver request and Form I–765 with no fee.
Your previous TPS application is still pending	You are applying to renew your temporary treatment benefits (i.e., an EAD with category "c-19" on its face).	You must complete and file the Form I–765 with the fee of $340 or a fee waiver request. You must also submit Form I–821, Application for Temporary Protected Status, with no fee.

Certain applicants must also submit a Biometric Service Fee (See Table 2).

TABLE 2.—BIOMETRIC SERVICE FEES

If	And	Then
You are 14 years of age or older	1. You are re-registering for TPS, or 2. You are applying for TPS under the late initial registration provisions, or 3. Your TPS application is still pending and you are applying to renew temporary treatment benefits (i.e., EAD with category "C–19" on its face)	You must submit a Biometric Service fee of $80 as defined in 8 CFR 103.7 or a fee waiver request.
You are younger than 14 years of age	You are applying for an EAD.	You must submit a Biometric Service fee of $80 as defined in 8 CFR 103.7 or a fee waiver request.
You are younger than 14 years of age	You are NOT applying for an EAD	You do NOT need to submit a Biometric Service fee.

What edition of the form I–821 should I submit?

Only the edition of Form I–821 dated November 5, 2004, or later will be accepted. The revision date can be found in the bottom right corner of the form. The proper form can be found on the Internet at *http://www.uscis.gov* or by calling the USCIS forms hotline at 1–800–870–3676.

Where should I submit my application for TPS?

Please reference Table 3 below to see where to mail your specific application.

TABLE 3.—APPLICATION MAILING DIRECTIONS

If	Then mail to	Or, for non-United States Postal Service (USPS) deliveries, mail to
You are applying for re-registration or applying to renew your temporary treatment benefits.	U.S. Citizenship and Immigration Services, Attn: TPS El Salvador, P.O. Box 8635, Chicago, IL 60680–8635.	U.S. Citizenship and Immigration Services, Attn: TPS El Salvador, 427 S. LaSalle—3rd Floor, Chicago, IL 60605–1029.
You are applying for TPS for the first time, as a late initial registrant, or you were granted TPS by an Immigration Judge or the Board of Immigration Appeals.	U.S. Citizenship and Immigration Services, Attn: TPS El Salvador, P.O. Box 8670, Chicago, IL 60680–8670.	U.S. Citizenship and Immigration Services, Attn: TPS El Salvador, [EOIR/Additional Documents] or [Late Initial Registrant], 427 S. LaSalle—3rd Floor, Chicago, IL 60605–1029.

How will I know if I need to submit supporting documentation with my application package?

See Table 4 below to determine if you need to submit supporting documentation.

TABLE 4.—WHO SHOULD SUBMIT SUPPORTING DOCUMENTATION?

If	Then
One or more of the questions listed in Part 4, Question 2 of Form I–821 applies to you.	You must submit an explanation, on a separate sheet(s) of paper, and/or additional documentation must be provided. You may NOT file electronically.
You were granted TPS by an Immigration Judge or the Board of Immigration Appeals.	You must include evidence of the grant of TPS (such as an order from the Immigration Judge) with your application package. You may NOT file electronically.

Can I file my application electronically?

If you are filing for re-registration and *do not* need to submit supporting documentation with your application, you may file your application electronically. To file your application electronically, follow directions on the USCIS Web site at: *http://www.uscis.gov*.

What is late initial registration?

Some persons may be eligible for late initial registration under 8 CFR 244.2. In order to be eligible for late initial registration, an applicant must:

(1) Be a national of El Salvador (or an alien who has no nationality and who last habitually resided in El Salvador);

(2) Have continuously resided in the United States since February 13, 2001;

(3) Have been continuously physically present in the United States since March 9, 2001; and

(4) Be both admissible as an immigrant, except as provided under section 244(c)(2)(A) of the Immigration and Nationality Act (Act), and not ineligible under section 244(c)(2)(B) of the Act.

Additionally, the applicant must be able to demonstrate that, during the initial registration period (from March 9, 2001 to September 9, 2002), he or she:

(1) Was a nonimmigrant or had been granted voluntary departure status or any relief from removal;

(2) Had an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal or change of status pending or subject to further review or appeal;

(3) Was a parolee or had a pending request for reparole; or

(4) Is the spouse or child of an alien currently eligible to be a TPS registrant.

An applicant for late initial registration must file an application for late registration no later than 60 days after the expiration or termination of the conditions described above. 8 CFR 244.2(g). All late initial registration applications for TPS, pursuant to the designation of El Salvador, should be submitted to the appropriate address in Chicago, Illinois as defined in Table 3.

Are certain aliens ineligible for TPS?

Yes. There are certain criminal and terrorism-related inadmissibility grounds that render an alien ineligible for TPS. *See* 8 U.S.C. 1254a(c)(2)(A)(iii). Further, aliens who have been convicted of any felony or two or more misdemeanors committed in the United States are ineligible for TPS under section 244(c)(2)(B)(i) of the Act, 8 U.S.C. 1254a(c)(2)(B)(i), as are aliens described in the bars to asylum in section 208(b)(2)(A) of the Act, 8 U.S.C. 1158(b)(2)(A). *See* 8 U.S.C. 1254a(c)(2)(B)(ii).

If I currently have TPS, can I lose my TPS benefits?

An individual granted TPS will have his or her TPS withdrawn if the alien is not in fact eligible for TPS, if the alien fails to timely re-register for TPS without good cause, or if the alien fails to maintain continuous physical presence in the United States. *See* 8 U.S.C. 1254a(c)(3)(A)–(C).

Does TPS lead to lawful permanent residence?

No. TPS is a temporary benefit that does not lead to lawful permanent residence or confer any other immigration status. 8 U.S.C. 1254a, (f)(1), and (h). When a country's TPS designation is terminated, TPS beneficiaries will maintain the same immigration status that they held prior to TPS (unless that status has since expired or been terminated), or any other status they may have acquired while registered for TPS. Accordingly, if an alien held no lawful immigration status prior to being granted TPS and did not obtain any other status during the TPS period, he or she will revert to unlawful status upon the termination of the TPS designation. Once the Secretary determines that a TPS designation should be terminated, aliens who had TPS under that designation are expected to plan for their departure from the United States.

May I apply for another immigration benefit while registered for TPS?

Yes. Registration for TPS does not prevent you from applying for non-immigrant status, filing for adjustment of status based on an immigrant petition, or applying for any other immigration benefit or protection. 8 U.S.C. 1254a(a)(5). For the purposes of change of status and adjustment of status, an alien is considered as being in, and maintaining, lawful status as a nonimmigrant during the period in which the alien is granted TPS. *See* 8 U.S.C. 1254a(f)(4).

How does an application for TPS affect my application for asylum or other immigration benefits?

An application for TPS does not affect an application for asylum or any other immigration benefit. Denial of an application for asylum or any other immigration benefit does not affect an applicant's TPS eligibility, although the grounds for denying one form of relief may also be grounds for denying TPS. For example, a person who has been convicted of a particularly serious crime is not eligible for asylum or TPS. *See* 8 U.S.C. 1158(b)(2)(A)(ii) and 8 U.S.C. 1254a(c)(2)(B)(ii).

Does this extension allow nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) who entered the United States after February 13, 2001, to file for TPS?

No. An extension of a TPS designation does not change the required dates of continuous residence and continuous physical presence in the United States. This extension does not expand TPS eligibility to those that are not eligible currently. To be eligible for benefits under this extension, nationals

of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) must have continuously resided in the United States since February 13, 2001 and been continuously physically present in the United States since March 9, 2001, the date of the current designation of El Salvador for TPS.

Employment Authorization Document Automatic Extension Guidelines

Who is eligible to receive an automatic extension of his or her EAD from September 9, 2007 to March 9, 2008?

To receive an automatic extension of an EAD, an individual must be a national of El Salvador (or an alien having no nationality who last habitually resided in El Salvador) who has applied for and received an EAD under the designation of El Salvador for TPS and who has not had TPS withdrawn or denied. This automatic extension is limited to: (1) EADs issued on Form I–766, Employment Authorization Document, bearing an expiration date of either July 5, 2006, or September 9, 2006, on the face AND that have a September 2007 DHS-issued extension sticker on the back of the card; and (2) EADs issued on Form I–766, Employment Authorization Document, bearing an expiration date of September 30, 2007. These EADs must also bear the notation ''A–12'' or ''C–19'' on the face card under ''Category.''

If I am currently registered under the designation of El Salvador for TPS and am re-registering for TPS, how do I receive an extension of my ead after the automatic six-month extension?

TPS re-registrants will receive a notice in the mail with instructions as to whether or not they will be required to appear at a USCIS Application Support Center (ASC) for biometrics collection. To increase efficiency and improve customer service, whenever possible USCIS will reuse previously-captured biometrics and conduct the security checks using those biometrics, such that you may not be required to appear at an ASC.

Regardless of whether you are required to appear at an ASC, you are required to pay the biometrics fee during this re-registration. The fee will cover the USCIS costs associated with the use of the collected biometrics for FBI and other background checks. USCIS fees fund the cost of processing applications and petitions for immigration benefits and services, and USCIS' associated operating costs. A detailed description of how USCIS developed its current fee schedule is contained in the proposed rule Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, at 72 FR 4888 (Feb. 1, 2007). The fee schedule was established in a final rule on May 30, 2007. 72 FR 29851.

If you are required to report to an ASC, you must bring the following documents: (1) Your receipt notice for your re-registration application; (2) your ASC appointment notice; and (3) your current EAD. If no further action is required for your case, you will receive a new EAD by mail valid through March 9, 2009. If your case requires further resolution, USCIS will contact you in writing to explain what additional information, if any, is necessary to resolve your case. Once your case is resolved and if your application is approved, you will receive a new EAD in the mail with an expiration date of March 9, 2009.

May I request an interim EAD at my local district office?

No. USCIS will not be issuing interim EADs to TPS applicants and re-registrants at District Offices.

How may employers determine whether an EAD has been automatically extended for six months through March 9, 2008, and is therefore acceptable for completion of the Form I–9?

An EAD that has been automatically extended for six months by this Notice through March 9, 2008, will be a Form I–766 bearing the notation ''A–12'' or ''C–19'' on the face of the card under ''Category,'' and either: (1) Have an expiration date of July 5, 2006, or September 9, 2006 on the face of the card, and a September 2007 DHS-issued extension sticker on the back; or (2) have an expiration date of September 30, 2007 on the face of the card. New EADs or extension stickers showing the March 9, 2008, expiration date of the six-month automatic extension will not be issued. Employers should not request proof of Salvadoran citizenship.

Employers should accept an EAD as a valid ''List A'' document and not ask for additional Form I–9, Employment Eligibility Verification documentation if presented with an EAD that has been extended pursuant to this **Federal Register** Notice, and the EAD reasonably appears on its face to be genuine and to relate to the employee. This does not affect the right of an applicant for employment or an employee to present any legally acceptable document as proof of identity and eligibility for employment.

Note to Employers: Employers are reminded that the laws requiring employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This Notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those setting forth re-verification requirements. *See* 8 CFR 274a.2(b)(1)(vii). For questions, employers may call the USCIS Office of Business Liaison Employer Hotline at 1–800–357–2099. Also, employers may call the U.S. Department of Justice Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) Employer Hotline at 1–800–255–8155 or 1–800–362–2735 (TDD). Employees or applicants may call the OSC Employee Hotline at 1–800–255–7688 or 1–800–237–2515 (TDD) for information regarding the automatic extension. Additional information is available on the OSC Web site at *http://www.usdoj.gov/crt/osc/index.html.*

How may employers determine an employee's eligibility for employment once the automatic six-month extension expires on March 9, 2008?

Eligible TPS aliens will possess an EAD with an expiration date of March 9, 2009. The EAD will be a Form I–766 bearing the notation ''A–12'' or ''C–19'' on the face of the card under ''Category,'' and should be accepted for the purposes of verifying identity and employment authorization.

What documents may a qualified individual show to his or her employer as proof of employment authorization and identity when completing Form I–9, employment eligibility verification?

During the first six months of this extension, qualified individuals who have received a six-month automatic extension of their EADs by virtue of this **Federal Register** Notice may present their TPS-based EAD to their employer, as described above, as proof of identity and employment authorization through March 9, 2008. To minimize confusion over this extension at the time of hire or re-verification, qualified individuals may also present a copy of this **Federal Register** Notice regarding the automatic extension of employment authorization documentation through March 9, 2008.

After the first six months of this extension, and continuing until the end of the extension period, March 9, 2009, a qualified individual may present a new EAD valid through March 9, 2009.

In the alternative, any legally acceptable document or combination of documents listed in List A, List B, or List C of the Form I–9 may be presented as proof of identity and employment eligibility.

[FR Doc. E7–16092 Filed 8–20–07; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Modification and Extension of the Post-Entry Amendment Processing Test

AGENCY: Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: This document announces a modification of U.S. Customs and Border Protection's (CBP) Post-Entry Amendment Processing test. The test allows the amendment of entry summaries prior to liquidation. The modification to the test requires the filer of a post-entry amendment to submit an individual amendment letter no later than 20 days prior to the scheduled liquidation date for the subject entry summary. This document also sets forth that CBP is terminating the supplemental information letter policy so that the post-entry amendment procedure will be the only procedure for submitting post summary adjustments on entry summaries prior to liquidation. Except for the modification set forth in this document, the test procedure is the same as that set forth in previously published **Federal Register** notices. The document also announces that the test is being extended for another year.

DATES: The Post-Entry Amendment Processing test modification set forth in this document is effective on September 20, 2007. The test is extended for a one-year period commencing on August 21, 2007. CBP will discontinue accepting Supplementary Information Letters on September 20, 2007.

ADDRESSES: Written comments regarding this notice, should be addressed to U.S. Customs and Border Protection, Entry and Drawback Management Branch, Office of International Trade, ATTN: Post-Entry Amendment, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Questions pertaining to any aspect of this notice should be directed to Jennifer Dolan, U.S. Customs and Border Protection, Entry and Drawback Management Branch, Office of International Trade, at (202) 344–2568 or via e-mail at *Jennifer.Dolan@dhs.gov*.

SUPPLEMENTARY INFORMATION:

Background

The U.S. Customs Service (Customs; now U.S. Customs and Border Protection or CBP) announced and described the Post-Entry Amendment Processing test (the test or PEA test) in a general notice document published in the **Federal Register** (65 FR 70872) on November 28, 2000. The notice announced that the test would commence no earlier than December 28, 2000, and run approximately one year. The test was extended on three subsequent occasions by publication of notice in the **Federal Register** as follows: to December 21, 2002 (67 FR 768; January 7, 2002); to December 31, 2003 (68 FR 8329; February 20, 2003); and to December 31, 2004 (69 FR 5860; February 6, 2004).

The PEA test procedure, authorized under section 101.9(a) of the CBP regulations (19 CFR 101.9(a)), allows importers to amend entry summaries (not informal entries) prior to liquidation by filing with CBP either an individual amendment letter upon discovery of certain kinds of errors or a quarterly tracking report covering certain other errors that occurred during the quarter. The November 28, 2000, and the February 6, 2004, **Federal Register** notices describe in full detail the PEA test procedure, including an explanation of the kinds of errors mentioned above. Also, an explanation of the procedure is available at *www.cbp.gov* (under the following links: ''Import'' and ''Cargo Summary'').

Modification

Under the PEA test, an individual amendment letter (also known as a single PEA) must be filed by the importer (or its broker) upon discovery of: (1) A revenue related error in an entry summary where the error results in either an overpayment or underpayment of duties, taxes, and/or fees in the amount of $20 or more; (2) any error in an entry summary relating to antidumping or countervailing duties; and (3) any non-revenue related statistical information errors in an entry summary that must be reported to the U.S. Census Bureau. Prior to publication of this document, individual amendment letters were required to be filed promptly after discovery of the error(s) and prior to liquidation of the one or more entry summaries covered in the letter.

Effective upon publication of this document in the **Federal Register**, an importer or broker filing a single PEA must submit the PEA at least 20 days prior to the scheduled liquidation date of each entry summary covered in the letter. This 20-day period will provide CBP sufficient time to review all entry summaries covered in a single PEA prior to the scheduled liquidation date. Liquidation of single PEAs (i.e., of the entry summaries covered) under the test is a manual function and past performance has shown that more time is needed to process these amendment requests effectively. Single PEAs submitted untimely will be rejected and returned to the filer. In those instances where the single PEAs are submitted timely but the entry summaries are not unset or processed by the scheduled liquidation date and liquidation occurs without benefit of the requested amendment, CBP will treat them as protests under 19 U.S.C. 1514 or, if appropriate in the circumstances, as evidence warranting reliquidation under 19 U.S.C. 1501.

Other than this modification, the test procedure remains as set forth in previously published notices.

Extension

This notice announces a further extension of the PEA test for a period of one year, such period to commence on the date this document is published in the **Federal Register**.

Discontinuation of the SIL Policy

Finally, as of the effective date of this notice, the PEA test will be the only procedure in place for post summary adjustments prior to liquidation, and the SIL procedure (see Administrative Message 97–0727, August 3, 1997) will be discontinued. CBP will issue an administrative message regarding this change soon after publication of this notice.

Dated: August 15, 2007.

Daniel Baldwin,

Assistant Commissioner, Office of International Trade.

[FR Doc. E7–16415 Filed 8–20–07; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5124–N–13]

Notice of Proposed Information Collection for Public Comment; Memorandum of Agreement (MOA) and Improvement Plan (IP) in Connection With the Public Housing Assessment System (PHAS)

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* October 22, 2007.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB Control number and should be sent to: Aneita L. Waites, Reports Liaison Officer, Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4116, Washington, DC 20410–5000.

FOR FURTHER INFORMATION CONTACT: Aneita L. Waites, (202) 708–0614, for copies of the proposed forms and other available documents. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated collection techniques or other forms of information technology; e.g., permitting electronic submission of responses. This Notice also lists the following information:

Title of Proposal: Memorandum of Agreement (MOA), Progress Report and Improvement Plan (IP).

OMB Control Number: 2577–0237.

Description of the need for the information and proposed use: A Public Housing Agency (PHA) that is designated troubled or substandard under the Public Housing Assessment System (PHAS) must enter into a Memorandum of Agreement (MOA) with HUD to outline its planned improvements. Similarly, a PHA that is a standard performer, but receives a total PHAS score of less than 70% but not less than 60% is required to submit an Improvement Plan (IP). These plans are designed to address deficiencies in a PHA's operations found through the PHAS assessment process (management, financial, physical, or resident related) and any other deficiencies identified by HUD through independent assessments or other methods.

Agency form number: HUD–53336–A, 53336–Bi, 53336–B, 53337, 53337i and 53338.

Members of affected public: Public Housing Agencies.

Estimation of the total number of hours needed to prepare the information collection including number of respondents: 375 respondents for either an MOA or an IP, and either monthly or quarterly reports, 27 hours average response (including reporting), 31,910 hours total reporting burden hours.

Status of the proposed information collection: Extension of currently approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: August 14, 2007.

Merrie Nichols-Dixon,

Acting Deputy Assistant Secretary, Office of Policy, Program and Legislative Initiatives.

[FR Doc. E7–16376 Filed 8–20–07; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–056–5853-EU; NVN–78190, 7–08807]

Notice of Realty Action: Competitive Sale of Public Lands in Clark County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM) proposes to offer for sale by public auction 31 parcels of Federal public land totaling approximately 167.5 acres in the Las Vegas Valley, Nevada. The sale will be conducted under the authority of the Southern Nevada Public Land Management Act of 1998 (SNPLMA), 112 Stat. 2343, as amended. The SNPLMA sale will be subject to the applicable provisions of Sections 203 and 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1713 and 1719, respectively, and BLM land sale and mineral conveyance regulations at 43 CFR Parts 2710 and 2720.

DATES: Comments regarding the proposed SNPLMA sale and Environmental Assessment (EA) (NV–2007–201 must be received by BLM on or before October 5, 2007. Sealed bids must be received no later than 4:30 p.m. PDT, October 26, 2007, at the address of the Las Vegas Field Office (LVFO) listed below. The sale by public auction will begin at 10 a.m., PDT, November 1, 2007.

ADDRESSES: Written comments regarding the proposed sale may be submitted to BLM at the following address: Manager, Las Vegas Field Office, Bureau of Land Management, 4701 N. Torrey Pines Drive, Las Vegas, Nevada 89130.

The address for oral bidding registration and the location of the public auction is: Clark County Commission Chambers, 500 S. Grand Central Parkway, Las Vegas, Nevada.

FOR FURTHER INFORMATION CONTACT: You may contact the LVFO at (702) 515–5000 and ask to have your call directed to a member of the sales team. For general information on BLM's public land sale procedures, refer to the following Web address: *http://www.blm.gov/nhp/what/lands/realty/sales.htm.*

SUPPLEMENTARY INFORMATION: This public sale is in conformance with the Las Vegas Resource Management Plan, approved on October 5, 1998. BLM has determined that the proposed action conforms to land use plan decision LD–1 under the authority of FLPMA.

The public lands would be offered for sale competitively on November 1, 2007, at an oral auction for not less than the appraised fair market value (FMV) for each parcel. The parcels described below would be auctioned under the terms and conditions of this Notice of Realty Action (NORA).

Mount Diablo Meridian, Nevada

T. 19 S., R. 59 E., sec. 3,
E½NW¼SW¼SW¼,
W½SE¼SW¼SW¼,
W½NW¼SE¼SW¼,
E½SW¼SE¼SW¼; sec. 25,
NE¼NE¼SW¼.
T. 19 S., R. 60 E., sec. 30, lot 22.
T. 22 S., R 60 E., sec. 13,
SE¼NE¼SE¼NE¼,
NE¼SE¼SE¼NE¼; sec. 14,
NW¼SW¼NW¼SW¼; sec. 15,
NE¼SW¼SW¼NE¼,
NW¼SW¼SW¼NE¼,
SW¼SW¼SW¼NE¼,
SE¼SW¼SW¼NE¼; sec. 19,
N½SW¼NE¼SW¼NE¼; sec. 24,
S½SW¼NW¼SE¼NE¼; sec 27,
NW¼NE¼SW¼NE¼,
NW¼NW¼SW¼NE¼.
T. 22 S., R. 61 E., sec. 33,
SW¼NW¼SW¼NE¼,
SW¼SW¼SW¼NE¼,
SE¼SW¼SW¼NE¼,
NE¼NE¼NW¼SE¼,
SW¼NE¼NW¼SE¼,
NE¼NW¼NW¼SE¼,
SW¼NW¼NW¼SE¼,
SE¼NW¼NW¼SE¼,
NE¼SW¼NW¼SE¼.

T. 23 S., R. 61 E., Sec. 10,
S½SW¼NE¼SW¼, SE¼NE¼SW¼,
S½NE¼NW¼SE¼,
S½NW¼NW¼SE¼,
S½NE¼SE¼SW¼, S½NE¼SW¼SE¼,
NW¼SW¼SE¼, N½SW¼SW¼SE¼,
S½SW¼SW¼NW¼, SE¼SW¼NW¼,
SW¼SE¼NW¼, N½SW¼SE¼SW¼,
S½SE¼SE¼SW¼.

Consisting of 31 parcels containing approximately 167.5 acres in Clark County.

Maps delineating the individual proposed sale parcels and current appraisals for each parcel are available for public review at the LVFO, and online at: *http://www.propertydisposal.gsa.gov*.

In addition to the lands described herein, other parcels that have been previously noticed for sale, but did not sell, may be offered at this sale.

Terms and Conditions

Minerals for each parcel would be reserved in accordance with BLM's approved Mineral Potential Report dated January 22, 1999. Information pertaining to the reservation of minerals is specific to each parcel. That is, some will be reserved and some will be conveyed. This information is located in the case file and available for public review by visiting the BLM LVFO.

For those parcels for which the minerals will be conveyed, an offer to purchase these listed parcels would constitute an application for mineral conveyance. In conjunction with the final payment, an applicant for ''no known value'' mineral parcels would be required to pay a $50 non-refundable filing fee for processing the conveyance of the ''no known value'' mineral interests which will be sold simultaneously with the surface interests.

Registration for oral bidding for those who have not pre-registered would begin at 8 a.m., PDT, November 1, 2007, and end at 10 a.m., PDT. Other deadline dates for the receipt of payments, and arranging for certain payments to be made by electronic transfer, are specified in the proposed terms and conditions of sale.

The following numbered terms and conditions would appear on the conveyance documents for these parcels, as follows:

1. All parcels described above will have discretionary leasable and saleable mineral deposits on the lands in Clark County, if any, reserved to the United States, in accordance with BLM's approved Mineral Potential Report, dated January 22, 1999. Permittees, licensees, and lessees of the United States retain the right to prospect for, mine, and remove such leasable and saleable minerals owned by the United States under applicable law and any regulations that the Secretary of the Interior may prescribe, together with all necessary access and exit rights.

2. A right-of-way is reserved for ditches and canals constructed by authority of the United States under the Act of August 30, 1890 (43 U.S.C. 945).

3. All parcels are subject to valid existing rights.

4. All purchasers/patentees, by accepting a patent, covenant and agree to indemnify, defend, and hold the United States harmless from any costs, damages, claims, causes of action, penalties, fines, liabilities, and judgments of any kind or nature arising from the past, present, and future acts or omissions of the patentees or their employees, agents, contractors, or lessees, or any third party, arising out of or in connection with the patentees' use, occupancy, or operations on the patented real property. This indemnification and hold harmless agreement includes, but is not limited to, acts and omissions of the patentees and their employees, agents, contractors, or lessees, or any third party, arising out of or in connection with the use and/or occupancy of the patented real property which has already resulted or does hereafter result in: (1) Violations of Federal, State, and local laws and regulations that are now or may in the future become, applicable to the real property; (2) Judgments, claims or demands of any kind assessed against the United States; (3) Costs, expenses, or damages of any kind incurred by the United States; (4) Releases or threatened releases of solid or hazardous waste(s) and/or hazardous substances(s), as defined by Federal or State environmental laws, off, on, into or under land, property and other interests of the United States; (5) Activities by which solid waste or hazardous substances or waste, as defined by Federal and State environmental laws are generated, released, stored, used or otherwise disposed of on the patented real property, and any cleanup response, remedial action or other actions related in any manner to said solid or hazardous substances or wastes; or (6) Natural resource damages as defined by Federal and State law. This covenant shall be construed as running with the parcels of land patented or otherwise conveyed by the United States, and may be enforced by the United States in a court of competent jurisdiction.

5. Pursuant to the requirements established by section 120(h) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9620(h) (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1988, 100 Stat. 1670, notice is hereby given that the above-described lands have been examined and no evidence was found to indicate that any hazardous substances have been stored for one year or more, nor had any hazardous substances been disposed of or released on the subject property.

Parcels may also be subject to applications received prior to publication of this NORA if processing the application would have no adverse affect on the marketability or the federally approved FMV of a parcel. Encumbrances that may appear on the BLM public files for the parcels proposed for sale are available for review during business hours, 7:30 a.m. PDT to 4:30 p.m. PDT, Monday through Friday, at the BLM LVFO.

Pursuant to 43 CFR 2800, BLM will notify valid existing rights-of-way holders of their ability to convert their compliant rights-of-way to perpetual rights-of-way or easements. Each valid holder will be notified in writing of their rights and then must apply for the conversion of their current authorization.

All parcels are subject to reservations for roads, public utilities and flood control purposes in accordance with the local governing entities' transportation plans.

No representation, warranty, or covenant of any kind, express or implied, is given or made by the United States as to title, whether or to what extent the land may be developed, its physical condition, future uses, or any other circumstance or condition. The conveyance of any parcel will not be on a contingency basis. However, to the extent required by law, all parcels are subject to the requirements of section 120(h) of the CERCLA.

Sealed bids under 43 CFR 2711.3–1(c) may be submitted for any parcel. Sealed bids must be received at the BLM LVFO no later than 4:30 p.m., PDT, October 26, 2007. Sealed bid envelopes must be marked on the lower front left corner with the BLM Serial Number for the parcel and the sale date. Bids must be for not less than the federally approved FMV, and a separate bid must be submitted for each parcel.

As required by 43 CFR 2711.3–1(c), each sealed bid shall be accompanied by a certified check, postal money order, bank draft, or cashier's check made payable in U.S. dollars to the order of the Bureau of Land Management, for not less than 10 percent or more than 30 percent of the amount bid. The highest qualifying sealed bid for each parcel

will become the starting bid at the oral auction. If no sealed bids are received, oral bidding will begin at the FMV, as determined by the authorized officer. All sealed bids will be opened and recorded at 2 p.m. PDT on October 30, 2007, at the BLM office on 4701 N. Torrey Pines Drive in Las Vegas.

Interested parties who will not be bidding at the public auction are not required to register and may proceed directly to the Clark County Commission Chambers. If seating becomes limited, bidders will have seating preference.

All oral bidders are required to register. Registration for oral bidding will begin at 8 a.m. PDT on the day of the sale and end at 10 a.m. PDT that day. Bidders are encouraged to pre-register by mail or fax by completing the form located in the sale packet. The form is also available at the BLM LVFO and online at: *http://www.auctionrp.com.*

Prior to receiving a bidder number on the day of the sale, all registered bidders must submit a certified check, bank draft, postal money order, or cashier's check in the amount of $10,000. This is a bid guarantee. The check must be made payable in U.S. dollars to the order of the Bureau of Land Management. On the day of the sale, pre-registered bidders may go to the express registration desk, present their photo identification and proof of citizenship, the required $10,000 bid guarantee and receive a bidder number. Bidders that have not pre-registered must go to the standard registration line where additional information will be requested including photo identification, proof of citizenship, and the required $10,000 bid guarantee. On completion of registration a bidder number will be assigned.

At auction, the highest qualifying bid for any parcel will be declared the apparent high bid. Under 43 CFR 2711.3–1(d), the apparent high bidder must submit a deposit of not less than 20 percent of the successful bid by 3 p.m. PDT on the day of the sale either in the form of cash (U.S. dollars), a personal check, bank draft, cashier's check, postal money order or any combination thereof, made payable in U.S. dollars to the order of the Bureau of Land Management. The deposit must be delivered no later than 3 p.m. PDT the day of the sale to the BLM collection officers at the Clark County Commission Chambers. Deposits will not be accepted at the BLM LVFO.

Following the auction, all monies submitted with sealed bids and bid guarantees will be returned to the unsuccessful bidders upon presentation of photo identification at the designated area. If the apparent high bidder so chooses, the bid guarantee may be applied to the required deposit. Failure to submit the deposit following the sale under 43 CFR 2711.3–1(d) will result in forfeiture of the bid guarantee. If a bidder offers to purchase more than one parcel and fails to submit the bid deposit following the sale on any single parcel, BLM will retain the bid guarantee and may cancel the sale of all of the parcels for which a bidder is declared the apparent high bidder.

The remainder of the full bid price for each parcel must be paid within 180 calendar days of the competitive sale date, April 30, 2008, in the form of a certified check, postal money order, bank draft, or cashier's check made payable in U.S. dollars to the order of the Bureau of Land Management. Personal checks will not be accepted. Arrangements for electronic fund transfer to BLM for the balance due on or before April 30, 2008, shall be made a minimum of 2 weeks prior to the date you wish to make payment. Failure to pay the full price within the 180 days will disqualify the apparent high bidder and cause the entire 20 percent deposit to be forfeited to the BLM. Forfeiture of the 20 percent deposit is by operation of 43 CFR 2711.3–1(d). No exceptions will be made. BLM cannot accept the full price at any time following the 180th day after the sale.

Within 30 days of the sale, BLM will either accept or reject all bids received. Under 43 CFR 2711.3–1, a bid is the bidder's offer to BLM to purchase the parcel. No contractual or other rights against the United States may accrue until BLM officially accepts the offer to purchase, and the full bid price is submitted by the 180th day following the sale. BLM will mail ''High Bidder Declared'' letters the day after the sale informing bidders whether their offer to purchase has been accepted or rejected by BLM. All name changes and supporting documentation must be received at BLM by 4:30 p.m. PST, December 3, 2007. Otherwise, the patent will be issued to the name on the bidder statement completed at the sale on November 1, 2007. No name changes will be accepted after 4:30 p.m. PST, December 3, 2007. To change the name, high bidders must notify the BLM LVFO in writing and re-submit a new bidder statement (available at BLM) completed by the intended patentee.

BLM will not sign any documents related to 1031 Exchange transactions. The timing for completion of the exchange is the bidder's responsibility in accordance with Internal Revenue Service regulations. BLM is not a party to any 1031 Exchange.

Requests for BLM escrow instructions must be received by BLM prior to 30 days before the bidder's scheduled closing date. There are no exceptions.

All sales are made in accordance with and subject to the governing provisions of law and applicable regulations. In accordance with 43 CFR 2711.3–1(f), the BLM may accept or reject any or all offers to purchase, or withdraw any parcel of land or interest therein from sale, if, in the opinion of the BLM authorized officer, consummation of the sale would be inconsistent with any law, or for other reasons.

Federal law requires bidders to be U.S. citizens 18 years of age or older; a corporation subject to the laws of any State or of the United States; a State, State Instrumentality or political subdivision authorized to hold property or an entity legally capable of conveying lands or interests therein under the laws of the State of Nevada. Registered bidders must provide to BLM, on the day of the sale, proof of citizenship, or proof of current corporate or partnership status in good standing filed within the United States. Citizenship is evidenced by presenting a birth certificate, passport, or immigration/naturalization papers. Failure to submit the above requested documents will result in denial of registration.

If not sold, any parcel described above in this NORA may be identified for sale at a later date without further legal notice. Unsold parcels may be offered for sale in a future online Internet auction. Internet auction procedures will be available at *http://www.auctionrp.com.* If unsold on the Internet, parcels may be put up for sale at future oral and online Internet auctions without additional legal notice.

Upon publication of this NORA and until the completion of the sale, the BLM is no longer accepting land use applications affecting any parcel identified for sale, including parcels that have been published in a previous NORA. However, land use applications may be considered after completion of the sale for parcels that are not sold through oral or online Internet auction procedures provided the authorization will not adversely affect the marketability or value of the parcel.

In order to determine the value, through appraisal, of the parcels of land proposed to be sold, certain assumptions may have been made of the attributes and limitations of the lands and potential effects of local regulations and policies on potential future land uses. Through publication of this NORA, the Bureau of Land Management

gives notice that these assumptions may not be endorsed or approved by units of local government. It is the buyer's responsibility to be aware of all applicable Federal, State, and local government laws, regulations and policies that may affect the subject lands, including any required dedication of lands for public uses. It is also the buyer's responsibility to be aware of existing or projected use of nearby properties. When conveyed out of Federal ownership, the lands will be subject to any applicable laws, regulations, and policies of the applicable local government for proposed future uses. It will be the responsibility of the purchaser to be aware of those laws, regulations, and policies, and to seek any required local approvals for future uses. Buyers should also make themselves aware of any Federal or State law or regulation that may impact the future use of the property. Any land lacking access from a public road or highway will be conveyed as such, and future access acquisition will be the responsibility of the buyer.

The SNPLMA parcels proposed for sale were analyzed in the ''Las Vegas Land Disposal Boundary Environmental Impact Statement,'' approved December 23, 2004, which is available for public review at the BLM LVFO. Twenty-six parcels being offered were previously analyzed through EAs and approved for sale. Copies of the applicable EAs for N–78190, N–79698, N–79699, N–80681 through N–80684SB, N–80690, N–80692, N–80719, N–80730 through N–80736, N–80739, N–81906 through N–81909, N–81951, N–81969, N–81970 and N–81978 are available for review upon request at the BLM LVFO. The BLM LVFO sales team will assist with identifying the legal description corresponding to each sale parcel serial number. The remaining five parcels are analyzed in an EA (NV–2007–201) for this sale, which tiers to the EIS approved December 23, 2004. Upon publication of this NORA, this EA is available for public review and comment at the BLM LVFO. BLM will be accepting public comment on EA (NV–2007–201) for the 5 parcels for 45 days after publication of this Notice of Realty Action in the **Federal Register**.

Other information concerning the sale, including the appraisals, reservations, sale procedures and conditions, CERCLA and other environmental documents will be available for review at the BLM LVFO, or by calling (702) 515–5000 and asking to speak to a member of the sales team. Most of this information will also be available on the Internet at: *http://propertydisposal.gsa.gov.*

Public Comments

The general public and interested parties may submit written comments regarding the proposed sale or the specified EA (NV–2007–201) to the Field Manager, BLM LVFO, up to October 5, 2007. Only written comments submitted by postal service or overnight mail to the Field Manager, BLM LVFO will be considered properly filed. E-mail, facsimile or telephone comments will not be considered as properly filed.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 43 CFR 2711.1–2)

Angie Lara,

Acting Field Manager.

[FR Doc. E7–16438 Filed 8–20–07; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM–210–1430–01; NMNM117354]

Notice of Realty Action—Recreation and Public Purpose (R&PP) Act Classification, New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of R&PP lease and or patent of public land in San Juan County; New Mexico.

SUMMARY: The following described public land is determined suitable for classification for leasing and subsequent conveyance to the Aztec Municipal School District #2, Aztec, New Mexico under the provisions of the Recreation and Public Purposes (R&PP) Act, as amended (43 U.S.C. 869 *et seq.*). The Aztec Municipal School district #2 proposes to use the land for recreational facilities with soccer fields, softball field, restrooms, a changing room and a concession stand and a parking lot and an access road. In the future, another softball field and a baseball field may be added to serve the local children of the area. The identified lands are surrounded on three sides by private land and have a high potential for further residential development.

New Mexico Principal Meridian

T. 30 N., R. 11 W.,

Sec. 7: SWNENE, S½SE¼NE¼, NE¼NW¼NE¼, N½SE¼NW¼NE¼, SWSENW¼NE¼.

The area described contains 32.5 aacres more or less, in San Juan County.

Comment Dates: On or before October 5, 2007 interested parties may submit comments regarding the proposed leasing/conveyance or classification of the lands to the Bureau of Land Management at the following address. Any adverse comments will be reviewed by the Bureau of Land Management, Farmington District Manager, 1235 La Plata Highway, Farmington, NM 87401, who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, this realty action becomes the final determination of the Department of the Interior and effective October 22, 2007.

FOR FURTHER INFORMATION CONTACT: Contact Mary Jo Albin, Realty Specialist, at the Bureau of Land Management, Farmington Field Office, at (505) 599–6332. Information related to this action, including the environmental assessment, is available for review at the 1235 La Plata Highway, Farmington, NM 87401.

SUPPLEMENTARY INFORMATION: Publication of this notice segregates the public land described above from all other forms of appropriation under the public land laws, including the general mining laws, except for leasing and conveyance under the Recreation and Public Purposes Act and leasing under the mineral leasing laws.

The lease, when issued, will be subject to the following terms:

1. The Recreation and Public Purposes Act and to all applicable regulations of the Secretary of the Interior.

2. The Resource Conservation and Recovery Act of 1976 (RCRA) as amended, 42 U.S.C. 6901–6987 and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) as amended, 42 U.S.C. 9601 and all applicable regulations.

3. Provisions of Title VI of the Civil Rights Act of 1964.

4. Provisions that the lease be operated in compliance with the approved Development Plan.

The patent document, when issued, will be subject to the provisions of the R&PP Act and applicable regulations of the Secretary of the Interior and will contain the following terms, conditions, and reservations to the United States:

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

2. All minerals, together with the right to prospect for, mine, and remove such deposits from the lands under applicable law and such regulations as the Secretary of the Interior may prescribe.

3. All valid existing rights, e.g. rights-of-way and leases of record.

Provisions that if the patentee or its successor attempts to transfer title to or control over the land to another or the land is devoted to a use other than that for which the land was conveyed, without the consent of the Secretary of the Interior or his delegate, or prohibits or restricts, directly or indirectly, or permits it agents, employees, contractors, or subcontractors, including without limitation, lessees, sublessees and permittees, to prohibit or restrict, directly or indirectly, the use of any part of the patented lands or any of the facilities whereon by any person because of such person's race, creed, sex, color, or national origin, title shall revert to the United States.

The lands are not needed for Federal purposes. Leasing and later patenting is consistent with current Bureau of Land Management policies and land use planning. The proposal serves the public interest since it would provide the recreation facilities and related buildings that would meet the needs of the school system and the surrounding population.

Upon publication of this notice in the **Federal Register**, the above described public lands will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for patent under the R&PP Act and leasing under the mineral leasing laws.

Classification Comments: Interested parties may submit comments involving the suitability of the land for conveyance. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with state and Federal programs.

Patent Comments: Interested parties may submit comments regarding the patent and the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability of the land for R&PP use.

Confidentiality of Comments: Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Any adverse comments will be reviewed by the Dillon Field Manager, who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, the classification of the land described in this notice will become effective on October 22, 2007. The land will not be offered for patent until after the classification becomes effective.

(Authority: 43 CFR 2741.5)

Dated: August 14, 2007.

Joel E. Farrell,

Assistant Field Manager for Resources.

[FR Doc. E7–16434 Filed 8–20–07; 8:45 am]

BILLING CODE 4310–VB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–932–1430–ET; F–22389]

Notice of Proposed Withdrawal Extension and Opportunity for Public Meeting; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: On behalf of the U.S. Department of Air Force, the Bureau of Land Management proposes to extend the duration of Public Land Order (PLO) No. 6677 for an additional 20-year term. This order withdrew 2.5 acres of public land from settlement, sale, location, or entry under the general land laws, including the United States mining laws [30 U.S.C. Ch. 2] and from leasing under the mineral leasing laws, to protect a United States Air Force radio relay site. This notice also gives an opportunity to comment on the proposed action and to request a public meeting.

DATES: Comments and requests for a public meeting must be received by November 19, 2007.

ADDRESSES: Comments and meeting requests should be sent to the Alaska State Director, BLM Alaska State Office, 222 West 7th Avenue, No. 13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: Renee Fencl, BLM Alaska State Office, (907) 271–5067, or at the above address.

SUPPLEMENTARY INFORMATION: The withdrawal created by PLO No. 6677 (53 FR 18283) will expire May 22, 2008, unless extended. The U.S. Department of the Air Force has filed an application to extend the withdrawal for an additional 20-year period to protect the Beaver Creek Radio Relay Site.

This withdrawal comprises 2.50 acres of public land described in PLO No. 6677 (53 FR 18283) and located in:

Copper River Meridian

T. 15 N., R. 19 E.
Secs. 21 and 28.

A complete description can be provided by the BLM Alaska State Office at the address shown above.

As extended, the withdrawal would not alter the application of those public land laws governing the use of land under lease, license, or permit or governing the disposal of the mineral or vegetative resources other than under the mining and mineral leasing laws. No water rights would be needed to fulfill the purpose of the requested withdrawal extension.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal extension may present their views in writing to the BLM State Director at the address indicated above. Comments, including names and street addresses of respondents, will be available for public review at the BLM Alaska Office at the address noted above during regular business hours 7:30 a.m. to 4:30 p.m., Monday through Friday, except holidays. Before including your address, phone number, e-mail address, or other personal identifying information in your comments, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal extension. All interested parties who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the BLM State Director at the address indicated above within 90 days from the publication of this notice. Upon determination by the authorized officer

that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting. The withdrawal extension proposal will be processed in accordance with the regulations set forth in 43 CFR 2310.4 and subject to Section 810 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3120 (2000).

(Authority: 43 CFR 2310.3–1)

Carolyn J. Spoon,

Chief, Branch of Lands and Realty.

[FR Doc. E7–16357 Filed 8–20–07; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

National Park Service

Cape Cod National Seashore; South Wellfleet, Massachusetts; Cape Cod National Seashore Advisory Commission; Two Hundredth Sixty Second Notice of Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770, 5 U.S.C. App. 1, Section 10), that a meeting of the Cape Cod National Seashore Advisory Commission will be held on September 24, 2007.

The Commission was reestablished pursuant to Public Law 87–126 as amended by Public Law 105–280. The purpose of the Commission is to consult with the Secretary of the Interior, or her designee, with respect to matters relating to the development of Cape Cod National Seashore, and with respect to carrying out the provisions of sections 4 and 5 of the Act establishing the Seashore.

The Commission members will meet at 1 p.m. in the meeting room at Headquarters, Marconi Station, Wellfleet, Massachusetts for the regular business meeting to discuss the following:

1. Adoption of Agenda
2. Approval of Minutes of Previous Meeting (May 21, 2007)
3. Reports of Officers
4. Reports of Subcommittees
5. Superintendent's Report
   - Update on Dune Shacks and Report
   - Land Acquisition Funds for the North of Highlands Campground.
   - Improved Properties/Town Bylaws
   - Wind Turbines/Cell Towers
   - Highlands Center Update
   - Atlantic Research Center Update
   - ORV's and Piping Plover Nesting Impact
   - Hunting EIS
   - Overwash Over at South Beach in Chatham.
   - Centennial Challenge
6. Old Business
7. New Business
8. Date and Agenda for Next Meeting
9. Public Comment and
10. Adjournment

The meeting is open to the public. It is expected that 15 persons will be able to attend the meeting in addition to Commission members.

Interested persons may make oral/written presentations to the Commission during the business meeting or file written statements. Such requests should be made to the park superintendent at least seven days prior to the meeting. Further information concerning the meeting may be obtained from the Superintendent, Cape Cod National Seashore, 99 Marconi Site Road, Wellfleet, MA 02667.

Dated: July 21, 2007.

George E. Price, Jr.,

Superintendent.

[FR Doc. E7–16418 Filed 8–20–07; 8:45 am]

BILLING CODE 4310–WV–P

DEPARTMENT OF THE INTERIOR

National Park Service

Cedar Creek and Belle Grove National Historical Park Advisory Commission; Notice of Meetings

AGENCY: National Park Service, Interior.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act that meetings of the Cedar Creek and Belle Grove National Historical Park Advisory Commission will be held to discuss the development of the Park's general management plan.

Dates and Locations: September 20, 2007, at the Warren County Government Center, 220 N. Commerce Ave., Front Royal, VA; December 13, 2007, at the Strasburg Town Hall Council Chambers, 174 East King St., Strasburg, VA; March 20, 2008, at the Middletown Town Hall Council Chambers, 7875 Church St., Middletown, VA; and June 19, 2008, at the Warren County Government Center.

All meetings will convene at 9 a.m. and are open to the public.

FOR FURTHER INFORMATION CONTACT: Diann Jacox, Superintendent, Cedar Creek and Belle Grove National Historical Park, (540) 868–9176.

SUPPLEMENTARY INFORMATION: Topics to be discussed at the meetings include: Review of draft plan, general management plan public comments, planning process and schedule, land protection planning, environmental impact analysis, election of a commission chair, and commission subcommittees.

Dated: July 31, 2007.

Christopher J. Stubbs,

Acting Superintendent, Cedar Creek and Belle Grove National Historical Park.

[FR Doc. 07–4078 Filed 8–20–07; 8:45 am]

BILLING CODE 4310–AN–M

DEPARTMENT OF THE INTERIOR

National Park Service

Chesapeake and Ohio Canal National Historical Park; Notice of Public Meeting

AGENCY: Department of the Interior, National Park Service, Chesapeake and Ohio Canal National Historical Park.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that a meeting of the Chesapeake and Ohio National Historical Park Advisory Commission will be held at 9:30 a.m., on Friday, October 19, 2007, at the Chesapeake and Ohio Canal National Historical Park Headquarters, 1850 Dual Highway, Hagerstown, MD 21740.

DATES: Friday, October 19, 2007.

ADDRESSES: Chesapeake and Ohio Canal National Historical Park Headquarters, 1850 Dual Highway, Hagerstown, MD 21740.

FOR FURTHER INFORMATION CONTACT: Kevin Brandt, Superintendent, Chesapeake and Ohio Canal National Historical Park, 1850 Dual Highway, Suite 100, Hagerstown, MD 21740, telephone: (301) 714–2201.

SUPPLEMENTARY INFORMATION: The Commission was established by Public Law 91–664 to meet and consult with the Secretary of the Interior on general policies and specific matters related to the administration and development of the Chesapeake and Ohio Canal National Historical Park.

The Members of the Commission are as follows:

Mrs. Sheila Rabb Weidenfeld, Chairperson.
Mr. Charles J. Weir.
Mr. James G. McCleaf, II.
Mr. Barry A. Passet.
Mr. John A. Ziegler.
Mrs. Mary E. Woodward.
Mrs. Donna Printz.
Mrs. Ferial S. Bishop.
Ms. Nancy C. Long.
Mrs. Jo Reynolds.
Dr. James H. Gilford.
Brother James Kirkpatrick.
Ms. Mary Ann D. Moen.
Dr. George E. Lewis, Jr.

Mr. Charles D. McElrath.
Ms. Patricia Schooley.
Mr. Jack Reeder.
Ms. Merrily Pierce.

Topics that will be presented during the meeting include:

1. Update on park operations.
2. Update on major construction/development projects.
3. Update on partnership projects.
4. Subcommittee Reports.

The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning the matters to be discussed. Persons wishing further information concerning this meeting, or who wish to submit written statements, may contact Kevin Brandt, Superintendent, Chesapeake and Ohio Canal National Historical Park. Minutes of the meeting will be available for public inspection six weeks after the meeting at Chesapeake and Ohio Canal National Historical Park Headquarters, 1850 Dual Highway, Suite 100, Hagerstown, MD 21740.

Dated: June 26, 2007.

Kevin D. Brandt,

Superintendent, Chesapeake and Ohio Canal National Historical Park.

[FR Doc. 07–4079 Filed 8–20–07; 8:45 am]

BILLING CODE 4310–6V–M

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–596]

In the Matter of Certain GPS Chips, Associated Software and Systems, and Products Containing Same; Notice of Commission Determination Not To Review ALJ Order No. 19 Granting Complainant's Motion for Leave to Amend the Complaint and Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 19) of the presiding administrative law judge (''ALJ'') granting complainant's motion for leave to amend the complaint and notice of investigation.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3152. Copies of the ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: On March 13, 2007, the Commission instituted an investigation under section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, based on a complaint filed by SiRF Technology, Inc. of San Jose, California (''SiRF''), alleging a violation of section 337 in the importation, sale for importation, and sale within the United States after importation of certain GPS chips, associated software and systems, and products containing same by reason of infringement of certain claims of U.S. Patent Nos. 6,304,216; 7,043,363; 7,091,904 (''the '904 patent''); and 7,132,980. 72 FR 11378 (Mar. 13, 2007). The complainant named Global Locate, Inc. of San Jose, California (''Global Locate'') as respondent.

On July 11, 2007, complainant SiRF moved to add dependent claim 2 of the '904 patent to the list of claims of the '904 patent in paragraph 6.8 of the complaint, and to amend the notice of investigation dated March 8, 2007, to include claim 2 in the list of claims of the '904 patent. The Commission investigative attorney stated on July 17, 2007, that he did not oppose complainant's motion. On July 19, 2007, respondent Global Locate opposed complainant's motion.

On July 24, 2007, the ALJ issued Order No. 19 granting complainant's motion. No party petitioned for review of Order No. 19. The Commission has determined not to review the ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in § 210.42(h) of the Commission's Rules of Practice and Procedure (19 CFR 210.42(h)).

By order of the Commission.

Issued: August 15, 2007.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. E7–16362 Filed 8–20–07; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on August 10, 2007, a proposed Consent Decree was filed in *United States, the State of Indiana, and the City of Hammond, Indiana* v. *Jupiter Aluminum Corporation*, Civil Action No. 2:07 CV 262 PS, with the United States District Court for the Northern District of Indiana, Hammond Division.

The United States filed a civil action on August 9, 2007, seeking injunctive relief and a civil penalty against Jupiter Aluminum Corporation (''Jupiter'') for alleged violations of the National Emission Standards for Hazardous Air Pollutants applicable to secondary aluminum production facilities, under the Clean Air Act. The Jupiter aluminum recycling facility that is the subject of the lawsuit is located in Hammond, Indiana. The State of Indiana and the City of Hammond intervened as co-plaintiffs in the federal lawsuit, and filed complaints in intervention. All claims alleged in the United States', the State's and the City's complaints would be resolved by a settlement reflected in the Consent Decree, if approved by the court.

Under the proposed Consent Decree, Jupiter will perform tests to determine whether recent modifications to the pollution control equipment on its melting furnaces adequately captures fugitive emissions and whether the equipment adequately removes dioxin/furans, hydrochloric acid and particulate matter. If the tests demonstrate that Jupiter is not adequately capturing fugitive emissions or not adequately removing pollutants, Jupiter will be required to make further modifications, or alter its production processes to ensure compliance. The decree also requires Jupiter to properly weigh scrap aluminum before melting it in the furnaces, and to keep records of the type and amount of scrap used, to fund an independent monitoring consultant to assist the regulatory agencies in monitoring compliance, to allow Hammond to video record its furnace operations for compliance purposes, to resubmit an Operation, Maintenance and Monitoring Plan, and to improve maintenance and recordkeeping practices. Under the Consent Decree, Jupiter also will pay a civil penalty of $2.0 million, to be divided between the United States and Hammond.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments

relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States, Indiana and Hammond* v. *Jupiter Aluminum Corp.*, D.J. Ref. 90–5–2–1–08734.

The Consent Decree may be examined at the Office of the United States Attorney, Northern District of Indiana, 5400 Federal Plaza, Suite 1500, Hammond, Indiana 46320, and at U.S. EPA Region 5, Regional Counsel's Office, 77 West Jackson Blvd., Chicago, Illinois 60604. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Jupiter Aluminum Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia-fleetwood@usdoj.gov*), fax number (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $22.00 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

William D. Brighton,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 07–4066 Filed 8–20–07; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Clean Water Act

In accordance with Departmental Policy, 28 C.F.R. 50.7, notice is hereby given that a proposed consent decree in *United States* v. *TE Products Pipeline Company, LLC* and *TEPPCO Crude Pipeline, LLC* (E.D. Tex.), No. 1:07–CV–0569–TH, was lodged in the United States District Court for the Eastern District of Texas on August 15, 2007. The Decree will resolve the liability of the named Defendants to the United States for civil penalties and injunctive relief for their violations of Sections 301 and 311(b)(3) of the Clean Water Act (''CWA''), 33 U.S.C. 1311 and 1321(b)(3), resulting from spills of crude and refined petroleum products from Defendants' pipelines in four separate spill events dated November 27, 2001, March 12, 2004, February 28, 2005, and May 13, 2005, at locations in Texas, Arkansas, and Oklahoma.

Under the proposed Consent Decree, Defendants are jointly and severally liable to perform injunctive relief on the impacted pipelines and pay a civil penalty. Specifically, Defendants will (a) conduct a close interval survey of a segment of the pipeline system from Beaumont, Texas to Many, Louisiana, and take corrective action to bring the cathodic protection into compliance with standards, (b) install remote surveillance cameras at specified points on the pipeline to ensure constant monitoring of pipeline systems and provide surveillance of the pipeline system equipment, and (c) update the Supervisory Control and Data Acquisition ('SCADA'') system on the pipeline system to enable Defendants to monitor and balance the volume of product in the pipeline and pipeline pressure and temperature deviations which can be indicators of leaks or spills from the pipeline. Additionally, Defendants will pay a civil penalty of $2,865,000 for the four spills.

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, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *TE Products Pipeline Company, LLC* and *TEPPCO Crude Pipeline, LLC,* DOJ #90–5–1–1–08194. The proposed Consent Decree may be examined at the Office of the United States Attorney, Eastern District of Texas, 350 Magnolia Avenue, Suite 150, Beaumont, TX 77701–2237, and at U.S. EPA REgion 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas, 75202. During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $7.75 for the Consent Decree (25 cents per page reproduction cost) payable to the U.S. Treasury, or if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Thomas Mariani,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 07–4089 Filed 8–20–07; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

[OMB Number 1140–0041]

Agency Information Collection Activities; Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Implementation of Public Law 103–322, the Violent Crime Control and Law Enforcement Act of 1994.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 72, Number 112, page 32311 on June 12, 2007, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until September 20, 2007. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of

information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Implementation of Public Law 103–322, The Violent Crime Control and Law Enforcement Act of 1994.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: none. Abstract: The Violent Crime Control and Law Enforcement Act of 1994 restricts the manufacture, transfer, and possession of certain semiautomatic assault weapons and large capacity ammunition feeding devices. Federal firearms licensees may transfer these weapons to law enforcement agencies and law enforcement officers with proper documentation. This documentation is necessary for ATF to ensure compliance with the law and to prevent the introduction of semiautomatic assault weapons into commercial channels.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 61,529 respondents will provide the necessary documentation and maintain records for a total of 2 hours and 50 minutes.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 148,900 total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street, NW., Washington, DC 20530.

August 14, 2007.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E7–16428 Filed 8–20–07; 8:45 am]

BILLING CODE 4810–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

[OMB Number 1140–0040]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Application for an Amended Federal Firearms License.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 72, Number 112, page 32312 on June 12, 2007, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until September 20, 2007. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202)–395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application For An Amended Federal Firearms License.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 5300.38. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: Individuals or households. Abstract: The form is used when a Federal firearms licensee makes application to change the location of the firearms business premises. The applicant must certify that the proposed new business premises will be in compliance with State and local law for that location.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: There will be an estimated 18,000 respondents, who will complete the form within approximately 1 hour and 15 minutes.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 22,500 total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department

Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street, NW., Washington, DC 20530.

Dated: August 14, 2007.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E7–16429 Filed 8–20–07; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

[OMB Number 1140–0028]

Agency Information Collection Activities: Proposed Collection; Comments Requested

Action: 30-Day Notice of Information Collection Under Review: Inventories, Licensed Explosives Importers, Manufacturers, Dealers, and Permittees.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 72, Number 112, page 32313–32314 on June 12, 2007, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until September 20, 2007. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Inventories, Licensed Explosives Importers, Manufacturers, Dealers, and Permittees.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF REC 5400/1. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. Other: none. Abstract: The records show the explosive material inventories of those persons engaged in various activities within the explosive industry and are used by the government as initial figures from which an audit trail can be developed during the course of a compliance inspection or criminal investigation. Licensees and permittees shall keep records on the business premises for five years from the date a transaction occurs or until discontinuance of business or operations by licensees or permittees.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 13,106 respondents, who will complete the records within approximately 2 hours.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 26,212 total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street NW., Washington, DC 20530.

Dated: August 14, 2007.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E7–16430 Filed 8–20–07; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

[OMB Number 1140–0013]

Agency Information Collection Activities: Proposed Collection; Comments Requested

Action: 30-Day Notice of Information Collection Under Review: Application for Tax-Exempt Transfer of Firearm and Registration to Special Occupational Taxpayer.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 72, Number 112, pages 32311–32312 on June 12, 2007, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until September 20, 2007. This process is conducted in accordance with 5 CFR 1320.10. Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary

for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agencies' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Tax-Exempt Transfer of Firearm and Registration to Special Occupational Taxpayer.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 3 (5320.3). Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: None. Abstract: The form is submitted and approved by ATF prior to the transfer of a National Firearms Act weapon from one Special Occupational Tax paying Federal firearms licensee to another special taxpaying licensee. The form is required whenever such a transfer is to be made.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 2,521 respondents, who will complete the form within approximately 30 minutes.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 11,850 total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street, NW., Washington, DC 20530.

Dated: August 14, 2007.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E7–16431 Filed 8–20–07; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

August 15, 2007.

The Department of Labor has submitted the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). Copies of each ICR announced herein with applicable supporting documentation including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *king.darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: Brian Harris-Kojetin, OMB Desk Officer for the Bureau of Labor Statistics (BLS), Office of Management and Budget, 725 17th Street, NW., Room 10235, Washington, DC 20503, Telephone: 202–395–4816/Fax: 202–395–6974 (these are not a toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the applicable OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Bureau of Labor Statistics.

Type of Review: Revision of currently approved collection.

Title: Annual Refiling Survey (ARS) forms.

OMB Control Number: 1220–0032.

Estimated Number of Annual Respondents: 1,379,661.

Estimated Total Annual Burden Hours: 138,235.

Affected Public: Private sector: Business or other for-profit; Not-for-profit institutions; and Farms.

Description: The Quarterly Census of Employment and Wages (QCEW) program is a Federal/State cooperative effort which compiles monthly employment data, quarterly wages data, and business identification information from employers subject to State Unemployment Insurance (UI) laws. These data are collected from State Quarterly Contribution Reports (QCRs) submitted to State Workforce Agencies (SWAs). The States send micro-level employment and wages data, supplemented with the names, addresses, and business identification information of these employers, to the BLS. The State data are used to create the BLS sampling frame, known as the longitudinal QCEW data.

To ensure the continued accuracy of these data, the information supplied by employers must be periodically verified and updated. For this purpose, the Annual Refiling Survey (ARS) is used in conjunction with the UI tax reporting system in each State. The information collected on the ARS is used to review the existing industry code assigned to each establishment as well as the physical location of the business establishment. As a result, changes in the industrial and geographical compositions of our economy are captured in a timely manner and reflected in the BLS statistical programs.

The ARS also asks employers to identify new locations in the State. If these employers meet QCEW program reporting criteria, then a Multiple Worksite Report (MWR) is mailed to the employer requesting employment and wages for each worksite each quarter. Thus, the ARS is also used to identify new potential MWR-eligible employers.

Agency: Bureau of Labor Statistics.

Type of Review: Revision of currently approved collection.

Title: National Longitudinal Survey of Youth 1979.

OMB Control Number: 1220–0109.

Estimated Number of Annual Respondents: 11,265.

Estimated Total Annual Burden Hours: 11,044.

Affected Public: Individuals or households.

Description: The information obtained in this survey will be used by the Department of Labor, other government agencies, academic researchers, the news media, and the general public to understand the employment experiences and life-cycle transitions of men and women born in the years 1957 to 1964 and living in the United States when the survey began in 1979.

Darrin A. King,

Acting Departmental Clearance Officer.

[FR Doc. E7–16405 Filed 8–20–07; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

August 15, 2007.

The Department of Labor has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). Copies of this ICRs, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *king.darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: John Kraemer, OMB Desk Officer for the Occupational Safety and Health Administration (OSHA), Office of Management and Budget, 725 17th Street, NW., Room 10235, Washington, DC 20503, Telephone: 202–395–4816/Fax: 202–395–6974 (these are not a toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension without change of currently approved collection.

Title: Student Data Form.

OMB Control Number: 1218–0172.

Estimated Number of Respondents: 2,000.

Estimated Total Burden Hours: 167.

Affected Public: Individuals or households.

Description: The form is used to collect student group and emergency contact information from Training Institute students. Student group data is used for reports, and tuition receipts.

Darrin A. King,

Acting Departmental Clearance Officer.

[FR Doc. E7–16406 Filed 8–20–07; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL SCIENCE FOUNDATION

Emergency Clearance; Public Information Collection Requirements Submitted to the Office of Management and Budget; Notice

AGENCY: National Science Foundation.

ACTION: Emergency Clearance: Public Information Collection Requirements Submitted to the Office of Management and Budget (OMB).

SUMMARY: The National Science Foundation (NSF) is announcing plans to request approval of this collection. In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we are providing an opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting that OMB approve clearance of this collection for no longer than 3 years.

DATES: Interested persons are invited to send comments regarding the burden or any other aspect of these collections of information requirements by September 20, 2007.

ADDRESSES: Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington, VA 22230, or by e-mail to *splimpto@nsf.gov,* and Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503. Attn: John Kraemer, NSF Desk Officer.

Comments: Written comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

NSF has determined that it cannot reasonably comply with the normal clearance procedures under 5 CFR 1320 because normal clearance procedures are reasonably likely to prevent or disrupt the collection of information. NSF is requesting emergency review from OMB of this information collection to enable the Emergency review and approval of this ICR will assure continuation of the PFF evaluation that is also funded by the Atlantic Philanthropies. OMB approval has been requested for September 24, 2007. If granted, the emergency approval is only valid for 90 days.

During this same period, a regular review of this information collection will be undertaken. During the regular review period, the NSF requests written comments and suggestions from the public and affected agencies concerning this information collection. Comments

are encouraged and will be accepted until October 22, 2007 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230; telephone (703) 292–7556; or send e-mail to *splimpto@nsf.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

OMB Approval Number: OMB 3145–0058.

Expiration Date: January 31, 2010.

Overview of this information collection: The *Federal Funding Accountability* and *Transparency Act (FFATA)* of 2006 (Pub. L. 109–282) requires agencies to make award and sub-award information available to be searched by the public in a single searchable Web site developed by the Office of Management and Budget (OMB). The impetus for this Act was the lack of a single source of accurate, complete and timely information on federal government spending.[1] The requirements and residual technical and policy impacts of FFATA were unanticipated at the time the prior information clearance package was cleared by OMB. In order to meet the legislative mandate and Congressional intent of FFATA, NSF needs a reliable source of data and the ability to validate the accuracy of that data. The change that is being proposed by NSF, therefore, is essential to ensuring compliance with FFATA requirements. If NSF cannot collect and validate the accuracy of award data, NSF will miss the deadline imposed by Congress to make award data publicly available by January 1, 2008.

NSF is committed to providing citizens accurate, complete, and timely information regarding the expenditure of taxpayer funds. The policy change for which NSF is seeking approval will enable the Foundation to accomplish this goal. If NSF must follow the normal OIRA clearance review process, the result will be incomplete and inaccurate award data on OMB's single searchable Web site.

[1] Source: Chairman's Statement, Senator Tom Coburn, N.D. (R–OK), What You Don't Know Can Hurt You: S. 2590, the ''Federal Funding Accountability and Transparency Act of 2006'' (July 18, 2006).

Consult With Other Agencies & the Public

The policy change identified is consistent with a previously established Government-wide standard imposed by Grants.gov as part of its registration process. (Reference OMB Clearance Number: 4040–0001, Expiration Date: 04/30/2008). Grants.gov currently has 103,000 Authorized Organizational Representatives registered in the system. As reiterated below, 93.1% of organizations that submitted proposals to NSF in FY06 are already registered in CCR. Implementing this policy change, will make NSF's registration requirement consistent with that currently in use by all other Federal granting agencies.

NSF also plans to announce this proposed change at an upcoming Federal Demonstration Partnership meeting in September to gauge community response to this policy change. Finally, NSF plans to communicate with its small business community to obtain feedback as well as post a notice on the NSF Web site regarding the Foundation's plans in this area. The estimated impact of this change is described more fully below.

Background

FFATA specifies requisite information (14 data elements) that must be included for each award, one of which is the unique identifier for the entity. OMB Memorandum, ''Reporting of Data Elements Required by the Federal Funding Accountability and Transparency Act,'' (dated March 30, 2007) defines the unique identifier for the entity as the Data Universal Numbering System (DUNS) number.

In accordance with the OMB policy ''Use of a Universal Identifier by Grant Applicants,'' (June 27, 2003) [68 FR 38402], NSF collects DUNS numbers for all awardees. While NSF collects this information, NSF currently does not have a mechanism to validate the accuracy of the DUNS number provided by the organization during the FastLane proposal submission process.

In order to meet the legislative mandate and Congressional intent of FFATA, NSF needs a reliable source of data to validate the accuracy of the DUNS number provided by the organization. NSF has identified the Central Contractor Registration (CCR) database as the most complete and accurate data source. The CCR system is managed under the Integrated Acquisition Environment (IAE) Presidential Management Agenda (PMA) E-Gov initiative. IAE is sponsored by OMB and managed by the General Services Administration. CCR is the primary registrant database for the U.S. Government. CCR collects, validates, stores, and disseminates data in support of agency acquisition missions, including Federal agency contract and assistance awards.

All contractors that do business with the Federal government and all grantees that use Grants.gov are required to register in CCR prior to conducting any transactions (e.g. submitting a grant application). Any organization that registers with the CCR must have a valid DUNS number. To ensure each organization receiving an NSF award and/or subaward has a valid DUNS number, NSF will require potential proposers to register in the CCR prior to proposal submission. This approach aligns with the government-wide efforts described above. The proposed effective date for this policy change is October 1, 2007. Requiring CCR registration effective October 1, 2007 will provide NSF with sufficient time to change NSF proposal preparation requirements to mandate this requirement, as well as validate DUNS numbers in preparation for meeting the FFATA January 1, 2008 milestone to make award data publicly available.

Impact of Policy Change

NSF has analyzed the impact of this proposed policy change and the additional burden associated with it on the Foundation's proposer community. The results of this assessment are as follows:

- CCR states it takes approximately one hour for an organization to complete the online registration, depending upon the size and complexity of the organization. The one hour to complete registration includes the time to read the instructions and to complete the form online. CCR does have handbook users may refer during the registration process. CCR recommends factoring in an additional 15 minutes in the instance the user references the handbook.
- NSF retrieved a list of organizations that submitted proposals to the Foundation in FY 2006 and used a sample (5% error) to determine the percentage of these organizations registered in the CCR.
- A total of 2,677 organizations submitted proposals to NSF in FY 2006.
- Out of the 2,677 organizations that submitted proposals to NSF in FY06, a random sample of 247 organizations was used to verify CCR registration.
- Of the 247 sample organizations, 230 were registered in CCR (93.1%).

• Based on the sample analysis of FY06 data (the 247 sample organizations), it can be concluded that:

• 93.1% of organizations that submitted proposals to NSF in FY06 are already registered in CCR.

• 6.9% of organizations that submitted proposals to NSF in FY06 are not registered in CCR.

• Of the 2,677 organizations that submitted proposals to NSF in FY06, 184 organizations (6.9%) would be impacted by this policy change.

The amount of additional burden associated with this policy change is 230 hours (184 organizations * 1.25 hour to register = 230 hours). On average, it takes CCR three days to process a registration submission.

Respondents: Not-for-profit institutions, for-profit institutions, individuals.

Number of Respondents: 184.

Burden on the Public: 230 additional hours.

Dated: August 15, 2007.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 07–4087 Filed 8–20–07; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–346, 50–440, 50–334, and 50–412; License Nos. NPF–3, NPF–58, DPR–66 and NPF–73; EA 07–199]

In the Matter of FirstEnergy Nuclear Operating Company; Davis-Besse Nuclear Power Station, Unit 1; Beaver Valley Power Station, Units 1 and 2; Confirmatory Order (Effective Immediately)

I

FirstEnergy Nuclear Operating Company (FENOC or licensee) is the holder of four NRC Facility Operating Licenses issued by the U.S. Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Part 50, which authorizes the operation of the specifically-named facilities in accordance with the conditions specified in each license. License No. NPF–3 was issued on April 22, 1977, to operate the Davis-Besse Nuclear Power Station, Unit No. 1. License No. NPF–58 was issued on November 13, 1986, to operate the Perry Nuclear Power Plant, Unit No. 1. License Nos. DPR–66 and NPF–73 to operate the Beaver Valley Power Station, Units 1 and 2, were issued on July 2, 1976, and August 14, 1987, respectively. Davis-Besse is located near Toledo, Ohio; Perry is located near Painesville, Ohio; and Beaver Valley is located near McCandless, Pennsylvania.

II

The events leading up to this Confirmatory Order date back several years. In 2005, the NRC took enforcement action against FENOC, imposing a $5,450,000 civil penalty for regulatory violations associated with the 2002 reactor pressure vessel head degradation event at the Davis-Besse Plant. In response to that event, FENOC performed root cause evaluations. Among other things, FENOC's root cause reports determined that the reactor pressure vessel head degradation was the result of ongoing and undetected Control Rod Drive Mechanism nozzle leakage that had lasted more than four years.

In February 2007, the licensee informed the NRC that Davis-Besse was initiating a condition report based on information contained in a letter received from Nuclear Electric Insurance Limited (NEIL). The NEIL letter referenced a new analysis that FENOC had commissioned of the Davis-Besse reactor pressure vessel head degradation event. The new analysis, submitted to NEIL as expert testimony in an insurance arbitration on December 18, 2006, was performed by Exponent Failure Analysis Associates and Altran Solutions Corporation (Exponent) and concluded that the time period between the beginning of substantial leakage from the reactor pressure vessel head nozzle and the development of the large cavity next to the nozzle may have been as short as four months.

On April 2, 2007, after several conference calls with the licensee and Exponent to assess whether the Exponent Report raised any immediate safety concerns (it did not), the NRC requested FENOC to respond in writing to four questions regarding information and conclusions presented in the Exponent Report. Among other things, the NRC's request for information asked FENOC to ''discuss any differences between the Exponent Report information and conclusions drawn therein, and information previously provided in the Root Cause Analysis Report and Licensee Event Report for the Davis-Besse reactor pressure vessel head wastage event.''

In its May 2, 2007, response to the NRC's request for information, FENOC stated that it ''ha[d] not specifically evaluated all of the assumptions used by Exponent'' but nevertheless concluded that the Exponent Report ''more accurately characterizes the time line of the reactor head degradation event based on [Exponent's] use of more recently available test data in conjunction with detailed analytical modeling.'' FENOC's response did not include a detailed discussion of the differences between the operational experience data and the Exponent Report assumptions.

Consequently, on May 14, 2007, the NRC issued FENOC a Demand for Information (DFI) pursuant to 10 CFR 2.204 to determine whether further enforcement action was necessary to provide reasonable assurance that FENOC would continue to operate its licensed facilities in accordance with the terms of its licenses and the Commission's regulations. The DFI required FENOC to provide a detailed discussion of the process used to determine if the Exponent Report assumptions, analyses, conclusions, or other related information should have been reported to the NRC in a more prompt manner; a detailed discussion of the differences in assumptions, analyses, conclusions, and other related information of the Exponent Report and technical and programmatic root cause reports developed in 2002; and a position on whether FENOC endorsed the conclusions of a second contractor report prepared in connection with the NEIL insurance arbitration.

FENOC responded to the DFI in writing on June 13, 2007. In that response, FENOC stated that its May 2, 2007, response ''was primarily focused on the detailed analytical studies that form the basis for the Exponent Report's time line for the crack growth and wastage phenomenon * * * and was not a comprehensive review of the differences between our root cause reports and the Exponent Report.'' According to the June 13 response, FENOC ''continues to believe'' that its earlier root cause reports ''provide a comprehensive explanation of the progression and causal factors of the Davis-Besse reactor pressure vessel head degradation event and, hence, contain the most appropriate information to have used in development and implementation of corrective actions to prevent recurrence.'' FENOC's June 13, 2007, response further acknowledged that it ''should have communicated more effectively internally and more promptly with the NRC'' about the Exponent Report, and included commitments to implement corrective actions in those areas.

On June 27, 2007, the NRC held a public meeting with FENOC to discuss the DFI response. During the meeting, the NRC questioned the corporate safety culture at FirstEnergy and whether FENOC had changed its position

regarding the root causes of the Davis-Besse reactor pressure vessel head degradation event. The NRC further questioned why FENOC had not immediately shared the Exponent Report with the NRC, given the importance of its subject matter and potential safety significance. The NRC also sought clarification regarding the licensee's proposed corrective actions and FENOC agreed to provide clarification in a supplemental DFI response.

On July 16, 2007, FENOC provided the NRC its supplemental response to the DFI, which elaborated on the commitments and corrective actions discussed at the public meeting. In general, FENOC's commitments and corrective actions are designed to prevent recurrence of the events that culminated in the issuance of the NRC's Demand for Information. Specifically, FENOC's commitments are designed to ensure that information of potential regulatory significance is recognized by FENOC and FirstEnergy employees and communicated to the NRC in a timely and effective manner.

In the short term, FENOC has implemented interim corrective actions to prevent recurrence of the events that culminated in the issuance of the NRC's Demand for Information. Specifically, FENOC has developed criteria to be used in determining whether documents developed in support of commercial matters, including the pending insurance arbitration with NEIL, contain information of potential regulatory interest to the NRC. FENOC's interim actions will remain in place until the procedural changes required by this Confirmatory Order are implemented.

III

On August 14, 2007, the Licensee consented to the issuance of this Order to confirm the commitments described in section IV below. The Licensee further agreed that this Order is effective upon issuance and has waived its right to a hearing.

I find that the commitments set forth in Section IV are acceptable and necessary and conclude that with these commitments the public health and safety are reasonably assured. In view of the foregoing, I have determined that public health, safety, and interest require that the Licensee's commitments be confirmed by this Order. Based on the above and the Licensee's consent, this Order is immediately effective upon issuance.

IV

Accordingly, pursuant to sections 103, 104b, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, it is hereby ordered, effective immediately, that the licensee shall implement the following:

1. The Licensee shall conduct regulatory sensitivity training for selected FENOC and non-FENOC FirstEnergy employees to ensure those employees identify and communicate information that has the potential for regulatory impact either at FENOC sites or within the nuclear industry to the NRC. At least 30 days prior to conducting the training, the Licensee shall submit by letter to the Director, NRC Office of Enforcement, a description of (1) the population to be trained, (2) the planned training methodology and materials, and (3) the training objectives. The Licensee shall complete its regulatory sensitivity training no later than November 30, 2007, and within 60 days following completion shall inform the Director, NRC Office of Enforcement, by letter.

2. The Licensee shall conduct effectiveness reviews to determine if an appropriate level of regulatory sensitivity is evident among FirstEnergy employees including those who received regulatory sensitivity training. The first effectiveness review shall be conducted in January 2008 by an external consultant. A follow-up effectiveness review shall be conducted in January 2009. At least 45 days prior to starting each external effectiveness review, the Licensee shall inform, by letter, the Director, NRC Office of Enforcement, of the identity of its external consultant, the qualifications of its external consultant, and the scope and depth of its plan for assessing effectiveness. Within 60 days following completion of each external effectiveness review, the Licensee shall inform, by letter, the Director, NRC Office of Enforcement, of a summary of the results of the review and a description of any actions taken or planned in response to those results.

3. The Licensee shall develop a formal process to review technical reports prepared as part of a commercial matter. The process shall provide criteria for the Licensee to use in determining whether a report has the potential for regulatory implications, or impact on nuclear safety either at FENOC sites or within the nuclear industry. The Licensee shall implement the process no later than December 14, 2007, and within 30 days following implementation shall submit a description of the process by letter to the Director, NRC Office of Enforcement.

4. The Licensee shall assess its Regulatory Communications policy and make process changes to its NRC Correspondence procedure to ensure specific questions are asked during the process relative to the experience gained from efforts to respond to the NRC's May 14, 2007, Demand for Information. The Licensee shall complete any revisions to its NRC Correspondence procedure or Regulatory Communications policy no later than December 14, 2007, and within 30 days following completion shall submit a description of the policy and procedure changes, if any, or the basis for the determination that such revisions were not necessary, by letter to the Director, NRC Office of Enforcement.

5. The Licensee shall provide an Operating Experience (OE) document to the nuclear industry through the industry's established OE process. The document shall discuss the issues surrounding the NRC's May 14, 2007, Demand for Information, including the review of technical reports prepared as part of a commercial matter. The OE document shall be provided to the nuclear industry, and to the Director, NRC Office of Enforcement, within 30 days of the date of this Order.

6. The Licensee shall complete a root cause evaluation of the events that culminated in the issuance of the NRC's May 14, 2007, Demand for Information. The licensee shall make the root cause evaluation available for review by NRC inspectors and summarize the results of the evaluation in a letter to the Director, NRC Office of Enforcement, no later than December 14, 2007. The Licensee's letter to the NRC shall document the results of an assessment as to whether the results of the root cause evaluation reflect a need for any corrective actions different from or in addition to the requirements of this Confirmatory Order.

7. The Licensee shall maintain the interim corrective actions, discussed, in part, in Section II of this Order and implemented as a result of the events leading up to the issuance of the NRC's May 14, 2007, DFI, until the procedural changes described in paragraphs 3 and 4 of Section IV of this Confirmatory Order are implemented.

The Director, Office of Enforcement, may, in writing, relax or rescind any of the above conditions upon demonstration by the Licensee of good cause.

V

Any person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its issuance. Where good cause is shown, consideration will be given to extending the time to request a

hearing. A request for extension of time in which to request a hearing must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and must include a statement of good cause for the extension. Any request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory commission, ATTN: Chief, Rulemakings and Adjudications Staff, Washington, DC 20555. Copies of the hearing request shall also be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Materials Litigation and Enforcement at the same address, to the Regional Administrator for NRC Region III, 801 Warrenville Road, Lisle, IL 60532–4351, to the Regional Administrator for NRC Region I, 475 Allendale Road, King of Prussia, PA 19406–1415, and to the Licensee. It is requested that requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301–415–1101 or by e-mail to *hearingdocket@nrc.gov* and also to the Office of the General Counsel either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov.* If a person other than the licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained. In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in section IV above shall be final 20 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in section IV shall be final when the extension expires if a hearing request has not been received. A request for hearing shall not stay the immediate effectiveness of this order.

Dated this 15th day of August 2007.

For the Nuclear Regulatory Commission.

Cynthia A. Carpenter,

Director, Office of Enforcement.

[FR Doc. E7–16463 Filed 8–20–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–387 and 50–388]

PPL Susquehanna, LLC, Susquehanna Steam Electric Station, Units 1 and 2; Draft Environmental Assessment and Finding of No Significant Impact Related to the Proposed License Amendment To Increase the Maximum Reactor Power Level

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of Opportunity for Public Comment.

SUMMARY: The NRC has prepared a Draft Environmental Assessment as its evaluation of a request by PPL Susquehanna, LLC for a license amendment to increase the maximum thermal power at Susquehanna Steam Electric Station, Units 1 and 2 (SSES 1 and 2), from 3,489 megawatts-thermal (MWt) to 3,952 MWt at each unit. This represents a power increase of approximately 13 percent thermal power. As stated in the NRC staff's position paper dated February 8, 1996, on the Boiling-Water Reactor Extended Power Uprate (EPU) Program, the NRC staff (the staff) will prepare an environmental impact statement if it believes a power uprate would have a significant impact on the human environment. The staff did not identify any significant impact from the information provided in the licensee's EPU application for Susquehanna Steam Electric Station, Units 1 and 2, or the staff's independent review; therefore, the staff is documenting its environmental review in an Environmental Assessment. Also, in accordance with the position paper, the Draft Environmental Assessment and Finding of No Significant Impact is being published in the **Federal Register** with a 30-day public comment period.

Environmental Assessment

Plant Site and Environs

SSES is located just west of the Susquehanna River approximately 5 miles northeast of Berwick, in Luzerne County, Pennsylvania. In total, SSES majority owner and licensed operator, PPL Susquehanna, LLC (PPL, the licensee), owns 2,355 acres of land on both sides of the Susquehanna River. Generally, this land is characterized by open deciduous woodlands interspersed with grasslands and orchards. Approximately 487 acres are used for generation facilities and associated maintenance facilities, laydown areas, parking lots, and roads. Approximately 130 acres are leased to local farmers. PPL maintains a 401-acre nature preserve, referred to as the Susquehanna Riverlands, which is located between SSES and the river; U.S. Route 11 separates the Susquehanna Riverlands from the plant site. West of the Susquehanna River, PPL and Allegheny Electric Cooperative jointly own 717 acres of mostly undeveloped land, which includes natural, recreational, and wildlife areas. Additionally, PPL and Allegheny Electric Cooperative own Gould Island, a 65-acre island just north of SSES on the Susquehanna River (Reference 10).

SSES is a two-unit plant with General Electric boiling-water reactors and generators. NRC approved the Unit 1 operating license on July 17, 1982, and commercial operation began June 8, 1983. The Unit 2 operating license was issued on March 3, 1984, and commercial operation began February 12, 1985. Units 1 and 2 both currently operate at 3,489 MWt (Reference 8). The units share a common control room, refueling floor, turbine operating deck, radwaste system, and other auxiliary systems (Reference 9).

SSES uses a closed-cycle heat dissipation system (two natural-draft cooling towers) to transfer waste heat from the circulating water system to the atmosphere. The circulating water and the service water systems draw water from, and discharge to, the Susquehanna River. The river intake structure is located on the western bank of the river and consists of two water entrance chambers with 1-inch, on-center vertical trash bars and 3/8-inch-mesh traveling screens. A low-pressure screen-wash system periodically operates to release aquatic organisms and debris impinged on the traveling screens to a pit with debris removal equipment that collects material into a dumpster for offsite disposal. Cooling tower blowdown, spray pond overflow, and other permitted effluents are discharged to the Susquehanna River through a buried pipe leading to a submerged discharge diffuser structure, approximately 600 feet downstream of the river intake structure. The diffuser pipe is 200 feet long, with the last 120 feet containing 72 four-inch portals that direct the discharge at a 45-degree angle upwards and downstream. Warm circulating water from the cooling towers can be diverted to the river intake structure to prevent icing; this usually occurs from November through March on an as-needed basis (Reference 10).

For the specific purpose of connecting SSES to the regional transmission system, there are approximately 150

miles of transmission line corridors that occupy 3,341 acres of land. The corridors pass through land that is primarily agricultural and forested with low population densities. Two 500-kilovolt (kV) lines and one 230-kV line connect SSES to the electric grid, with approximately 2.3 miles of short ties in the immediate plant vicinity to connect SSES to the 230-kV system. The Stanton-Susquehanna #2 230-kV transmission line corridor runs northeast from the plant for approximately 30 miles and ranges from 100–400 feet wide. The Susquehanna-Wescosville-Alburtis 500-kV transmission line corridor ranges from 100 to 350 feet wide and runs generally southeast from the plant for approximately 76 miles; the Sunbury-Susquehanna #2 500-kV transmission line corridor is approximately 325 feet wide and runs 44 miles west-southwest from the plant. The transmission line corridors cross the following Pennsylvania counties: Luzerne (the location of SSES), Carbon, Columbia, Lehigh, Northampton, Northumberland, Montour, and Snyder. These transmission lines are owned by PPL Electric Utilities and are integral to the larger transmission system, and as such, PPL Electric Utilities plans to maintain these lines indefinitely. Except for the short ties on the plant site, the lines would likely remain a permanent part of the transmission system even after SSES is decommissioned (Reference 10).

Identification of the Proposed Action

By letter dated October 11, 2006, PPL proposed amendments to the operating licenses for SSES Units 1 and 2 to increase the maximum thermal power level of both units by approximately 13 percent thermal power, from 3,489 MWt to 3,952 MWt (Reference 8). The change is considered an EPU because it would raise the reactor core power level more than 7 percent above the original licensed maximum power level. This amendment would allow the heat output of the reactor to increase, which would increase the flow of steam to the turbine. This would result in the increase in production of electricity and the amount of waste heat delivered to the condenser, and an increase in the temperature of the water being discharged to the Susquehanna River.

PPL plans to implement the proposed EPU in two phases to obtain optimal fuel utilization and to ensure that manageable core thermal limits are maintained. The core thermal power level of Unit 2 would be increased by approximately 7 percent during the spring 2007 refueling outage and the remaining 7 percent during the spring 2009 refueling outage. Unit 1's core thermal power level would also be increased in two stages of about 7 percent each during the spring 2008 and spring 2010 refueling outages (Reference 8).

The original operating licenses for Units 1 and 2 authorized operation up to a maximum power level of 3,293 MWt per unit. Since the units went online, SSES has implemented two power uprates. Stretch uprates (4.5 percent each) were implemented in 1994 (Unit 2) and 1995 (Unit 1), increasing the licensed thermal power levels of SSES Units 1 and 2 from 3,293 MWt to 3,441 MWt. Two separate NRC environmental assessments each resulted in a finding of no significant impact and determined that these actions " * * * would have no significant impact on the quality of the human environment." These decisions were published in the **Federal Register,** Vol. 59, No. 53, pp. 12990–12992 and Vol. 60, No. 9, pp. 3278–3280 (Reference 12, 13). In 2001, a Measurement Uncertainty Recapture (MUR) uprate of 1.4 percent increased the licensed thermal power levels of SSES Units 1 and 2 to 3,489 MWt. The NRC environmental assessment for this action also resulted in a finding of no significant impact and was published in the **FEDERAL REGISTER**, Vol. 66, No. 122, pp. 33716–33717 (Reference 14).

The Need for the Proposed Action

SSES is within the transmission area controlled by PJM Interconnection, L.L.C. (PJM). PJM operates the largest regional transmission territory in the U.S., currently serving a 164,260-square-mile area in all or parts of 13 states and the District of Columbia, representing approximately 163,806 megawatts electrical (MWe) of generating capacity. PJM has forecasted that the summer unrestricted peak load in the Mid-Atlantic geographic zone where SSES is located would grow at an annual average rate of 1.8 percent for the next 10 years. This represents an increase in peak load of almost 6,000 MWe from 2005 to 2010, when the proposed SSES EPU is scheduled to be completed. The proposed EPU would add an average of 205 MWe of base load generation to the grid from both Units 1 and 2. This added electricity is projected to be enough to meet the power needs of approximately 195,000 homes and is forecasted to be produced for the PJM grid at a cost lower than the projected market price (Reference 9).

PJM uses a queue system to manage requests to add or remove generation from the regional transmission system. SSES submitted an application to PJM for the EPU additional generation on May 19, 2004. The PJM Interconnection Service Agreements and Construction Service Agreements were signed for Unit 2 on July 7, 2005, and for Unit 1 on January 20, 2006 (Reference 9).

Environmental Impacts of the Proposed Action

At the time of issuance of the operating licenses for SSES, the staff noted that any activity authorized by the licenses would be encompassed by the overall action evaluated in the Final Environmental Statement (FES) for the operation of SSES, which was issued by the NRC in June 1981. This Environmental Assessment summarizes the radiological and non-radiological impacts in the environment that may result from the proposed action.

Non-Radiological Impacts

Land Use Impacts

Potential land use impacts due to the proposed EPU include impacts from construction and plant modifications at SSES. While some plant components would be modified, most plant changes related to the proposed EPU would occur within existing structures, buildings, and fenced equipment yards housing major components within the developed part of the site. No new construction would occur outside of existing facilities, and no expansion of buildings, roads, parking lots, equipment storage areas, or transmission facilities would be required to support the proposed EPU with the following exceptions.

The 230-kV switchyard located on PPL property across the river from the station, and the 500-kV switchyard located on the plant site would both be expanded to house additional capacitor banks. The site road adjacent to the 500-kV switchyard would be moved to accommodate this expansion. Both switchyard modifications would require no land disturbance outside the power block area. Relocation of the road adjacent to the 500-kV switchyard would occur in a previously developed area of the plant site, resulting in no or little impact to land use. In addition, the turbine building may be expanded to allow for the installation of condensate filters, and additional aboveground storage tanks may be required to support cooling tower basin acid injection. If required, storage tank installation and turbine building expansion would be located in the developed part of the site (Reference 8, 9).

Existing parking lots, road access, lay-down areas, offices, workshops, warehouses, and restrooms would be

used during construction and plant modifications. Therefore, land use conditions would not change at SSES. Also, there would be no land use changes along transmission lines (no new lines would be required for the proposed EPU), transmission corridors, switch yards, or substations. Because land use conditions would not change at SSES and because any disturbance would occur within previously disturbed areas within the plant site, there would be little or no impact to aesthetic resources (except during outside construction) and historic and archeological resources in the vicinity of SSES.

The impacts of continued operation of SSES Units 1 and 2 combined with the proposed EPU would be bounded by the scope of the original FES for operation, ''Final Environmental Statement Related to the Operation of Susquehanna Steam Electric Station, Units 1 and 2,'' dated 1981, and therefore, the staff concludes that there would be no significant impacts to land use, aesthetics, and historic and archaeological resources from the proposed EPU.

Non-Radiological Waste

SSES generates both hazardous and non-hazardous waste. Under the Resource Conservation and Recovery Act (RCRA) Subtitle C, SSES is classified as a Large Quantity Generator of hazardous waste, including spent batteries, solvents, corrosives, and paint thinners. According to the Environmental Protection Agency's *Envirofacts Warehouse* database, there are no RCRA violations listed for SSES related to the management of these hazardous wastes (Reference 11). Non-hazardous waste is managed by SSES's current program and includes municipal waste, maintenance waste, wood, and non-friable asbestos. Plant modifications necessary for the proposed EPU may result in additional hazardous and non-hazardous waste generation; however, all wastes would continue to be managed by the waste management program currently in place at SSES, which is designed to minimize hazardous waste generation and promote recycling of waste whenever possible (Reference 9) and subject to state (commonwealth) and Federal oversight. As such, the staff concludes there would be no impacts from additional non-radiological waste generated as a result of the proposed EPU.

Cooling Tower Impacts

SSES operates two natural draft cooling towers to transfer waste heat from the circulating water system (which cools the main condensers) to the atmosphere. No additional cooling tower capacity is planned to accommodate the proposed EPU. However, additional aboveground storage tanks could be required to support cooling tower basin acid injection. If built, these tanks would be located in the developed part of the plant site (Reference 9).

Aesthetic impacts associated with cooling tower operation following implementation of the proposed action would be similar to those associated with current operating conditions and include noise and visual impacts from the plume such as fogging and icing.

No significant increase in noise is anticipated for cooling tower operation following the proposed EPU. The FES for operation evaluated the potential noise impacts of operation of SSES and determined that pump and motor noise from the cooling water system would not exceed ambient (baseline) levels in offsite areas and that cooling tower noise would be audible for no more than a mile offsite to the west, southwest, and southeast of the station. PPL conducted an initial noise survey in 1985 after commercial operation of both units began, and again in 1995 following the stretch uprate. The 1995 noise measurements were similar to those recorded in 1985, and PPL received no noise complaints following implementation of the stretch uprate. The staff concludes that the proposed EPU, like the stretch uprate, would not produce measurable changes in the character, sources, or intensity of noises generated by the station's cooling water system or cooling towers (Reference 9).

Conclusions reached in NUREG–1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS),'' Volumes 1 and 2, dated 1996, apply to the proposed action regarding cooling tower impacts on crops, ornamental vegetation, and native plants. The GEIS concluded that natural-draft cooling towers release drift and moisture high into the atmosphere where they are dispersed over long distances, and increased fogging, cloud cover, salt drift, and relative humidity have little potential to affect crops, ornamental vegetation, and native plants.

Impacts associated with continued cooling tower operation at SSES following the proposed EPU, including noise, fogging, cloud cover, salt drift, and icing would not change significantly from current impacts. Therefore, the staff concludes there would be no significant impacts associated with cooling tower operation for the proposed action.

Transmission Facility Impacts

The potential impacts associated with transmission facilities for the proposed action include changes in transmission line corridor maintenance and electric shock hazards due to increased current. The proposed EPU would not require any new transmission lines and would not require changes in the maintenance and operation of existing transmission lines or substations. Corridor maintenance practices (including vegetative management) would not be affected by the proposed EPU.

The proposed EPU would require the installation of additional capacitor banks in the 500- and 230-kV switchyards, and PPL plans to conduct a power delivery environmental risk identification evaluation prior to these installations. The capacitor bank installations are the only modification of transmission facilities that would accompany the proposed EPU. The only operational change to transmission lines resulting from the proposed EPU would be increased current; voltage would remain unchanged. As PPL states in its October 11, 2006, application, page 7–2, ''increased current may cause transmission lines to sag more, but there would still be adequate clearance between energized conductors and the ground to prevent electrical shock.'' Additionally, PPL has evaluated all related transmission facilities and found these facilities to be within acceptable design parameters (Reference 9).

The National Electric Safety Code (NESC) provides design criteria that limit hazards from steady-state currents. The NESC limits the short-circuit current to ground to less than 5 milliamps. As stated above, there would be an increase in current passing through the transmission lines associated with the increased power level of the proposed EPU. The higher electrical current passing through the transmission lines would cause an increase in electromagnetic field strength. However, with the proposed increase in power level, the impact of exposure to electromagnetic fields from the offsite transmission lines would not be expected to increase significantly over the current impact. The transmission lines meet the applicable shock prevention provisions of the NESC. Therefore, even with the small increase in current attributable to the proposed EPU, adequate protection is provided against hazards from electric shock.

The impacts associated with transmission facilities for the proposed action would not change significantly from the impacts associated with

current plant operation. There would be no physical modifications to the transmission lines, transmission line corridor maintenance practices would not change, there would be no changes to transmission line corridors or vertical clearances, electric current passing through the transmission lines would increase only slightly, and capacitor bank modifications would occur only within the existing power blocks. Therefore, the staff concludes that there would be no significant impacts associated with transmission facilities for the proposed action.

Water Use Impacts

Potential water use impacts from the proposed action include hydrological alterations to the Susquehanna River and changes to plant water supply. SSES uses cooling water from the Susquehanna River and discharges water back to the river at a point approximately 600 feet downstream of the intake structure. River water enters the plant cooling system via cooling tower basins and provides water to the circulating water and service water systems. SSES uses a closed-cycle, natural-draft cooling tower heat dissipation system to remove waste heat from the main condensers; cooling tower blowdown is discharged back to the Susquehanna River (Reference 9).

No changes to the cooling water intake system are expected during the proposed action. While the volume of intake embayments would not change, the intake flow rate would increase from an average of 58.3 million gallons per day (gpd) to an average of 60.9 million gpd, as the amount of time all four river intake pumps operate would increase. This represents a 4.5-percent increase in intake water withdrawn from the Susquehanna River and is not expected to alter the hydrology of the river significantly (Reference 9). The maximum withdrawal rate possible as a result of the proposed EPU is 65.4 million gpd, which was calculated using worst-case meteorological conditions (NRC 2006). This represents a 12.2-percent increase in intake water withdrawn from the river and is not expected to alter the hydrology of the river significantly.

The amount of consumptive water usage due to evaporation and drift of cooling water through the cooling towers is expected to increase from a monthly average of 38 million gpd to 44 million gpd. This represents a 15.7-percent increase over current usage. Based on the Susquehanna River's average annual flow rate of 9,427 million gpd, the proposed EPU would result in an average annual loss of 0.5 percent of river water at that location. During low-flow conditions, which usually occur in late August, the average evaporative loss at SSES may approach 1 percent of the low-flow river value (Reference 9). The staff concludes that the amount of water consumed by SSES under the proposed EPU conditions would not result in significant alterations to Susquehanna River flow patterns at this location.

Consumptive water usage at SSES is regulated by the Susquehanna River Basin Commission (SRBC), an independent agency that manages water usage along the entire length of the Susquehanna River. The current permit granted for SSES operation by SRBC is for average monthly consumptive water usage up to 40 million gpd (permit #19950301 EPUL–0578). In December 2006, PPL submitted an application to SRBC to eliminate the 40 million gpd average monthly limit and to approve a maximum daily river water withdrawal of 66 million gpd (Reference 15). SRBC is currently reviewing PPL's application and will make a decision independent of the NRC whether to allow the increased consumptive water usage required to implement the proposed EPU. The SRBC permit is required for plant operation, and PPL must adhere to the prescribed water usage limits and any applicable mitigative measures.

No changes to the cooling water intake system and the volume of intake embayment are expected for the proposed EPU, but the average intake flow would increase by 4.5 percent. The staff concludes this increase would not alter significantly the hydrology of the Susquehanna River. The proposed EPU would result in a small increase in the amount of Susquehanna River consumptive water usage due to evaporative losses. However, the increased loss would be insignificant relative to the flow of the Susquehanna River, and SRBC would continue to regulate SSES's consumptive water usage. With respect to the proposed action, the staff concludes there would be no significant impact to the hydrological pattern on the Susquehanna River, and there would be no significant impact to the plant's consumptive water supply.

Discharge Impacts

Potential impacts to the Susquehanna River from the SSES discharge include increased turbidity, scouring, erosion, and sedimentation. These discharge-related impacts apply to the region near the discharge structure due to the large volume of cooling water released to the river. However, since the proposed EPU would result in no significant changes in discharge volume or velocity, there would be no expected changes in turbidity, scouring, erosion or sedimentation related to the proposed EPU.

Surface and wastewater discharges at SSES are regulated through the National Pollutant Discharge Elimination System (NPDES) permit (No. PA0047325), which is issued and enforced by the Pennsylvania Department of Environmental Protection (DEP) Bureau of Water Supply and Wastewater Management. The DEP periodically reviews and renews the NPDES permit; SSES's current NPDES permit was effective beginning September 1, 2005, and is valid through August 31, 2010. The NPDES permit sets water quality standards for all plant discharges to the Susquehanna River, including limits on free available chlorine, total zinc, and total chromium in cooling tower blowdown. According to Pennsylvania's Environmental Facility Application Compliance Tracking System (eFACTS), there are no past or current NPDES violations listed for SSES (Reference 4).

While the proposed EPU would increase the amount of cooling tower blowdown to the Susquehanna River, there is no expected increase in associated biocides, solvents, or dissolved solids entering the river, and SSES would continue to adhere to the water quality standards set within the NPDES permit. The NPDES permit does not contain thermal discharge temperature limits, but SSES must adhere to Susquehanna River temperature limits prescribed by Pennsylvania Code water quality standards (Reference 1). Thermal discharge effects and applicable Pennsylvania Code water quality standards will be discussed further in the Impacts on Aquatic Biota section.

No expected changes in turbidity, scouring, erosion or sedimentation are expected as a result of the proposed EPU. Surface and wastewater discharges to the Susquehanna River would continue to be regulated by the Pennsylvania DEP. Any discharge-related impacts for the proposed action would be similar to current impacts from plant operation, and therefore, the staff concludes the proposed action would not result in significant impacts on the Susquehanna River from cooling water discharge.

Impacts on Aquatic Biota

The potential impacts to aquatic biota from the proposed EPU include impingement, entrainment, thermal discharge effects, and impacts due to transmission line right-of-way maintenance. The aquatic species

evaluated in this draft Environmental Assessment are those in the vicinity of the SSES cooling water intake and discharge structures along the Susquehanna River, and those that occur in water bodies crossed by transmission lines associated with SSES.

The licensee has conducted aquatic biota studies of the Susquehanna River upstream and downstream of SSES since 1971. The studies assessed water quality, algae (periphyton and photoplankton), macroinvertebrates, and fish from 1971 to 1994, with annual fish studies beginning in 1976. The Susquehanna River in the vicinity of SSES has both coolwater and warmwater fishes, primarily consisting of minnows (*Cyprinidae*), suckers (*Catastomidae*), catfish (*Icaluridae*), sunfish (*Centrarchidae*), and darters and perch (*Percidae*). There are also records of smallmouth bass (*Micropterus dolomieu*), walleye (*Sander vitreus*), and channel catfish (*Ictalurus punctatus*) found in proximity to SSES. Monitoring of benthic macroinvertebrates and biofouling mollusks was also included in the studies. No zebra mussels (*Dreissena polymorpha*) have been recorded at SSES or in the vicinity of the North Branch of the Susquehanna River; however, Asiatic clams (*Corbicula fluminea*) have been found in the North Branch of the Susquehanna River for several years and were collected by scuba divers in the SSES engineered safeguard service water spray pond in July 2005.

No sensitive aquatic species are known to occur at or near SSES (Reference 9); however, the 1981 FES for operation indicated that two endangered and two rare fish listed by the Pennsylvania Fish Commission (now the Pennsylvania Fish & Boat Commission) have ranges that fall within SSES transmission line corridors (NRC 1981). PPL has provided the staff with a vegetative management program for its transmission line corridors that states no herbicides shall be applied within 50 feet of any water body, except stump treatments and herbicides approved for watershed/aquatic use. Additionally, the transmission line corridor maintenance activities in the vicinity of stream and river crossings employ procedures to minimize erosion and shoreline disturbance while encouraging vegetative cover (Reference 7).

In addition to setting water quality parameters for surface and wastewater discharges, the SSES NPDES permit (PA–0047325) also regulates entrainment and impingement of aquatic species at SSES. Because SSES uses a closed-cycle, recirculating cooling water system, entrainment and impingement impacts on aquatic biota resulting from the proposed EPU are not expected to be significant.

The proposed EPU would require additional water withdrawal from the Susquehanna River for increased cooling tower evaporative losses and other plant needs. The average increase in daily water withdrawal from the Susquehanna River would be approximately 4.4 percent, from 58.3 million gpd to 60.9 million gpd. PPL also reported a maximum daily water withdrawal estimate of 65.4 million gpd (an 11.2 percent increase), which would only occur during worst-case meteorological conditions (Reference 15). Under the proposed EPU conditions, the average increase in water withdrawal would result in the impingement of approximately one additional fish per day (from 21 to 22) and entrainment of approximately 15,972 additional larvae per day (from 363,000 to 378,000) during spawning season. These small increases in entrainment and impingement related to the proposed EPU would result in no significant impact to the Susquehanna River aquatic community (Reference 9).

Effective July 9, 2007, the EPA suspended the Phase II rule (NRC 2007b). As a result, all permits for Phase II facilities should include conditions under Section 316(b) of the Clean Water Act that are developed on a Best Professional Judgment basis, rather than best technology available. Best Professional Judgment is used by National Pollutant Discharge Elimination System (NPDES) permit writers to develop technology-based permit conditions on a case-by-case basis using all reasonably available and relevant data. Any site-specific mitigation required under the NPDES permitting process would result in a reduction in the impacts of continued plant operations.

The NPDES permit issued by the Pennsylvania DEP does not specify thermal discharge limits; however, the amount and temperature of heated effluent discharged to the Susquehanna River is governed by Section 93.7 of Pennsylvania Code, which places restrictions on waters designated ''Warm Water Fisheries.'' During the July 1–August 31 time frame, the highest river water temperature allowable is 87 degrees Fahrenheit (°F), with lower temperature limits during other parts of the year (Reference 1). In the 1981 FES for operation, the NRC performed an analysis of SSES blowdown plume characteristics. The analysis concluded that blowdown temperatures during all four seasons were lower than the maximum river temperatures set by section 93.7. The location and design of the SSES cooling water discharge structure and the high flow rate of the Susquehanna River allow for sufficient mixing and cooling of heated effluent. Using conservative assumptions similar to those used in the original FES thermal plume analysis, PPL calculated that after implementation of the proposed EPU, blowdown temperatures would increase by 2 °F. This would result in a 0.6 °F increase in the maximum expected temperature at the edge of the thermal plume mixing zone (maximum temperature 86.5 °F). The staff concludes that the increase in thermal discharge temperature and volume resulting from the proposed EPU would still fall within the guidelines prescribed by the original FES for operation (NRC 1981).

Liquid effluents discharged to the Susquehanna River include cooling tower blowdown, spray pond overflow, liquid rad waste treatment effluents, and surface and wastewater discharges. The Commonwealth of Pennsylvania regulates these discharges through SSES's NPDES permit, which sets water quality standards for all plant discharges to the Susquehanna River. Ecological studies of the Susquehanna River conducted for the licensee indicate that river water quality in the vicinity of SSES continues to improve. From 1973 through 2002, there was a significant decreasing trend in turbidity, sulfate, total iron, and total suspended solids; and a significant increasing trend in river temperature, pH, total alkalinity, and dissolved oxygen. A reduction in acid-mine drainage pollutants and improvements in upstream waste-water treatment have likely contributed to the overall-improved river ecosystem health (Ecology III 2003).

SSES operates a closed-cycle cooling water system, and as such, the staff concludes that impacts to aquatic biota in the Susquehanna River from entrainment, impingement, and thermal discharge resulting from the proposed EPU would not be significant. The Pennsylvania DEP will continue to regulate the performance of the SSES cooling water system and surface and wastewater discharges through the NPDES permit and Pennsylvania Code designed to protect warm water fisheries. Furthermore, SSES transmission line corridor maintenance practices would not change upon implementation of the proposed EPU; thus, the staff concludes there would be no significant impacts to aquatic species

associated with transmission line corridor maintenance.

Impacts on Terrestrial Biota

Potential impacts to terrestrial biota from the proposed EPU include impacts due to transmission line corridor maintenance and any planned new construction. The natural communities at SSES and in the surrounding areas consist of river floodplain forest, upland forest, marshes, and wetlands. The river floodplain forest at SSES is dominated by silver maple (*Acer saccharinum*), river birch (*Betula nigra*), and Northern red oak (*Quercus rubra*). The upland forest is dominated by Virginia pine (*Pinus virginiana*), sweet birch (*Betula lenta*), flowering dogwood (*Cornaceae cornus*), white oak (*Fagaceae quercus*), Northern red oak, black oak (*Q. velutina*), and yellow poplar (*Liriodendron tulipifera*). The marshes are dominated by a variety of emergent vegetation such as sedges (*Cyperaceae*), bulrush and cattail (*Typhaceae*), and cutgrass (*Poaceae*) (Reference 9). Although wetlands do occur at the SSES site, none of the wetlands would be affected by the proposed action.

As stated in the Cooling Tower Impacts section, no significant increase in noise is anticipated for cooling tower operation following the proposed EPU, and as such, biota would not be impacted. The staff agrees with the conclusions reached in the GEIS regarding bird collisions with cooling towers: avian mortality due to collisions with cooling towers is considered to be of small significance if the losses do not destabilize local populations of any species and there is no noticeable impairment of its function with the local ecosystem (NRC 1996).

The proposed action would not involve new land disturbance outside of the existing power block or developed areas, and as discussed in the Transmission Facilities Impacts section, there would be no changes to transmission line corridor maintenance practices. Thus, the staff concludes that there would be no significant impacts to terrestrial species or their habitat associated with the proposed action, including transmission line right-of-way maintenance.

Impacts on Threatened and Endangered Species

Potential impacts to threatened and endangered species from the proposed action include the impacts assessed in the aquatic and terrestrial biota sections of this Environmental Assessment. These impacts include impingement, entrainment, thermal discharge effects, and impacts from transmission line right-of-way maintenance for aquatic and terrestrial species. A review of databases maintained by the U.S. Fish and Wildlife Service (FWS) and the Pennsylvania Natural Heritage Program indicate that several animal and plant species that are Federally or Commonwealth-listed as threatened or endangered occur in the vicinity of SSES and its associated transmission line corridors. Informal consultation with the FWS Pennsylvania Field Office regarding the proposed EPU's potential impact on threatened or endangered species is ongoing.

Four species listed as threatened or endangered under the Endangered Species Act and 24 species that are listed by the Commonwealth of Pennsylvania as threatened or endangered occur within the counties where SSES and its associated transmission line corridors are located. These species are listed below in Table 1.

TABLE 1.—ENDANGERED AND THREATENED SPECIES THAT COULD OCCUR IN THE VICINITY OF SSES OR IN COUNTIES CROSSED BY SSES TRANSMISSION LINES

Scientific name	Common name	Federal status*	State status*
Mammals			
Neotoma magister	Allegheny woodrat	—	T
Myotis sodalis	Indiana bat	E	E
Myotis leibii	Small-footed myotis	—	T
Sciurus niger	Eastern fox squirrel	—	T
Birds			
Ardia alba	Great egret	—	E
Asio flammeus	Short-eared owl	—	E
Bartramia longicauda	Upland sandpiper	—	T
Botaurus lentiginosus	American bittern	—	E
Chlidonias niger	Black tern	—	E
Cistothorus platensis	Sedge wren	—	T
Falco peregrinus	Peregrine falcon	—	E
Haliaeetus leucocephalus	Bald eagle	T	E
Ixobrychus exilis	Least bittern	—	E
Pandion haliaetus	Osprey	—	T
Reptiles			
Clemmys muhlenbergii	Bog turtle	T	E
Invertebrates			
Enodia anthedon	Northern peary-eye	—	VS
Euphydryas phaeton	Baltimore checkerspot	—	VS
Poanes massasoit	Mulberry wing	—	V
Polites mystic	Long dash	—	V
Speyeria idalia	Regal fritillary	—	E
Speyeria aphrodite	Aphrodite fritillary	—	VS

*T = Threatened, E = Endangered, V = Vulnerable, VS = Vulnerable to Apparently Secure, — = Not Listed.

(Sources: References 3, 5, 6, 16).

The proposed EPU would involve no new land disturbance, and any construction necessary would be minimal and would only occur in previously developed areas of SSES. Additionally, no changes would be made to the transmission line corridor maintenance program, including

vegetative maintenance. As such, the staff concludes that the proposed action would have no significant impact on Federally or Commonwealth-listed species in the vicinity of SSES and its transmission line corridors.

Social and Economic Impacts

Potential socioeconomic impacts due to the proposed EPU include changes in the payments in lieu of taxes for Luzerne County and changes in the size of the workforce at SSES. Currently SSES employs approximately 1,200 full-time staff, 89 percent of whom live in Luzerne or Columbia Counties, and approximately 260 contract employees. During outages, approximately 1,400 personnel provide additional support (Reference 9).

The proposed EPU is not expected to increase the size of the permanent SSES workforce, since proposed plant modifications would be phased in during planned outages when SSES has the support of 1,400 additional workers. In addition, the proposed EPU would not require an increase in the size of the SSES workforce during future refueling outages. Accordingly, the proposed EPU would not have any measurable effect on annual earnings and income in Luzerne and Columbia Counties or on community services (Reference 9).

According to the 2000 Census, Luzerne and Columbia County populations were about 2.9 and 2.0 percent minority, respectively, which is well below the Commonwealth minority population of 13.2 percent. The poverty rates in 1999 for individuals living in Luzerne and Columbia Counties are 11.1 percent and 13.1 percent, respectively, which are slightly higher than the Commonwealth's average of 11.0 percent. Due to the lack of significant environmental impacts resulting from the proposed action, the proposed EPU would not have any disproportionately high and adverse impacts to minority or low-income populations (Reference 9).

In the past, PPL paid real estate taxes to the Commonwealth of Pennsylvania for power generation, transmission, and distribution facilities. Under authority of the Pennsylvania Utility Realty Tax Act (PURTA), real estate taxes collected from all utilities (water, telephone, electric, and railroads) were redistributed to the taxing jurisdictions within the Commonwealth. In Pennsylvania, these jurisdictions include counties, cities, townships, boroughs, and school districts. The distribution of PURTA funds was determined by formula and was not necessarily based on the individual utility's effect on a particular government entity (Reference 9).

In 1996, Electricity Generation Customer Choice and Competition Act became law, which allows consumers to choose among competitive suppliers of electrical power. As a result of utility restructuring, Act 4 of 1999 revised the tax base assessment methodology for utilities from the depreciated book value to the market value of utility property. Additionally, as of January 1, 2000, PPL was required to begin paying real estate taxes directly to local jurisdictions, ceasing payments to the Commonwealth's PURTA fund. PPL currently pays annual real estate taxes to the Berwick Area School District, Luzerne County, and Salem Township (Reference 9).

The proposed EPU could affect the in-lieu-of-tax payments because the total amount of tax money to be distributed would increase as power generation increases and because the proposed EPU would increase SSES's value, thus resulting in a larger allocation of the payment to the Berwick Area School District, Luzerne County, and Salem Township. Because the proposed EPU would increase the economic viability of SSES, the probability of early plant retirement would be reduced. Early plant retirement would be expected to have negative impacts on the local economy and the community by reducing in-lieu-of-tax payments and limiting local employment opportunities for the long term (Reference 9).

Since the proposed EPU would not have any measurable effect on the annual earnings and income in Luzerne and Columbia Counties or on community services and due to the lack of significant environmental impacts on minority or low-income populations, there would be no significant socioeconomic or environmental justice impacts associated with the proposed EPU. Conversely, the proposed EPU could have a positive effect on the regional economy because of the potential increase in the in-lieu-of-tax payments received by the Berwick Area School District, Luzerne County, and Salem Township, due to the potential increase in the book value of SSES, and the increased long-term viability of SSES.

Summary

The proposed EPU would not result in a significant change in non-radiological impacts in the areas of land use, water use, cooling tower operation, terrestrial and aquatic biota, transmission facility operation, or social and economic factors. No other non-radiological impacts were identified or would be expected. Table 2 summarizes the non-radiological environmental impacts of the proposed EPU at SSES.

TABLE 2.—SUMMARY OF NON-RADIOLOGICAL ENVIRONMENTAL IMPACTS

Land Use	No significant land-use modifications.
Non-Radiological Waste	Any additional hazardous and non-hazardous waste as a result of the proposed EPU would continue to be regulated by RCRA and managed by SSES's waste management program.
Cooling Tower	Impacts associated with continued cooling tower operation following the proposed EPU, including noise, fogging, cloud cover, salt drift, and icing would not change significantly from current impacts.
Transmission Facilities	No physical modifications to transmission lines; lines meet electrical shock safety requirements; no changes to transmission line corridor maintenance; small increase in electrical current would cause small increase in electromagnetic field around transmission lines; no changes to voltage.
Water Use	No configuration change to intake structure; increase in cooling water flow rate; increase in consumptive use due to evaporation; SRBC would continue to regulate consumptive water usage at SSES.
Discharge	Small increase in discharge temperature and volume; no increases in other effluents; discharge would remain within Pennsylvania water quality limits, and SSES would continue to operate under NPDES permit regulations.
Aquatic Biota	Small increases in entrainment and impingement are not expected to affect the Susquehanna River aquatic biota; increase in volume and temperature of thermal discharge would remain within original FES guidelines and below Pennsylvania Code Section 93.7 temperature limits; SSES would continue to operate under NPDES permit regulations with regard to entrainment and impingement.
Terrestrial Biota	No land disturbance or changes to transmission line corridor maintenance are expected; therefore, there would be no significant effects on terrestrial species or their habitat.

TABLE 2.—SUMMARY OF NON-RADIOLOGICAL ENVIRONMENTAL IMPACTS—Continued

Threatened and Endangered Species	As evaluated for aquatic and terrestrial biota, no significant impacts are expected on protected species or their habitat.
Social and Economic	No change in size of SSES labor force required for plant operation or for planned outages; proposed EPU could increase in-lieu-of-tax payments to Luzerne County and book value of SSES; there would be no disproportionately high and adverse impact on minority and low-income populations.

Radiological Impacts

Radioactive Waste Stream Impacts

SSES uses waste treatment systems designed to collect, process, and dispose of gaseous, liquid, and solid wastes that might contain radioactive material in a safe and controlled manner such that the discharges are in accordance with the requirements of Title 10 of the *Code of Federal Regulations* (10 CFR) Part 20, and the design objectives of Appendix I to 10 CFR Part 50 (Reference 9).

Minimal changes will be made to the waste treatment systems to handle the additional waste expected to be generated by the proposed EPU; the installation of an additional condensate filter and demineralizer. The gaseous, liquid, and solid radioactive wastes are discussed individually (Reference 9).

Gaseous Radioactive Waste and Offsite Doses

During normal operation, the gaseous effluent treatment system processes and controls the release of small quantities of radioactive noble gases, halogens, tritium, and particulate materials to the environment. The gaseous waste management system includes the offgas system and various building ventilation systems. The single year highest annual releases of radioactive material, for the time period 2000–2005 were; 2002 for noble gases with 9.68 Curies, 2001 for particulates and iodines with 0.0074 Curies, and 2004 for tritium with 160 Curies (Reference 9).

The licensee has estimated that the amount of radioactive material released in gaseous effluents would increase in proportion to the increase in power level (20 percent) (Reference 9). Based on experience from EPUs at other plants, the staff concludes that this is an acceptable estimate. The offsite dose to a member of the public, including the additional radioactive material that would be released from the proposed EPU, is calculated to still be well within the radiation standards of 10 CFR Part 20 and the design objectives of Appendix I to 10 CFR Part 50. Therefore, the staff concludes the increase in offsite dose due to gaseous effluent release following implementation of the proposed EPU would not be significant.

Liquid Radioactive Waste and Offsite Doses

During normal operation, the liquid effluent treatment system processes and controls the release of radioactive liquid effluents to the environment, such that the dose to individuals offsite are maintained within the limits of 10 CFR Part 20 and the design objectives of Appendix I to 10 CFR Part 50. The liquid radioactive waste system is designed to process and purify the waste and then recycle it for use within the plant, or to discharge it to the environment as radioactive liquid waste effluent in accordance with facility procedures which comply with Commonwealth of Pennsylvania and Federal regulations. The single year highest radioactive liquid releases, for the time period 2000–2005 were: 2005 at 1,470,000 gallons, 2003 with 70.25 Curies of tritium, 2000 with 36.95 Curies of fission and activation products, and 2002 with 0.0002 Curies of dissolved and entrained gases (Reference 9).

Even though the EPU would produce a larger amount of radioactive fission and activation products and a larger volume of liquid to be processed, the licensee performed an evaluation which shows that the liquid radwaste treatment system would remove all but a small amount of the increased radioactive material. The licensee estimated that the volume of radioactive liquid effluents released to the environment and the amount of radioactive material in the liquid effluents would increase slightly (less than 1 percent) due to the proposed EPU. Based on experience from EPUs at other plants, the staff concludes that this is an acceptable estimate. The dose to a member of the public from the radioactive releases described above, increased by 1 percent, would still be well within the radiation standards of 10 CFR Part 20 and the design objectives of Appendix I to 10 CFR Part 50. Therefore, the staff concludes that there would not be a significant environmental impact from the additional amount of radioactive material generated following implementation of the proposed EPU.

Solid Radioactive Wastes

The solid radioactive waste system collects, processes, packages, and temporarily stores radioactive dry and wet solid wastes prior to shipment offsite for permanent disposal. The volume of solid radioactive waste generated varied from about 2500 to almost 8000 cubic feet (ft^3) per year in the time period 2000–2005; the largest volume generated was 7980 ft^3 in 2003. The annual amount of radioactive material in the waste generated varied from 2500 to almost 190,000 Curies during that same period. The largest amount of radioactive material generated in the solid waste was 189,995 Curies in 2000 (Reference 9).

The proposed EPU would produce a larger amount of radioactive fission and activation products which would require more frequent replacement or regeneration of radwaste treatment system filters and demineralizer resins. The licensee has estimated that the volume of solid radioactive waste would increase by approximately 11 percent due to the proposed EPU (Reference 9). Based on experience from EPUs at other plants, the staff concludes that this is an acceptable estimate. The increased volume of the solid waste would still be bounded by the estimate of 10,400 ft^3 in the 1981 FES for operation. Therefore, the staff concludes that the impact from the increased volume of solid radwaste generated due to the proposed EPU would not be significant.

The licensee did not provide an estimate of the increase in the amount of radioactive solid waste in terms of Curies. However, for 4 of the 6 years between 2000 and 2005, the annual amount of radioactive material in the solid waste generated varied from 2500 to 5779 Curies (Reference 9). Based on experience from EPUs at other plants, the staff estimated that the amount of radioactive material in the solid waste would increase by 20 percent, proportional to the proposed EPU power increase. In 2000 and 2003, work was done that generated large amounts of used irradiated components, accounting for 98 percent and 92 percent, respectively, of the radioactive material generated in solid radwaste. Such work and the solid radwaste generated by that work occasionally occurs at SSES, but the range of 2500 to 5779 Curies is more

typical (Reference 9). The annual average of radioactive material generated after the proposed EPU would still be bounded by the estimate of 5500 Curies in the 1981 FES for operation. In addition, the licensee must continue to meet all NRC and Department of Transportation regulations for transportation of solid radioactive waste. Therefore, the staff concludes that the impact from the increased amount of radioactive material in the solid radwaste due to the proposed EPU would not be significant.

The licensee estimates that the EPU would require replacement of 10 percent more fuel assemblies at each refueling. This increase in the amount of spent fuel being generated would require an increase in the number of dry fuel storage casks used to store spent fuel. The current dry fuel storage facility at SSES has been evaluated and can accommodate the increase (Reference 9). Therefore, the staff concludes that there would be no significant environmental impacts resulting from storage of the additional fuel assemblies.

In-Plant Radiation Doses

The proposed EPU would result in the production of more radioactive material and higher radiation dose rates in the restricted areas at SSES. SSES's radiation protection staff will continue monitoring dose rates and would make adjustments in shielding, access requirements, decontamination methods, and procedures as necessary to minimize the dose to workers. In addition, occupational dose to individual workers must be maintained within the limits of 10 CFR Part 20 and as low as reasonably achievable (Reference 9).

The licensee has estimated that the work necessary to implement the proposed EPU at the plant would also increase the collective occupational radiation dose at the plant to approximately 230 person-rem per year until the implementation is completed in 2009. After the implementation is completed, the licensee estimates that the annual collective occupational dose would be in the range of 200 person-rem, roughly 20 percent higher than the current dose of 182 person-rem in 2005 and 184 person-rem in 2006 (Reference 9). Based on experience from EPUs at other plants, the staff concludes that these estimates are acceptable. The staff notes that SSES is allowed a maximum of 3,200 person-rem per year as provided in the 1981 Final Environmental Statement—Operating Stage. Therefore, the staff concludes that the increase in occupational exposure would not be significant.

Direct Radiation Doses Offsite

Offsite radiation dose consists of three components: gaseous, liquid, and direct gamma radiation. As previously discussed under the Gaseous Radiological Waste and Liquid Radiological Waste sections, the estimated doses to a member of the public from radioactive gaseous and liquid effluents after the proposed EPU is implemented, would be well within the dose limits of 10 CFR Part 20 and the design objectives of Appendix I to 10 CFR Part 50.

The final component of offsite dose is from direct gamma radiation from radioactive waste stored temporarily onsite, including spent fuel in dry cask storage, and radionuclides (mainly nitrogen-16) in the steam from the reactor passing through the turbine system. The high energy radiation from nitrogen-16 is scattered or reflected by the air above the facility and represents an additional public radiation dose pathway known as ''skyshine.'' The licensee estimated that the offsite radiation dose from skyshine would increase linearly with the increase in power level from the proposed EPU (20 percent); more nitrogen-16 is produced at the higher EPU power, and less of the nitrogen-16 decays before it reaches the turbine system because of the higher rate of steam flow due to the EPU. The licensee's radiological environmental monitoring program measures radiation dose at the site boundary and in the area around the facility with an array of thermoluminescent dosimeters. The licensee reported doses ranging from 0.2 to 1.3 mrem per year for the time period 2000–2005. The licensee estimated that the dose would increase approximately in proportion to the EPU power increase (20 percent) (Reference 9). Based on experience from EPUs at other plants, the staff concludes that this is an acceptable estimate. EPA regulation 40 CFR Part 190 and NRC regulation 10 CFR Part 20 limit the annual dose to any member of the public to 25 mrem to the whole body from the nuclear fuel cycle. The offsite dose from all sources, including radioactive gaseous and liquid effluents and direct radiation, would still be well within this limit after the proposed EPU is implemented. Therefore, the staff concludes that the increase in offsite radiation dose would not be significant.

Postulated Accident Doses

As a result of implementation of the proposed EPU, there would be an increase in the inventory of radionuclides in the reactor core; the core inventory of radionuclides would increase as power level increases. The concentration of radionuclides in the reactor coolant may also increase; however, this concentration is limited by the SSES Technical Specifications. Therefore, the reactor coolant concentration of radionuclides would not be expected to increase significantly. Some of the radioactive waste streams and storage systems may also contain slightly higher quantities of radioactive material. The calculated doses from design basis postulated accidents for SSES are currently well below the criteria of 10 CFR 50.67; this was confirmed by the NRC staff in the Safety Evaluation Report supporting a license amendment for SSES dated January 31, 2007. The licensee has estimated that the radiological consequences of postulated accidents would increase approximately in proportion to the increase in power level from the proposed EPU (20 percent) (Reference 9). Based on experience from EPUs at other plants, the NRC staff concludes that this is an acceptable estimate. The calculated doses from design basis postulated accidents are based on conservative assumption and would still be well within the criteria of 10 CFR 50.67 after the increase due to the implementation of the proposed EPU.

The staff has reviewed the licensee's analyses and performed confirmatory calculations to verify the acceptability of the licensee's calculated doses under accident conditions. The staff's independent review of dose calculations under postulated accident conditions determined that dose would be within regulatory limits. Therefore, the staff concludes that the EPU would not significantly increase the consequences of accidents and would not result in a significant increase in the radiological environmental impact of SSES 1 and 2 from postulated accidents.

Fuel Cycle and Transportation Impacts

Tables S–3 and S–4 in 10 CFR Part 51 specify the environmental impacts due to the uranium fuel cycle and transportation of fuel and wastes, respectively. SSES's EPU would increase the power level to 3952 mega-watt thermal (Mwt), which is 3.3 percent above the reference power level for Table S–4. The increased power level of 3952 Mwt corresponds to 1300 mega-watt electric (Mwe), which is 30 percent above the reference power level for Table S–3. Part of the increase is due to a more efficient turbine design; this increase in efficiency does not affect the impacts of the fuel cycle and transportation of wastes. However, more fuel will be used in the reactor (more

fuel assemblies will be replaced at each refueling outage), and that will potentially affect the impacts of the fuel cycle and transportation of wastes. The fuel enrichment and burn-up rate criteria of Tables S–3 and S–4 will still be met because fuel enrichment will be maintained no greater than 5 percent, and the fuel burn-up rate will be maintained within 60 giga-watt-days/metric ton uranium (Gwd/MTU). The staff concludes that after adjusting for the effects of the more efficient turbine, the potential increases in the impact due to the uranium fuel cycle and the transportation of fuel and wastes from the larger amount of fuel used would be small and would not be significant.

Summary

Based on staff review of licensee submissions and the 1981 FES for operation, it is concluded that the proposed EPU would not significantly increase the consequences of accidents, would not result in a significant increase in occupational or public radiation exposure, and would not result in significant additional fuel cycle environmental impacts. Accordingly, the staff concludes that there would be no significant radiological environmental impacts associated with the proposed action. Table 3 summarizes the radiological environmental impacts of the proposed EPU at SSES.

TABLE 3.—SUMMARY OF RADIOLOGICAL ENVIRONMENTAL IMPACTS

Gaseous Radiological Effluents	Increased gaseous effluents (20 percent) would remain within NRC limits and dose design objectives.
Liquid Radiological Effluents	Increased liquid effluents (1 percent) would remain within NRC limits and dose design objectives.
Solid Radioactive Waste	Increased amount of solid radioactive waste generated (11 percent by volume and 20 percent by radioactivity) would remain bounded by evaluation in the FES.
Occupational Radiation Doses	Occupational dose would increase by approximately 20 percent. Doses would be maintained within NRC limits and as low as is reasonably achievable.
Offsite Radiation Doses	Radiation doses to members of the public would continue to be very small, well within NRC and EPA regulations.
Postulated Accident Doses	Calculated doses for postulated design basis accidents would remain within NRC limits.
Fuel Cycle and Transportation Impacts	Fuel enrichment and burn-up rate criteria of Tables S–3 and S–4 are met because fuel enrichment will be maintained no greater than 5 percent, and the fuel burn-up rate will be maintained within 60 Gwd/MTU. After adjusting for the effects of the more efficient turbine, the potential increases in impacts due to the fuel cycle and transportation of fuel and wastes would not be significant.

Alternatives to Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed EPU (i.e., the ''no-action'' alternative). Denial of the application would result in no change in the current environmental impacts. However, if the proposed EPU were not approved, other agencies and electric power organizations may be required to pursue alternative means of providing electric generation capacity to offset the increased power demand forecasted for the PJM regional transmission territory.

A reasonable alternative to the proposed EPU would be to purchase power from other generators in the PJM network. In 2003, generating capacity in PJM consisted primarily of fossil fuel-fired generators: coal generated 36.2 percent of PJM capacity, oil 14.3 percent, and natural gas 6.8 percent (Reference 10). This indicates that purchased power in the PJM territory would likely be generated by a fossil-fuel-fired facility. Construction (if new generation is needed) and operation of a fossil fuel plant would create impacts in air quality, land use, and waste management significantly greater than those identified for the proposed EPU at SSES. SSES's nuclear units do not emit sulfur dioxide, nitrogen oxides, carbon dioxide, or other atmospheric pollutants that are commonly associated with fossil fuel plants. Conservation programs such as demand-side management could feasibly replace the proposed EPU's additional power output. However, forecasted future energy demand in the PJM territory may exceed conservation savings and still require additional generating capacity (Reference 9). The proposed EPU does not involve environmental impacts that are significantly different from those originally identified in the 1981 SSES FES for operation.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the original FES for construction.

Agencies and Persons Consulted

In accordance with its stated policy, on July 2, 2007, the staff consulted with the Pennsylvania State official, Brad Fuller, of the Pennsylvania Department of Environmental Protection, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the Environmental Assessment, the Commission concludes that the proposed action would not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's application dated October 11, 2006. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff at 1–800–397–4209, or 301–415–4737, or send an e-mail to *pdr@nrc.gov.*

DATES: The comment period expires September 20, 2007. Comments received after this date will be considered if it is practical to do so, but the Commission is only able to assure consideration of comments received on or before September 20, 2007.

ADDRESSES: Submit written comments to Chief, Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Mail Stop T–6D59, Washington, DC 20555–0001. Written comments may also be delivered to 11545 Rockville Pike, Room T–6D59, Rockville, Maryland 20852 from 7:30 a.m. to 4:15 p.m. on Federal workdays. Copies of written comments received will be electronically available at the NRC's Public Electronic Reading Room

(PERR) link, *http://www.nrc.gov/reading-rm/adams.html,* on the NRC Web site or at the NRC's Public Document Room located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff at 1–800–397–4209, or 301–415–4737, or by e-mail to *pdr@nrc.gov.*

SUPPLEMENTARY INFORMATION: The NRC is considering issuance of amendments to Facility Operating License Nos. NPF–014 (Unit 1) and NPF–022 (Unit 2) issued to PPL Susquehanna, LLC for operation of Susquehanna Steam Electric Station, Units 1 and 2, located in Luzerne County, Pennsylvania.

FOR FURTHER INFORMATION CONTACT: Richard V. Guzman, Office of Nuclear Reactor Regulation, Mail Stop O8–C2, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at (301) 415–1030, or by e-mail at *RVG@nrc.gov.*

Dated at Rockville, Maryland, this 15th day of August, 2007.

For the Nuclear Regulatory Commission.

Richard V. Guzman,

Senior Project Manager, Plant Licensing Branch I–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

References

1. Commonwealth of Pennsylvania (PA). *25 Pa. Code § 93.7 Specific water quality criteria.* Accessed at *http://www.pacode.com/secure/data/025/chapter93/025_0093.pdf* on March 19, 2007. (ML070780679).
2. Ecology III, Inc. (Ecology III). *Environmental Studies in the Vicinity of the Susquehanna Steam Electric Station, 2002*—Water Quality and Fishes. Berwick, PA. (ML071040042).
3. Pennsylvania Department of Conservation and Natural Resources (DCNR). *Wild Resource Conservation Program, Regal Fritillary.* Accessed at: *http://www.dcnr.state.pa.us/wrcf/regal.aspx* on April 12, 2007. (ML071040022).
4. Pennsylvania Department of Environmental Protection (DEP). *Pennsylvania's Environment Facility Application Compliance Tracking System.* Accessed at: *http://www.dep.state.pa.us/efacts/default.asp* on March 20, 2007. (ML071040025).
5. Pennsylvania Fish and Boat Commission (FBC). *Endangered and Threatened Species of Pennsylvania—Bog Turtle* Clemmys muhlenbergii. Accessed at: *http://sites.state.pa.us/PA_Exec/Fish_Boat/etspecis.htm* on April 12, 2007. (ML071040032).
6. Pennsylvania Game Commission (PGC). *Endangered Species.* Accessed at: *http://www.pgc.state.pa.us/pgc/cwp/view.asp?a=458&q=150321* on April 12, 2007. (ML071040030).
7. PPL Electric Utilities Corporation (PPL). *Specification For Initial Clearing and Control Maintenance Of Vegetation On Or Adjacent To Electric Line Right-of-Way Through Use Of Herbicides, Mechanical, And Handclearing Techniques.* Allentown, Pennsylvania. (ML071040030).
8. PPL Susquehanna, LLC (PPL). *Susquehanna Steam Electric Station Proposed License Amendment Numbers 285 For Unit 1 Operating License No. NPF–14 and 253 For Unit 2 Operating License No. NPF–22 Constant Pressure Power Uprate PLA–6076.* Allentown, Pennsylvania. (ML062900160).
9. PPL Susquehanna, LLC (PPL). *Susquehanna Steam Electric Station Proposed License Amendment Numbers 285 For Unit 1 Operating License No. NPF–14 and 253 For Unit 2 Operating License No. NPF–22 Constant Power Uprate PLA–6076, Attachment 3, Supplemental Environmental Report.* Allentown, Pennsylvania. (ML062900161).
10. PPL Susquehanna, LLC (PPL). *Susquehanna Steam Electric Station Units 1 and 2 License Renewal Application, Appendix E Applicant's Environmental Report—Operating Stage.* Allentown, Pennsylvania. (ML062630235).
11. U.S. Environmental Protection Agency. *Envirofacts Warehouse—Facility Registration System—Facility Detail Report.* Accessed at: *http://oaspub.epa.gov/enviro/fii_query_dtl.disp_program_facility?pgm_sys_id in=PAD000765883&pgm_sys_acrnm_in=RCRAINFO* on March 23, 2007. (ML071040026).
12. U.S. Nuclear Regulatory Commission. ''Pennsylvania Power and Light Company, Docket No. 50–388, Susquehanna Steam Electric Station, Unit 2, Luzerne County, Pennsylvania.'' **Federal Register**, Vol. 59, No. 53, pp. 12990–12992. Washington, DC (April 28, 1994). (ML071040017).
13. U.S. Nuclear Regulatory Commission. ''Pennsylvania Power & Light Co., Allegheny Electric Cooperative, Inc., Susquehanna Steam Electric Station, Unit 1; Environmental Assessment and Finding of No Significant Impact.'' **Federal Register**, Vol. 60, No. 9, pp. 3278–3280. Washington, DC (January 13, 1995). (ML071040020).
14. U.S. Nuclear Regulatory Commission. ''PPL Susquehanna, LLC; Susquehanna Steam Electric Station Environmental Assessment and Finding of No Significant Impact.'' **Federal Register**, Vol. 66, No. 122, pp. 33716–33717. Washington, DC (June 25, 2001). (ML071040021).
15. U.S. Nuclear Regulatory Commission. E-mail from J. Fields, PPL Susquehanna, LLC, Allentown, Pennsylvania, to A. Mullins, U.S. Nuclear Regulatory Commission, Rockville, Maryland. Subject: ''Application to Susquehanna River Basin Commission (SRBC).'' January 8, 2007. (ML070320756).
16. U.S. Nuclear Regulatory Commission. Letter from R. Bowen, Pennsylvania Department of Conservation and Natural Resources, Harrisburg, Pennsylvania, to A. Mullins, U.S. Nuclear Regulatory Commission, Rockville, Maryland. Subject: ''Pennsylvania Natural Diversity Inventory Review, PNDI Number 19031.'' January 8, 2007. (ML070190672).

[FR Doc. E7–16464 Filed 8–20–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–424 and 50–425]

Southern Nuclear Operating Company, Inc., Vogtle Electric Generating Plant, Units 1 and 2; Notice of Acceptance for Docketing of the Application, and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. NPF–68 and NPF–81 for an Additional 20-Year Period

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering an application for the renewal of operating licenses NPF–68 and NPF–81, which authorizes Southern Nuclear Operating Company, Inc. (SNC), to operate the Vogtle Electric Generating Plant (VEGP), Units 1 and 2, at 3565 and 3565 megawatts thermal, respectively. Renewal of the licenses would authorize the applicant to operate VEGP, Unit 1 for an additional 20-year period beyond the period specified in the current operating license. For VEGP, Unit 2, the renewed license would authorize the applicant to operate for an additional 20 years beyond the period specified in the current operating license or 40 years from the date of issuance of the new license, whichever occurs first. The current operating license for VEGP, Unit 1, (NPF–68), expires on January 16, 2027. VEGP, Unit 1 is a Pressurized Water Reactor designed by Westinghouse. The current operating license for VEGP, Unit 2, (NPF–81), expires on February 9, 2029. VEGP, Unit 2, is a Pressurized Water Reactor designed by Westinghouse. Both units are located near Waynesboro, Georgia.

On June 29, 2007, the Commission's staff received an application from SNC, to renew operating licenses NPF–68 and NPF–81, pursuant to Title 10, Part 54, ''Requirements for Renewal of Operating Licenses for Nuclear Power Plants,'' of the *Code of Federal Regulations* (10 CFR Part 54). A notice of receipt and availability of the license renewal application (LRA) was published in the **Federal Register** on August 3, 2007 (72 FR 43296).

The Commission's staff has reviewed the LRA for its acceptability and has determined that SNC has submitted sufficient information in accordance with 10 CFR 54.19, 54.21, 54.22, 54.23, and 51.53(c), and that the application is acceptable for docketing. The

Commission will retain the current Docket Nos. 50–424 and 50–425, for operating licenses NPF–68 and NPF–81. The docketing of the LRA does not preclude requests for additional information as the review proceeds, nor does it predict whether the Commission will grant or deny the license.

Before issuance of each requested renewed license, the NRC will have made the findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. In accordance with 10 CFR 54.29, ''Standards for Issuance of a Renewed License,'' the NRC will issue a renewed license on the basis of its review if it finds that actions have been identified and have been or will be taken with respect to (1) managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified as requiring aging management review, and (2) time-limited aging analyses that have been identified as requiring review, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the current licensing basis (CLB), and that any changes made to the plant's CLB comply with the Act and the Commission's regulations.

Additionally, in accordance with 10 CFR 51.95(c), the NRC will prepare an environmental impact statement that is a supplement to the Commission's NUREG–1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants,'' dated May 1996. Pursuant to 10 CFR 51.26, and as part of the environmental scoping process, the staff intends to hold a public scoping meeting. Detailed information regarding this meeting will be the subject of a separate **Federal Register** notice.

Within 60 days after the date of publication of this **Federal Register** notice, the requestor/petitioner may file a request for a hearing, and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene with respect to the renewal of the license. Interested parties must file requests for a hearing and a petition for leave to intervene in accordance with 10 CFR Part 2, ''Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders.'' Those interested should consult a current copy of 10 CFR 2.309, ''Hearing Requests, Petitions to Intervene, Requirements for Standing and Contentions,'' which is available at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, and is accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room through the Internet at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to the Internet or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 1–800–397–4209, or 301–415–4737, or by e-mail at *PDR@nrc.gov.* If a request for a hearing or a petition for leave to intervene is filed within the 60-day period, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel will rule on the request and/or petition, and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order. If no request for a hearing or petition for leave to intervene is filed within the 60-day period, the NRC may, upon completion of its evaluations and upon making the findings required under 10 CFR Part 51 and 10 CFR Part 54, renew the license without further notice.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding, taking into consideration the limited scope of matters that may be considered pursuant to 10 CFR Parts 51 and 54. The petition must specifically explain the reasons why intervention should be permitted with particular reference to (1) the nature of the requestor/petitioner's right under the Act to be made a party to the proceeding, (2) the nature and extent of the requestor/petitioner's property, financial, or other interest in the proceeding, and (3) the possible effect of any decision or order which may be entered in the proceeding on the requestor/petitioner's interest. The petition must also set forth the specific contentions that the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall briefly explain the bases of each contention and concisely state the alleged facts or the expert opinion that supports the contention on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the requestor/petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The requestor/petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[1] Contentions shall be limited to matters within the scope of the action under consideration. The contention must be one that, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

The Commission requests that each contention be given a separate numeric or alphabetical designation within one of the following groups (1) technical (primarily related to safety concerns), (2) environmental, or (3) miscellaneous.

As specified in 10 CFR 2.309, if two or more requestors/petitioners seek to co-sponsor a contention or propose substantially the same contention, the requestors/petitioners must jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing. A request for a hearing or a petition for leave to intervene must be filed by either (1) first class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff, (2) courier, express mail, and expedited delivery services to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff, (3) e-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *hearingdocket@nrc.gov,* or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemaking and Adjudications Staff at 301–415–1101

[1] To the extent that the application contains attachments and supporting documents that are not publicly available because they are asserted to contain safeguards or proprietary information, petitioners desiring access to this information should contact the applicant or applicant's counsel to discuss the need for a protective order.

(verification number is 301–415–1966).[2] Requestors/petitioners must send a copy of the request for hearing and petition for leave to intervene to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; copies should be transmitted either by facsimile to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov.* Requestors/petitioners must also send a copy of the request for hearing and petition for leave to intervene to the attorney for the licensee, Mr. Stanford M. Blanton, Esquire, Balch & Bingham LLP, P. O. Box 306, Birmingham, Alabama 35201.

Untimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition, request, and/or contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i)–(viii).

Detailed information about the license renewal process can be found under the Nuclear Reactors icon at *http://www.nrc.gov/reactors/operating/licensing/renewal.html* on the NRC's Web site. Copies of the application to renew the operating license for VEGP, Units 1 and 2 are publicly available at the NRC's PDR, located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, or from ADAMS. The ADAMS Accession numbers for the LRA and the Environmental Report (ER) are ML071840360 and ML071840357, respectively. The public may also view the LRA and the ER on the Internet at *www.nrc.gov/reactors/operating/licensing/renewal/applications.html.* In addition, the LRA and the ER are available to the public near VEGP, Units 1 and 2, at the Burke County Library, 130 Highway 24 South, Waynesboro, Georgia 30830.

Dated at Rockville, Maryland, this 15th day of August 2007.

For the Nuclear Regulatory Commission.

Pao-Tsin Kuo,

Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

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BILLING CODE 7590–01–P

[2] If the request/petition is filed by e-mail or facsimile, an original and two copies of the document must be mailed within 2 (two) business days thereafter to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; Attention: Rulemaking and Adjudications Staff.

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

DATES: Weeks of August 20, 27; September 3, 10, 17, 24, 2007.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

MATTERS TO BE CONSIDERED:

Week of August 20, 2007

Tuesday, August 21, 2007

1:25 p.m.
Affirmation Session (Public Meeting) (Tentative).
a. Final E-Filing Rule (Tentative).

This meeting will be webcast live at the Web address— *http://www.nrc.gov.*

1:30 p.m.
Meeting with OAS and CRCPD (Public Meeting) (Contact: Shawn Smith, 301 415–2620).

This meeting will be webcast live at the Web address— *http://www.nrc.gov.*

Wednesday, August 22, 2007

9:30 a.m.
Periodic Briefing on New Reactor Issues (Morning Session) (Public Meeting) (Contact: Donna Williams, 301 415–1322).

This meeting will be webcast live at the Web address— *http://www.nrc.gov.*

1:30 p.m.
Periodic Briefing on New Reactor Issues (Afternoon Session) (Public Meeting) (Contact: Donna Williams, 301 415–1322).

This meeting will be webcast live at the Web address— *http://www.nrc.gov.*

Week of August 27, 2007—Tentative

Thursday, August 30, 2007

12:55 p.m.
Affirmation Session (Public Meeting) (Tentative).
a. Pacific Gas and Electric Co. (Diablo Canyon ISFSI), Docket No. 72–26–ISFSI, San Luis Obispo Mothers for Peace's Contentions and Request for Hearing Regarding Diablo Canyon Environmental Assessment Supplement (Tentative).
b. Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site)—Certified Question Regarding Conduct of Mandatory Hearing (Tentative).

Week of September 3, 2007—Tentative

There are no meetings scheduled for the Week of September 3, 2007.

Week of September 10, 2007—Tentative

There are no meetings scheduled for the Week of September 10, 2007.

Week of September 17, 2007—Tentative

There are no meetings scheduled for the Week of September 17, 2007.

Week of September 24, 2007—Tentative

Friday, September 28, 2007

9:30 a.m.
Briefing on Radioactive Materials Security and Licensing (Public Meeting) (Tentative).

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

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Dated: August 16, 2007.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. 07–4114 Filed 8–17–07; 10:19 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[HLWRS–ISG–04]

Preclosure Safety Analysis—Human Reliability Analysis; Availability of Final Interim Staff Guidance Document

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is announcing the availability of the final interim staff guidance (ISG) document, ''HLWRS–ISG–04 Preclosure Safety Analysis—Human Reliability Analysis,'' and NRC responses to the public comments received on the draft document. The ISG clarifies or refines guidance provided in the Yucca Mountain Review Plan (YMRP) (NUREG–1804, Revision 2, July 2003). The YMRP provides guidance to NRC staff for evaluating a potential license application (LA) for a high-level radioactive waste geologic repository constructed or operated at Yucca Mountain, Nevada.

ADDRESSES: HLWRS–ISG–04 is available electronically at NRC's Electronic Reading Room, at *http://www.nrc.gov/reading-rm.html.* From this site, a member of the public can access NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession number for ISG–04 is ML071910213. If an individual does not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, or (301) 415–4737, or (by e-mail), at *pdr@nrc.gov.*

This document may also be viewed electronically on the public computers located at NRC's PDR, Mail Stop: O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents, for a fee.

NRC Responses to Public Comments on HLWRS–ISG–04: In preparing final NRC Division of High-Level Waste Repository Safety (HLWRS) ISG HLWRS–ISG–04, ''Preclosure Safety Analysis—Human Reliability Analysis,'' ADAMS ML071910213, the NRC staff reviewed and considered 34 comments received from two different organizations during the public comment period. Several comments regarded questions about the regulatory basis for human reliability analysis (HRA), and perceived ambiguity in expectations. Several related comments addressed the use of empirical data and their relationship to HRA. The remaining comments included recommendations on specific changes to the ISG. Three comments on the ISG process were consistent with comments made earlier on HLWRS–ISG–01, HLWRS–ISG–02, and HLWRS–ISG–03, and were addressed in responses to public comment on HLWRS–ISG–01 [see 71 FR 57582, ''Response to Comments 13 (a) and (b)'']. The following discussion indicates how the comments were addressed, and the changes, if any, made to ISG–04 as a result of the comments. Line numbers in the following comments refer to draft HLWRS–ISG–04, ADAMS ML070820387, which was made available for public comment on April 19, 2007 (72 FR 19729).

Comment 1. Both commenters noted that ISG lines 79–82 appear to imply that ''direct manual operator actions,'' and ''administrative and procedural safety controls'' are important to safety (ITS), which is inconsistent with the definition of ITS in 10 CFR 63.2. 10 CFR 63.2 defines ITS as applying to structures, systems, and components (SSCs) that are engineered features of the geologic repository operations area (GROA), and therefore, actions and controls would not be ITS. One commenter recommended specific revisions to ISG lines 79–82.

Response: NRC agrees with the commenters. However, note that 10 CFR 63.112(e), which is quoted in the ''Regulatory Bases'' section, in ISG lines 196–202, also states that the preclosure safety analysis (PCSA) of the GROA must include an analysis of the performance of the ITS SSCs. ''This analysis identifies and describes the controls that are relied on to limit or prevent potential event sequences or mitigate their consequences. This analysis also identifies measures taken to ensure the availability of safety systems.'' Therefore, the PCSA analyses for ITS SSCs also relate to controls, and measures to ensure safety system availability, and these could be tied to human actions.

The ISG has been revised to change ISG lines 79–82 to: ''Examples of human actions that are risk-significant include: (1) Direct manual operator actions that are related to reliability of important-to-safety (ITS) structures, systems, or components (SSCs); (2) administrative or procedure safety controls that are related to reliability of ITS SSCs and involve human actions; or (3) human actions that contribute significantly to the reliability of ITS SSCs.''

Comment 2. One commenter stated that there are two broad categories of methods to be considered for quantification in HRA: (1) Methods based on actual surrogate human performance data from other facilities (*e.g.*, chemical processes, interim storage, industrial operations, and nuclear power plants); and (2) generic second-generation methods in which probability distributions for human reliability are based on a qualitative assessment of context and performance factors. The commenter states that ISG–04 provides a considerable amount of guidance and cautions about the use of nuclear power plant data, but provides no explicit guidance on the use of non-nuclear data and no guidance on the use of generic second-generation quantification methods [such as Cognitive Reliability and Error Analysis Method (CREAM) and Human Error Assessment and Reduction Technique (HEART)].

The commenter recommends adding text to:

(a) Recognize human reliability data sources in addition to those associated with nuclear power plants; specifically, the commenter recommends adding a sentence at the beginning of Line 138, as follows: ''Use of any quantification method, either data-driven or contextual, requires justification that it applies to Geologic Repository Operations Area (GROA) operations'';

(b) provide guidance on the use of generic second-generation methods.

Response. (a) NRC agrees with the commenter that data sources and approaches other than those associated with nuclear power plants may be used as part of the basis for estimating reliability, provided that there is sufficient technical justification to do so. The discussion in the ISG on the use of nuclear power plant data and approaches, and associated justification needed, applies to the use of data and approaches from other sources, as well.

ISG lines 138–139 have been revised as follows: ''Commercial nuclear power applications'' has been changed to ''applications for commercial nuclear power plants or other facilities.''

ISG line 142 has been revised as follows: ''Commercial nuclear-power-plant HRAs'' has been changed to ''HRAs for commercial nuclear-power plants or other facilities.''

The sentence in ISG lines 142–145 has been revised to ''Staff should expect the use of any quantification method, either data-driven or model-driven, to be justified regarding its applicability to GROA operations.''

(b) The U.S. Department of Energy (DOE) has the flexibility to use any quantification method it chooses, including CREAM or HEART, provided there is sufficient technical basis to use the method for a particular application.

The following sentence is added after ISG line 136: ''DOE has the flexibility to choose any method(s) to support the PCSA, given there is a sufficient technical basis for applying the method(s) and approach(es) to the GROA.''

Comment 3. One commenter noted that the term ''risk-significant'' is used in many ways in this ISG without a clear definition. The commenter recommended the following definition of risk-significant in the Glossary: ''Risk-significant: Important contributor to the probabilities or the consequences of a single event sequence.''

Response: NRC agrees with the suggestion to clarify the meaning of ''risk-significant'' in the Part 63 context, and add a definition for ''risk-significant'' to the Glossary. Risk-significance would be assessed according to those aspects of the LA and technical bases that bear on regulatory compliance with 10 CFR Part 63, which is based on: (a) Whether an event sequence is category 1, category 2, or beyond category 2; and (b) whether the projected consequences meets the performance objective for that category. NRC expects the data and information provided to be commensurate with supporting these determinations. For example, staff expectations will be informed by: (1) The extent to which particular SSCs and controls are relied on to prevent or reduce the occurrence of event sequences; (2) the severity of the potential radiological consequences associated with these event sequences; and (3) the potential effects of uncertainty on regulatory compliance (e.g., the proximity of the associated frequency to the categorization limits for preclosure event sequences, and the proximity of the consequences to regulatory performance requirements). See also the discussion under ''Uncertainty,'' in HLWRS–ISG–02, p. 4, and the discussion under ''Introduction,'' to Appendix A, in HLWRS–ISG–02, p. 11.

The ISG has been revised as follows.

The following has been added to the end of ISG line 64:

''The goal of the review is to evaluate whether there is reasonable assurance that the performance objectives in Part 63 will be met, which in turn is determined by: (a) Whether an identified event sequence is category 1, category 2, or beyond category 2, and (b) whether the projected consequences meet the performance objective for that category. NRC expects the data and information in an LA to be commensurate with supporting these determinations, rather than supporting precise quantification for all event sequences.''

The following definition has been added to the Glossary, after ISG line 379: ''*Risk-significant:* Making a significant contribution to the probabilities and/or consequences of one or more event sequences that have the potential to exceed the performance objectives of Part 63 during GROA operations.''

In addition, the following sentence has been added to the beginning of the Glossary: ''The definitions provided in this glossary are specific to the way the terms are used in this ISG, and may not be universally appropriate or applicable.''

Comment 4. One commenter stated that the term ''full-blown'' is not a clear term, and recommended replacing the term with ''full HRA.''

Response: NRC agrees with the commenter.

ISG line 56 has been revised to change ''full-blown HRA'' to ''full HRA (i.e., encompassing all elements of a complete HRA).''

Comment 5. One commenter recommended that ISG lines 117–119 be revised to delete the phrase, ''Because recoveries are not possible for some waste-facility initiators, * * *.'' The commenter stated that the reason for reducing the frequency of occurrence of an event sequence or minimizing the probability of a hazard is not necessarily because of recovery difficulty.

Response. The intent of the sentence in lines 117–119 is to point out that for some waste-facility operational events or initiators (e.g., a drop event), recovery actions, such as actuation of safety systems to prevent the events-in-progress, may not be possible. Therefore, special attention to the associated human-induced initiators and the sequence of events leading up to the initiators may be of special interest in the staff review of the HRA/PCSA.

ISG lines 117–119 have been revised to change ''Because * * * hazards)'' to ''For waste-facility initiators that may not have safeguards to prevent events-in-progress, once initiated (e.g., drop events).''

Comment 6. One commenter stated that the cited nine regulatory bases in ISG lines 173–215 do not specifically address HRA within the context of the PCSA. The commenter recommended adding the definition of an *Event Sequence,* from 10 CFR 63.2 at ISG line 173, to specifically show the regulatory basis for HRA within the context of the PCSA.

Response: NRC agrees with the commenter's suggestion.

The following has been added to the beginning of item 1. at ISG line 173: ''*Event sequence* means a series of actions and/or occurrences within the natural and engineered components of a geologic repository operations area that could potentially lead to exposure of individuals to radiation. An event sequence includes one or more initiating events and associated combinations of repository system component failures, including those produced by the action or inaction of operating personnel.''

Comment 7. One commenter stated that the term ''key'' is used in a variety of phrases in lines 220, 223, 446, 461, and 476; yet, the term ''key'' is not defined and its use in the ISG implies multiple definitions. The commenter recommends providing a definition of the term ''key,'' in the Glossary, that states, ''Key: Relates to an important contributor to the probability or the consequence of a single event sequence.''

Response. The meaning of the term, ''key,'' in the ISG, and recommended changes to the YMRP, is the same as it is in plain language (i.e., important or fundamental). No further definition is necessary.

No change was made to ISG as a result of these comments.

Comment 8. One commenter recommended adding definitions to the Glossary for the following terms that are used throughout the ISG, and suggested a definition for each of these terms: (a) Human-induced initiator, (b) human reliability analysis, (c) pre-initiator human failure event, and (d) post-initiator human failure event.

Response. NRC agrees with the commenter.

The ISG has been revised, as follows, to add the recommended terms, to the Glossary, which begins on ISG line 352, except the term ''Pre-initiator Human Failure Event,'' which has been defined already in ISG lines 375–379 as ''Pre-initiators.'' The ''Pre-initiators'' term has been revised to ''Pre-initiator Human Failure Event (HFE).''

Human-Induced Initiator: An HFE that represents actions that cause or lead to an initiating event. The GROA is expected to employ various manually controlled waste-handling and transport equipment that may be subject to HFEs that could initiate an event sequence.

Human Reliability Analysis (HRA): HRA evaluates the potential for, and mechanisms of, human errors that may affect the safety of the GROA operations, including consideration of human reliability as it relates to design and programs such as training of personnel. The main objectives of the HRA are:

1. To ensure that human actions that could affect event sequences are systematically identified, screened, analyzed, and incorporated into the safety analysis in a traceable manner;

2. Where necessary, to quantify the probabilities of success and failure of

human actions for event-sequence quantification and screening.

Post-Initiator Human Failure Event (HFE): Post-initiator HFEs include both operator actions and inactions that have the result of degraded plant/facility conditions. An example of such an HFE is the failure to manually actuate or manipulate systems or equipment that are required for response to an initiating event, to prevent propagation of an event sequence, or to mitigate its consequences. Post-initiator HFEs can be further divided into recovery and non-recovery events, as appropriate for a given event sequence.

Comment 9. One commenter stated that the definitions for error of commission and error of omission use the term ''degraded plant state,'' which does not apply to the GROA. The commenter recommends revising lines 354–355 and line 358 by replacing ''degraded plant state'' with ''event sequence.''

Response. NRC agrees with the commenter that reference to the ''degraded plant state'' or ''plant configuration,'' in the definitions of *Error of Commission* and *Error of Omission,* in ISG lines 353–358, is not appropriate for the GROA.

ISG lines 354–355 and 357–358 have been revised as follows: ''Plant configuration'' is changed to ''facility configuration,'' and ''degraded plant state'' is changed to ''degraded facility state that may lead to an event sequence.''

Comment 10. One commenter stated that although the discussion in ISG lines 50–64 is useful, the reference, in footnote 3, to Regulatory Guide 1.174, is general in nature and not directly applicable to the PCSA. The commenter recommends deleting footnote 3 from the ISG.

Response. NRC agrees with the commenter that the reference to Regulatory Guide 1.174, in ISG footnote 3, is general in nature and not directly applicable to the Part 63 PCSA. However, as stated in footnote 3, the general discussion on the application of NRC's risk-informed regulatory principles is useful for other regulatory applications. Therefore, NRC disagrees with the commenter's suggestion to delete ISG footnote 3.

No change to the ISG was made as a result of this comment.

Comment 11. One commenter submitted several closely related comments, stating that the draft ISG lacks a sound regulatory basis, in that it is built on a presumption that DOE will be conducting an HRA that goes beyond what is required by Part 63. The commenter adds that the introduction section of the draft ISG on page 1 discusses HRA ''* * * as if it were a stand-alone requirement for conducting the PCSA,'' when ''* * * HRA should more appropriately be considered one of many possible elements of preclosure performance.'' The commenter, although recognizing that the paragraph on ISG page 2, lines 50–64, provides a more appropriate representation of how the HRA concepts should be used by the NRC staff, cites specific examples in the ISG that appear to be inconsistent with these concepts. The commenter's examples include the use of the phrase, ''the HRA review,'' in ISG page 1; and the mention of ''the HRA,'' the ''HRA approach,'' or ''an HRA for the GROA,'' in ISG lines 103, 108, 123, 154, and 168, as if a full HRA were required. The commenter also states that the ISG statement on page 2 that staff should not expect a full HRA including quantification of all human error probabilities in the PCSA, seems inconsistent with later ISG statements (lines 87–89) which suggest reviewers should verify that the HRA for risk-significant processes at the GROA was performed following a complete and technically appropriate HRA process, with follow-on discussion of ''* * * elements of a highly quantitative HRA process.''

Response. NRC disagrees with the commenter. Part 63 requires a PCSA, supported with adequate technical bases in risk-significant areas. Human reliability has been shown to be a key component in operations at industrial facilities similar to the GROA. The PCSA should address any aspects of human involvement, in pre-closure operations, that have a bearing on the performance criteria. The term ''HRA'' is used broadly to encompass any aspect of the PCSA that addresses human involvement. The HRA is not a stand-alone analysis, but rather a part of the PCSA that is required (10 CFR 63.112) to demonstrate compliance with Part 63 (10 CFR 63.111). As stated in ISG lines 2–4 and 50–64, the staff review of human reliability is in the context of the PCSA, and is not beyond what is required by Part 63. Furthermore, the ISG explicitly states (ISG lines 82–84), ''Staff should tailor the scope and emphasis of its review to the approach taken in the LA, and the extent to which human actions are (or are not) relied on to meet 10 CFR Part 63 performance objectives''; and (ISG lines 55–57) that the review should be risk-informed, and staff should not expect a full HRA, including quantification of all human-error probabilities in the PCSA. Note that even for risk-significant processes at the GROA, ISG lines 89–98 explicitly state that the quantification HRA steps (c)–(e), may not be needed.

For clarification, the ISG has been revised as follows.

The following sentence has been added to the introduction, in line 7: ''In this ISG, ''the HRA'' refers to any consideration of human performance in the PCSA analyses, i.e., the evaluation of the potential for, and mechanisms of, human errors that may affect safety of GROA operations, including consideration of human reliability, as it relates to design and programs such as training of personnel.''

ISG line 5 has been revised to change ''the HRA review'' to ''in the review of HRA in the PCSA.''

ISG lines 38–39 have been revised to change ''The HRA supporting an LA'' to ''The HRA supporting the PCSA in an LA.''

The following sentence has been added to the paragraph preceding ISG line 65: ''Staff should also recognize that the analysis of how human performance fits into planned operations and meeting performance goals at the GROA may appear in many different parts of the PCSA, and in varying scopes (in other words, human performance is likely to be addressed in different relevant parts of the PCSA, rather than addressed together in one place).''

The sentence in ISG lines 65–66 has been changed to the following: ''The guidance in this ISG is written with the expectation that staff will seek the assistance of an HRA specialist(s) for review of risk-significant aspects of an LA affected by human performance.''

ISG line 78 has been revised to change ''qualitative analyses in the HRA'' to ''the qualitative HRA analyses.''

ISG lines 123–124 have been revised to change ''an HRA for the GROA'' to ''HRA in the GROA PCSA.''

Comment 12. One commenter stated that the ISG imposes, on the license applicant (DOE), an expectation that information be provided, in the initial LA, that would be more appropriately developed later in the licensing and repository development process—and the expectation being conveyed by this ISG not only exceeds what is required, but goes beyond what is expected to be reasonably available at the time of the initial LA. The commenter adds that the programs and processes will be developed over time, as the repository moves toward operational status, and thus need not be fully developed at the time of the initial LA.

Response. NRC disagrees with the commenter that the ISG imposes an expectation on DOE to provide information beyond what is required to

demonstrate compliance with Part 63. For NRC staff to review the LA, DOE needs to provide sufficient information to demonstrate compliance with Part 63—including the basis for safe operations, and where safety relies on procedural controls (and human performance), versus hardware components. The expectations conveyed in this ISG are consistent with 10 CFR 63.21(a) that ''The application must be as complete as possible in light of information that is reasonably available at the time of docketing.'' The Technical Review Guidance contained in the ISG provides staff guidance on verifying that appropriate technical bases are provided in the LA for the PCSA, with respect to human reliability. The subsection, ''Relationship to Programmatic Review and Licensing Specifications,'' that begins on ISG line 153, specifically recognizes that certain assumptions may need to be verified later and included as probable subjects for license conditions in the LA. Note also that Part 63 requires one LA, with two regulatory decisions: Whether to grant a construction authorization in accordance with 10 CFR 63.31, and whether to grant the license to receive and possess, in accordance with 10 CFR 63.41, after construction of the facility is substantially complete. NRC recognizes that additional information may become available in different stages of the licensing process, but at each stage, DOE must provide sufficient information to support that stage. See Commission's discussion accompanying issuance of Part 63 (66 FR 55738–9; November 2, 2001).

No change to the ISG was made as a result of this comment.

Comment 13. One commenter submitted two closely related comments, stating that the bases, for the parenthetical material in ISG lines 36–37, and statement in ISG lines 115–116 and footnote 6, discussing differences in nuclear power plant versus nuclear materials facility operations, are unclear or speculative, since many of the fuel-handling operations at the repository will largely be a subset of the types of operations carried out at nuclear power plants. The commenter adds that there is no reason for NRC to convey additional expectations for HRA at the repository over and above what is expected at a power plant and suggests that, unless there is a basis, the parenthetical material in ISG lines 36–37 should be removed.

Response. NRC agrees with the commenter that the fuel-handling operations at the repository are likely to be similar to the fuel-handling operations at a nuclear power plant. The intent of the parenthetical material in ISG lines 36–37 and the statement in ISG lines 115–116 is to compare at-power nuclear power plant *power-generation* operations, where rule-based control-room tasks may dominate, versus *materials-handling* activities at nuclear materials facilities, where skill-based manual tasks may dominate the operations. The reason for these statements is to alert staff to these differences since, to date, much of the experience with HRAs, and focus of available guidance documents, are on HRAs for nuclear power-generation operations (not including *fuel-handling* activities at nuclear power plants). Furthermore, the ISG does not imply staff expectations for HRA beyond what is expected for power plants. Therefore, the staff disagrees with the commenter's suggestion that the parenthetical material in ISG lines 36–37 be removed.

The ISG, however, has been revised, as follows, to clarify the staff's intent:

In ISG line 36, ''(e.g., nuclear power plant,'' is revised to ''(e.g., at-power nuclear power-generation operations.''

In ISG line 37, ''nuclear materials facility'' is revised to ''nuclear materials facility activities.''

Comment 14. One commenter stated that the first paragraph beginning on ISG line 69 appears internally contradictory, since it first discusses the qualitative HRA tasks that are performed as part of an overall PCSA (i.e., the conceptual understanding of human performance in the planned operations), and then identifies tasks, such as identification of HFEs and unsafe actions, as qualitative tasks. The commenter stated that: (a) It is not appropriate to describe the activities of identification of HFEs and unsafe actions ''* * * as qualitative when they are the initial steps of a quantitative analysis''; (b) ''Most reliability analysis input for PCSA should not require explicit HRA. The reliability of most important to safety (ITS) systems, structures, and components (SSCs) should be determined by using empirical data collected from similar operations.''

Response. (a) NRC agrees with the commenter that the tasks encompassed by a conceptual understanding of human performance provide an important basis of, and hence could be considered a part of, and the initial steps, of a quantitative analysis. Similarly, the tasks of identification of HFEs, unsafe actions, and factors that influence performance *are* qualitative tasks related to a mechanistic understanding of human performance, and can be considered as the initial steps of a quantitative analysis. (b) NRC agrees with the commenter that reliability analysis inputs based on the use of empirical data, in many cases, may not require explicit HRA. However, DOE would need to justify that the empirical data are applicable to the planned GROA operations, including any human performance aspects. (See also response to comment 15 below.)

For clarification, the ISG has been revised as follows.

ISG lines 69–74 are replaced with the following sentences: ''It is important to have a conceptual understanding of how human performance fits into the planned GROA operations and safety. Although quantified reliability estimates are typically needed for categorizing event sequences, much of the HRA review should focus on the HRA tasks, that are performed as part of an overall PCSA, that explain the conceptual understanding of human performance in the planned operations. These tasks are part of the qualitative HRA analysis and would include, for example: (1) Identification of HFEs and unsafe actions; (2) identification of important factors influencing human performance; and (3) selection of appropriate HRA quantification method(s), if considered necessary.''

The following entry has been added to the ISG glossary: ''*Qualitative HRA Analysis:* HRA tasks that include: (1) Identification of HFEs and unsafe actions; (2) identification of important factors influencing human performance; and (3) selection of appropriate HRA quantification method(s), if considered necessary.''

Comment 15. One commenter submitted several closely related comments about the use of empirical data and their relationship to HRA. The commenter's statements include:

- A qualitative evaluation justifying the use of empirical data for the repository PCSA is a reasonable NRC staff expectation, but the applicant should be required to perform quantitative HRA as part of the reliability inputs only if human factors were not part of the existing data sets.
- ''HRA is only one method of quantifying the human elements of risk. A preferable, and likely more accurate, method would be to use empirical reliability and event data that quantifies the total operational reliability including human influenced circumstances.''
- Regarding the crane data from NUREG–1774, ''Human error is implicit in the data. If the applicant can show or commit to programs that have comparable rigor to the programs under which the data was collected, separate HRA should not be necessary.''

• ISG lines 428–431 guide NRC staff reviewers to determine whether the LA provides justification for data sources, based on relevant qualitative considerations—namely HRA activities: (a) Identification of HFEs, and associated unsafe actions, to be considered in the overall PCSA; and (b) identification of important factors influencing human performance. The commenter stated that this is an inappropriate implied requirement that is more appropriate for the goal of improving human performance, but is not necessary to perform safety analysis, and is not required by Part 63 .

• ''Items 4, 5, 6, and 7 on page 14 and 15 are more reasonable expectations of the NRC staff review of the repository license application than items 2 and 3 (*ISG—Appendix A*).''

Response. As noted on ISG lines 50–54, the applicant has flexibility in its approach to demonstrate compliance with Part 63 performance objectives. DOE may choose from a variety of approaches that, with adequate technical bases, can successfully demonstrate regulatory compliance. Relying on empirical data is one possible approach. If the applicant chooses to rely on empirical data to estimate reliability of SSCs during GROA operations, staff expects a technical-basis discussion to be provided, on why the data apply to the GROA operations.

In addition, see ISG lines 145–150, for guidance on staff review of use of empirical failure rates and their technical bases, with regard to human performance. If the LA relies on empirical data where human performance is an important contributor, the staff expects a qualitative evaluation that the relevant conditions at facilities from which the empirical data were obtained are similar to those expected at the GROA, since HFEs depend greatly on context (see ISG ''Discussion'' section, lines 28–39). NRC expects that, as part of this justification of ''similarity,'' of the operations at the empirical data facilities and the GROA, DOE would include a discussion on conditions relevant to human performance, if human performance were an important contributor. Item 6, in the Appendix beginning on ISG line 461, also clarifies the information pertinent to the data source (NUREG–1774), in the hypothetical example and potential discussion, that could be included in an LA, to address differences between the GROA and data source facilities.

No change to the ISG was made as a result of this comment.

Comment 16. One commenter submitted two closely related comments, stating that, ''The sections titled, ''Consideration of Applicability of Data Approaches,'' beginning on page 4, line 137, and ''Relationship to Programmatic Review and Licensing Specifications,'' beginning on page 5, line 153, are more reasonable than * * * other parts of the Draft ISG,'' with one exception (see next sentence). The last sentence, starting at ISG line 167, in the section titled ''Relationship to Programmatic Review and Licensing Specifications,'' should be clarified or deleted, because: (a) The term ''the HRA'' incorrectly presumes a full HRA is necessary; and (b) the phrase ''relevant programmatic elements of the HRA'' is not clearly defined.

Response. (a) See response to Comment 11 above. (b) The purpose of this section is to highlight the dependency between HRA and programs such as training. Risk-significant elements of the PCSA and HRA that rely on assumptions about the adequacy of training and other programs are expected to be identified explicitly, and possibly identified as probable subjects for license specifications in the LA (requirements for future implementation, to ensure that the technical bases of the PCSA are valid).

For further clarification, ISG line 167 has been revised to change ''programmatic elements of the HRA'' to ''programmatic elements supporting the HRA.''

Comment 17. One commenter was concerned that the proposed additions of ''key human actions'' and ''human factors engineering,'' to the YMRP, described in ISG lines 220, 223, 292, 296, 300, 304, 308, 312, 316, and 320, '' * * * may imply that staff LA review should be to verify improvement of human performance, rather than to determine if regulatory requirements are met.'' The commenter suggested that warnings should be placed, in the appropriate sections of the YMRP, stating that the purpose of the staff review is to determine regulatory compliance.

Response. NRC disagrees with the commenter. NRC believes that the staff understands clearly that the LA review is to verify compliance with Part 63, and that the change suggested by the commenter is not necessary. The proposed additions of the phrase ''key human actions'' to the YMRP are to alert the staff to the need to confirm that descriptions of the GROA operations in the LA include the key actions that operators would have to perform to maintain safety. Similarly, the phrase, ''human factors engineering,'' was added to the YMRP, to alert the staff to verify that the quality assurance personnel, assigned by DOE to perform independent review of the plans for conduct of normal activities, including the written operating procedures, have experience and competence in the area of human engineering.

No change to the ISG was made as a result of this comment.

Comment 18. One commenter recommended changing lines 252 and 253 to (addition italic): ''Verify that *any necessary* human reliability analysis is consistent with * * *.''

Response. NRC agrees with the commenter. However, the word ''necessary'' is not included. DOE has the flexibility to choose from a variety of approaches for different aspects of the LA. HRA may be chosen as one of multiple alternative possible approaches, rather than the only necessary approach, for a particular aspect of the LA.

The ISG has been revised as follows.

ISG line 108 has been changed from ''the HRA'' to ''any HRA in the LA.''

ISG lines 252–253 have been changed from ''Verify that the human reliability analysis is consistent with * * * '' to ''Verify that any human reliability analysis in the license application is consistent with * * *.''

Comment 19. One commenter noted that on ISG lines 415–417, the concept of ''important to human reliability'' is introduced. (a) The commenter stated that this term is not defined in regulation and is unnecessary in the draft ISG context. (b) The commenter recommended truncating the sentence as follows, '' * * * the data accurately reflect the characteristics or features of the GROA,'' in particular because it is not just the human reliability aspects that need to be accurately reflected in the applicant's safety analysis.

Response. (a) ''Important to human reliability'' is not introduced as a regulatory concept, but rather used as plain language. The purpose of this phrase is to remind review staff to keep a risk-informed focus. Not every characteristic or feature of the GROA will be important to risk contribution from human reliability; the review focus should be on those characteristics and features that are significant with respect to human reliability. (b) NRC recognizes that human reliability aspects are not the totality of a PCSA. The scope of this ISG, though, is specifically to provide guidance on reviewing any human reliability aspects of a PCSA.

No change to the ISG was made as a result of this comment.

Comment 20. One commenter stated that the quote, from NUREG–1774, on

ISG lines 422–427, that the percentage of ''crane issue reports caused by poor human performance'' has increased over time and averaged between 70–80 percent of the reports, should not be taken to mean that human performance is getting worse over time, and NRC should not establish any regulatory expectations based on such an assumption.

Response. NRC is not adding expectations based on these statistics reported in NUREG–1774. NRC recognizes there could be many factors, known and unknown, that may be driving the statistics. The intent of quoting the statistics in the ISG is to show that human performance did contribute significantly to the rate of load drops from cranes in the empirical data in this hypothetical example.

To help clarify, the ISG is revised to add the following sentence starting in line 425: ''The reason for citing this statistic is not to imply that human performance is deteriorating over time, but as an indicator that human performance *does* contribute significantly to events in the empirical data in this hypothetical example.''

Comment 21. One commenter stated that the statement in item 6 on ISG lines 491–493 that the NRC staff review should look for a ''rigorous performance-monitoring program that might compensate for elements missing from the NUREG–1774 facilities'' would not be a necessary part of the LA unless the applicant claimed better crane reliability than the empirical data in NUREG–1774.

Response. NRC disagrees with the commenter. The ISG does not direct NRC staff review to look for '' * * * a rigorous performance-monitoring program that might compensate for elements missing from the NUREG–1774 facilities.'' ISG lines 487–493 discuss a hypothetical scenario where there are differences, in the conditions at the facilities from which the empirical data were obtained, compared to those at the GROA. The ISG lists examples of what the LA might provide as part of the technical basis for whatever empirical rate(s) are chosen. ''Rigorous performance-monitoring program to account for uncertainties'' is just one example of justification the LA may provide for using a particular empirical rate (as is, or modified). This is part of the staff review of assumptions in the analysis, and checking for justifiable inputs from a human performance perspective (which the commenter recognized is a reasonable thing to do in the LA review).

No change to the ISG was made as a result of this comment.

FOR FURTHER INFORMATION CONTACT: Jon Chen, Project Manager, Division of High-Level Waste Repository Safety, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 [Telephone: (301) 492–3197; fax number: (301) 492–3361; e-mail: *jcc2@nrc.gov*]; or Robert K. Johnson, Senior Project Manager, Division of High-Level Waste Repository Safety, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 [Telephone: (301) 492–3175; fax number: (301) 492–3361; e-mail: *rkj@nrc.gov*].

Dated at Rockville, Maryland, this 10th day of August, 2007.

For the Nuclear Regulatory Commission.

N. King Stablein,

Chief, Project Management Branch B, Division of High-Level Waste Repository Safety, Office of Nuclear Material Safety and Safeguards.

[FR Doc. E7–16456 Filed 8–20–07; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Petition under Section 302 on China's Currency Valuation; Decision Not To Initiate Investigation

AGENCY: Office of the United States Trade Representative.

ACTION: Decision not to initiate investigation.

SUMMARY: The United States Trade Representative (USTR) has determined not to initiate an investigation under section 302 of the Trade Act of 1974 with respect to a petition addressed to China's currency valuation policies because initiation of an investigation would not be effective in addressing the issues raised in the petition.

EFFECTIVE DATE: June 14, 2007.

FOR FURTHER INFORMATION CONTACT: Terrence J. McCartin, Deputy Assistant United States Trade Representative for China Enforcement, (202) 395–3900; or William Busis, Associate General Counsel and Chairman of the Section 301 Committee, (202) 395–3150.

SUPPLEMENTARY INFORMATION: On May 17, 2007, the Bipartisan China Currency Action Coalition filed a petition pursuant to section 302(a)(1) of the Trade Act of 1974, as amended (the Trade Act), alleging that certain acts, policies and practices of the Government of China with respect to the valuation of China's currency deny and violate international legal rights of the United States, are unjustifiable, and burden or restrict U.S. commerce. In particular, the petition alleged that China's acts, policies, and practices that maintain a fixed exchange rate vis-á-vis the U.S. dollar have resulted in a significant undervaluation of China's currency. The petition alleged that these acts, policies and practices amount to: a prohibited export subsidy under the Agreement on Subsidies and Countervailing Measures and articles VI and XVI of the General Agreement on Tariffs and Trade 1994 (GATT 1994); exchange action under article XV of the GATT 1994 that frustrates the intent of articles I, II, III, VI, XI , and XVI of the GATT 1994; and subsidies that are inconsistent with China's obligations under articles 3, 9, and 10 of the Agreement on Agriculture. The petition also alleged that these acts, policies, and practices of China violate international legal rights of the United States under articles IV and VIII of the Articles of Agreement of the International Monetary Fund, and that they burden or restrict U.S. commerce by, among other things, suppressing U.S. manufacturing for domestic consumption and the growth in U.S. exports.

On June 14, 2007, the USTR determined not to initiate an investigation under section 302 of the Trade Act because, among other reasons, an investigation would not be effective in addressing the acts, policies, and practices covered in the petition. The Administration is currently involved in efforts to address with the Government of China the currency valuation issues raised in the petition. The USTR believes that initiation of an investigation under section 302 would hamper, rather than advance, Administration efforts to address China's currency valuation policies.

William Busis,

Chairman, Section 301 Committee.

[FR Doc. E7–16455 Filed 8–20–07; 8:45 am]

BILLING CODE 3190–W7–P

PEACE CORPS

Volunteer Language Testing Scores System

AGENCY: Peace Corps.

ACTION: Notice to add a new system of records.

SUMMARY: As required under the Privacy Act of 1974, (5 U.S.C. 552a), as amended, the Peace Corps is giving notice of a new system of records, Volunteer Language Testing Scores System.

DATES: This action will be effective without further notice on October 5, 2007 unless comments are received by September 20, 2007 that would result in a contrary determination.

ADDRESSES: You may submit comments by e-mail to *sglasow@peacecorps.gov.* Include Privacy Act System of Records in the subject line of the message. You may also submit comments by mail to Suzanne Glasow, Office of the General Counsel, Peace Corps, Suite 8200, 1111 20th Street, NW., Washington, DC 20526. Contact Suzanne Glasow for copies of comments.

FOR FURTHER INFORMATION CONTACT: Suzanne Glasow, Associate General Counsel, 202–692–2150, *sglasow@peacecorps.gov.*

SUPPLEMENTARY INFORMATION: The Privacy Act, 5 U.S.C. 552a, provides that the public will be given a 30-day period in which to comment on the new system. The Office of Management and Budget (OMB), which has oversight responsibility under the Act, requires a 40-day period in which to review the proposed system. In accordance with 5 U.S.C. 552a, Peace Corps has provided a report on this system to OMB and the Congress.

SYSTEM NAME:

PC–32, Volunteer Language Testing Scores System.

SYSTEM LOCATION:

Overseas Training Division, Training and Staff Development Unit, Peace Corps, 1111 20th St., NW., Washington, DC 20526.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any Peace Corps Trainee or currently serving Volunteer.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, Volunteer Identification Number, gender, Social Security Number, country of service, region of service, date of birth, project type, project name or assigned sector, language background, notes, test date, language code, tester code, length of preservice training, Educational Testing Services/Teaching of Foreign Language rating, certificate of language proficiency, and reason not tested, if applicable.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Peace Corps Act, 22 U.S.C. 2501 *et seq.*

PURPOSE:

To record Educational Testing Services/Teaching of Foreign Language rating of Peace Corps Volunteers.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM:

General routine uses A–L apply to this system.

RECORDS MAY ALSO BE DISCLOSED TO:

Peace Corps Volunteer host country officials for review of their qualifications for a program.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

In a computerized database.

RETRIEVABILITY:

By name, region, gender, assigned sector, or date tested.

SAFEGUARDS:

Computer records are maintained in a secure, password-protected computer system.

RETENTION AND DISPOSAL:

Records in the computerized database are kept for seven years after swear in and five years after close of service.

SYSTEM MANAGER:

Chief, Overseas Training, Center for Field Assistance and Applied Research (CEN), 1111 20th St., NW., Washington, DC 20526.

PROCEDURES FOR NOTIFICATION, ACCESS, AND CONTESTING:

Any individual who wants to know whether this system of records contains a record about him or her, who wants access to his or her record, or who wants to contest the contents of a record, should make a written request to the System Manager. Requesters will be required to provide adequate identification, such as a driver's license, employee identification card, or other identifying document. Additional identification may be required in some instances. Requests for correction or amendment must identify the record to be changed and the corrective action sought. Complete Peace Corps Privacy Act procedures are set out in 22 CFR Part 308.

RECORD SOURCE CATEGORIES:

Record subject and official records of Educational Testing Services/Teaching of Foreign Language rating.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: August 15, 2007.

Wilbert Bryant,

Associate Director for Management.

[FR Doc. E7–16366 Filed 8–20–07; 8:45 am]

BILLING CODE 6051–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56255; File No. SR–Amex–2007–77]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Eliminate Certain Exchange Rules Prohibiting the Entering of Limit Orders on Both Sides of the Market on a Regular and Continuous Basis

August 15, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 8, 2007, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. Amex has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rules 1000–AEMI, 1000A–AEMI, 1200–AEMI, 1200A–AEMI, 1200B–AEMI, 1500–AEMI, and Rule 1400 to eliminate the prohibition on the entering of certain limit orders in Exchange Traded Fund Shares and other equity derivative products into the Exchange's trading systems.

The text of the proposed rule change is available at the Amex, the Commission's Public Reference Room, and *www.amex.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

In August 2001, the Exchange adopted rules restricting the entry of certain limit orders in Portfolio Depositary Receipts, Index Fund Shares, and Trust Issued Receipts. Subsequently, the Exchange adopted the same rules for trading in Commodity-Based Trust Shares, Currency Trust Shares, Paired Trust Shares, and Partnership Units when those products began trading on the Exchange. All of these products will be collectively referred to herein as ''Exchange Traded Fund Shares'' or ''ETFs.'' Specifically, the rules provide that members, acting as either principal or agent, may not permit the entry of orders into the Exchange's electronic order routing system if the orders are limit orders for the account or accounts of the same or related beneficial owners and the limit orders are entered in such a manner that the member or the beneficial owner(s) effectively is operating as a market maker by holding itself out as willing to buy and sell such securities on a regular or continuous basis.

The Exchange adopted these rules because its business model at that time depended upon specialists and registered traders for competition and liquidity. To encourage participation by specialists and registered traders, the Exchange determined to limit the ability of non-specialists/registered traders to compete on equal terms within its automated systems. The Exchange determined that certain actions—simultaneous entry of limit orders to buy or sell the same ETF, multiple acquisition and liquidation of positions in the same ETF, and the entry of multiple orders at different prices in the same ETF—were tantamount to operating as a market maker and gave such members an advantage over the specialist who was required to yield priority to their orders. The adoption of these rules by the Exchange did not, however, confer market maker status on such members for any purpose under the Act or otherwise.

Since that time, trading in ETFs has changed considerably. Most recently, the implementation of the AEMI trading system and the introduction of Regulation NMS have changed the Exchange's view of these restrictions and the need to encourage order flow from all types of liquidity providers, particularly member firms trading for their own proprietary accounts. ETF specialists and registered traders now have the ability to stream quotations into the AEMI system using their own proprietary quoting systems in a manner that allows them to compete effectively with orders from members' proprietary accounts. In addition, specialists and registered traders have the ability to be on parity with these orders from members. Thus, the Exchange is proposing to amend its rules to eliminate the prohibition on limit orders from members operating as market makers. Management believes the removal of these restrictions will provide a level playing field for all market participants on parity and should enhance access to the Exchange providing additional liquidity in our ETFs.

The prohibition, however, will continue to apply to customer agency orders since those orders continue to have priority over specialists and registered traders. The rule prevents certain customers from obtaining an unfair advantage by acting as unregistered specialists and traders while having priority over the specialists and registered traders by virtue of their customer status. Permitting customers to enter multiple limit orders to such an extent that they are effectively acting as market makers in a secuirty, while at the same time giving them priority over all other orders on the book, gives such customers an inordinate advantage over other market participants.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)(5) of the Act,[4] which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and practices, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective immediately pursuant to Section 19(b)(3)(A)(iii) of the Act[5] and Rule 19b–4(f)(6) thereunder[6] because it does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.[7]

Rule 19b–4(f)(6) provides that the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The Commission hereby waives the 30 day pre-operative period.[8] In an order approving a proposed rule change by the Chicago Board Options Exchange, the Commission recognized that an exchange may permit members to submit orders on both sides of the market on a regular or continuous basis, even if such members are not registered as market makers.[9] Therefore, the Commission believes that it is consistent with the protection of investors and the public interest to waive the 30-day operative period so that the proposal may become operative upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78s(b)(3)(A)(iii).

[6] 17 CFR 240.19b–4(f)(6).

[7] Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. Amex has satisfied the five-day pre-filing notice requirement.

[8] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] *See* Securities Exchange Act Release No. 38054 (December 16, 1996), 61 FR 67365, 67370 (December 20, 1996).

interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–Amex–2007–77 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–Amex–2007–77. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2007–77 and should be submitted on or before September 11, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–16394 Filed 8–20–07; 8:45 am]

BILLING CODE 8010–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56253; File No. SR–BSE–2007–40]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change To Extend and Expand the Pilot Program To Quote Certain Options in Pennies

August 15, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 10, 2007, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared by the BSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Boston Options Exchange (''BOX'') Rules to reflect BOX's continued participation in the Penny Pilot Program, which would follow a two-phased extension schedule, first extending through March 27, 2008 and then extending through March 27, 2009. During this extension, the Exchange also proposes a corresponding expansion of the Penny Pilot Program, with each of the two expansion phases commencing when its corresponding extension phase becomes operative. The text of the proposed rule change is available on the BSE's Web site at (*http://www.bostonstock.com*), at the offices of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend the BOX Rules to reflect BOX's continued participation in the Penny Pilot Program, namely its participation in a two-phased extension and expansion of the program. The Exchange proposes to amend Section 33, (''Penny Pilot Program'') to Chapter V (''Doing Business on BOX'') of the BOX Rules.

All six options exchanges, including BOX, currently participate in the thirteen class[3] Penny Pilot Program set to expire on September 27, 2007.[4] The Exchange now proposes to both extend and expand the Penny Pilot Program; extending through March 27, 2008 and expanding with an additional twenty-two options classes during that six-month extension period. The additional twenty-two options classes would be as follows: SPDRs (SPY); Apple, Inc. (AAPL); Altria Group Inc. (MO); Dendreon Corp. (DNDN); Amgen Inc. (AMGN); Yahoo! Inc. (YHOO); QUALCOMM Inc. (QCOM); General Motors Corporation (GM); Energy Select Sector (XLE); DIAMONDS Trust, Series 1 (DIA); Oil Services HOLDRs (OIH); NYSE Euronext, Inc. (NYX); Cisco Systems, Inc. (CSCO); Financial Select Sector SPDR (XLF); AT&T Inc. (T); Citigroup Inc. (C); Amazon.com Inc. (AMZN); Motorola Inc. (MOT); Research in Motion Ltd. (RIMM); Freeport-McMoRan Copper & Gold Inc. (FCX);

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The thirteen option classes currently in the Pilot are: Ishares Russell 2000 (IWM); NASDAQ–100 Index Tracking Stock (QQQQ); SemiConductor Holders Trust (SMH); General Electric Company (GE); Advanced Micro Devices, Inc. (AMD), Microsoft Corporation (MSFT); Intel Corporation (INTC); Caterpillar, Inc. (CAT); Whole Foods Market, Inc. (WFMI); Texas Instruments, Inc. (TXN); Flextronics International Ltd. (FLEX); Sun Microsystems, Inc. (SUNW); and Agilent Technologies, Inc. (A).

[4] The Pilot Program is currently set to expire on September 27, 2007. *See* Securities Exchange Act Release No. 56149 (July 26, 2007), 72 FR 42450 (August 2, 2007) (SR–BSE–2007–38). *See also* Securities Exchange Act Release No. 55155 (January 23, 2007), 72 FR 4741 (February 1, 2007) (SR–BSE–2006–49) (''Original Penny Pilot Program Approval Order'').

ConocoPhillips (COP); and Bristol-Myers Squibb Co. (BMY). These options classes represent the most actively traded, multiply listed options classes that would, together with the current thirteen Penny Pilot classes, account for approximately 35% of total trading volume, based on OCC year-to-date trading volume data (through July 16, 2007). Excluded in this aggregate measurement are Google, NDX, and RUT because of their high premiums.

Furthermore, the Exchange proposes a second extension and expansion of the Penny Pilot Program. This second proposal would extend the Penny Pilot Program for an additional year, from March 28, 2008 through March 27, 2009. During this second extension, the number of options classes trading in pennies would again increase. The Exchange proposes to add the most actively traded, multiply listed options classes up to the top 50 by volume.[5] This would bring the total number of options classes being quoted in pennies to approximately sixty-three (the original 13 pilot options classes, the 22 from the first expansion, plus the 28 additional options classes from the second expansion) for the second expansion, from March 28, 2008 to March 27, 2009.

The minimum price variation for all classes included in the Penny Pilot Program, except for the QQQQs, would continue to be $0.01 for all quotations in option series that are quoted at less than $3 per contract and $0.05 for all quotations in option series that are quoted at $3 per contract or greater. The QQQQs would continue to be quoted in $0.01 increments for all options series.

During the extended and expanded pilot program, the BOX would deliver four reports to the Commission. Each report would analyze the impact of penny pricing on market quality and options system capacity. The first report would analyze the penny pilot results from May 1, 2007 through September 27, 2007. The second would analyze the results from September 28, 2007 through January 31, 2008. The third would analyze the results from February 1, 2008 through July 31, 2008. And the fourth and final report would examine the results from August 1, 2008 through January 31, 2009. These reports would be provided to the Commission within 30 days of the conclusion of the reporting period.

[5] The Exchange intends to file a 19(b)(3)(A) rule filing to identify the options classes to be included in the second expansion.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(5) of the Act,[7] in particular, in that the proposed rule change is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Based on Exchange's experience with the 13 pilot classes, the Exchange believes it is appropriate to extend and expand the pilot in the manner described.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. The Commission also requests and encourages interested persons to submit comments on the following specific questions:

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

- Whether there are circumstances under which options classes included in the Penny Pilot should be removed from the Pilot?
- If so, what factors should be considered in making the determination to remove an option class from the Penny Pilot?
  - Should an objective standard be used? For instance, should an option class come out of the Penny Pilot if its trading volume drops below a threshold amount? If so, what should that threshold be? Or, should an option class come out of the Penny Pilot if it is no longer among the most actively traded options? If so, what should be considered the most-actively traded options? What statistics or analysis should be used to support a determination to remove an options class?
  - Should a more subjective analysis be allowed? If so, what factors should be taken into account?
- What concerns might arise by removing an option from the Penny Pilot? How could such concerns be ameliorated?
- How frequently should the analysis be undertaken (*e.g.*, annually, bi-annually, quarterly), or should the evaluation be an automated process?
- If a determination is made that an option should be removed from the Penny Pilot, how much notice should be given to market participants that the quoting increment will change?

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BSE–2007–40 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BSE–2007–40. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the BSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BSE–2007–40 and should be submitted on or before September 11, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–16393 Filed 8–20–07; 8:45 am]

BILLING CODE 8010–01–P

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56258; File No. SR–NYSEArca–2007–59]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Accelerated Approval of Proposed Rule Change and Amendment No.1 Thereto Relating to Amendments to Rule 12 to Provide Guidance Regarding New and Pending Arbitration Claims in Light of the Consolidation of NYSE Regulation into NASD DR

August 15, 2007.

I. Introduction

On June 26, 2007, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change amending NYSE Arca Rule 12. On July 13, 2007, NYSE Arca filed Amendment No. 1 to the proposed rule change.[3] On July 23, 2007, the Commission published for comment the proposed rule change, as amended, in the **Federal Register**.[4] The Commission received no comments on the proposal. This order approves the proposed rule change, as amended, on an accelerated basis.

II. Description of the Proposal

The purpose of the rule change is to provide guidance regarding both new and pending NYSE Arca Rule 12 arbitration claims in light of the consolidation of the member firm regulation function of NYSE Regulation, Inc. (''NYSE Regulation'') with the National Association of Securities Dealers, Inc. (''NASD'').[5] On July 30, 2007,[6] NYSE Regulation ceased to provide an arbitration program, and its arbitration department (''NYSE Arbitration'') was consolidated with that of NASD Dispute Resolution, Inc. (''NASD DR''). Furthermore, NYSE Arbitration Rules 600 through 639, and Rule 347, only apply to NYSE arbitration cases pending prior to August 6, 2007, and, thereafter, the NASD DR Codes of Arbitration Procedure apply to any new cases previously subject to NYSE rules.[7]

Because the consolidation has already occurred, the effective date of this rule change will be when the Commission approves this proposed rule change (SR–NYSEArca–2007–59) (''Effective Date''). As a result, on and after July 30, 2007, all arbitration claims filed prior to the Effective Date, and previously subject to Rule 12 or NYSE Regulation rules, will be administered by NASD DR[8] pursuant to a Regulatory Services Agreement with the New York Stock Exchange LLC (''NYSE'').

The amendments to Rule 12 provide that: (i) All arbitrations filed with NYSE Arca after January 31, 2007 and prior to the Effective Date, shall continue to be governed by the Code of Arbitration contained in the 600 series of the NYSE Rules; (ii) arbitrations filed on or prior to January 31, 2007 shall continue to be governed by NYSE Arca Rule 12 as it was in effect on or prior to January 31, 2007; and (iii) from and after the Effective Date, disputes between NYSE Arca Option Trading Permit (''OTP'') holders and NYSE Arca OTP firms, associated persons, and/or their customers will be arbitrated under the NASD DR Codes of Arbitration Procedure.

Rule 12(a) will provide detailed guidance concerning claims involving OTP Holders and/or OTP Firms and/or associated persons that are asserted on and after the Effective Date. First, any dispute, claim or controversy between or among OTP Holders and/or OTP Firms and/or associated persons shall be arbitrated pursuant to the NASD DR Codes of Arbitration Procedure. Second, any dispute, claim or controversy between a customer or a non-member and an OTP Holder and/or OTP Firm, and/or associated person arising in connection with the business of such OTP Holder and/or OTP Firm and/or in connection with the activities of an associated person, shall be arbitrated pursuant to NASD DR Codes of Arbitration Procedure as provided by any duly executed and enforceable written agreement, or upon the demand of the customer or non-member. This obligation to arbitrate shall extend only to those matters that are permitted to be arbitrated under NASD DR Codes of Arbitration Procedure.

Rule 12(b) will explicitly retain NYSE Arca's enforcement authority related to arbitration. Rule 12(c) also will provide that any OTP Holder and/or OTP Firm, and/or associated person of any OTP Holder and/or OTP Firm, that fails to honor an award of arbitrators rendered under the NASD DR Codes of Arbitration Procedure, or under the auspices of any other self-regulatory organization, shall be subject to disciplinary proceedings in accordance with NYSE Arca Rule 10. Rule 12(d)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, which supplemented the original filing, the Exchange clarified the applicability of Rule 12 as it was in effect on or prior to January 31, 2007.

[4] *See* Securities Exchange Act Release No. 556071 (July 13, 2007), 72 FR 40184 (July 23, 2007).

[5] On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation. *See* Securities Exchange Act Release No. 56146 (July 26, 2007), 72 FR 42190 (Aug. 1, 2007) (SR–NASD–2007–053).

[6] The consolidation of the member firm regulatory functions did not occur until July 30, 2007, when definitive agreements were signed by the NYSE and NASD. *Id.*

[7] *See* Securities Exchange Act Release No. 56208 (Aug. 6, 2007), 72 FR 45077 (Aug. 10, 2007) (SR–NYSE–2007–48) (approval order).

[8] NASD DR now administers NYSE Arbitration, which is governed by NYSE Regulation Rules 600 through 639. NASD DR also administers NYSE Arca arbitration, which is governed by Rule 12 and Arca Equities Rule 12. NASD DR is in the process of changing its name to FINRA DR; however, this change has not been finalized. Once this name change is completed, NYSE and NYSE Arca anticipate amending references to NASD in its rules from NASD to FINRA. In the meantime, this rule reflects the current name. Telephone conversation among James F. Duffy, General Counsel, NYSE Regulation; Lourdes Gonzalez, Assitant Chief Counsel—Sales Practices, Commission; and Michael Hershaft, Special Counsel, Commission (Aug. 14, 2007).

also will specify that the submission of any matter to arbitration as provided for under the Rule shall in no way limit or preclude any right, action or determination by NYSE Arca that it would otherwise be authorized to adopt, administer or enforce.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of Section 6(b)(5) [9] of the Act, which requires, among other things, that the rules of an Exchange be designed to promote just and equitable principles of trade and to protect investors and the public interest. The Commission believes that the proposed rule change will streamline the arbitration process and, after a transitional period, provide for a unified and more efficient arbitration forum with one set of arbitration rules and administrative procedures. This will allow resources to be devoted to maintaining and improving the NASD DR program, rather than splitting resources among duplicative programs. The Commission also believes the proposed rule change will provide for a clear and orderly transition. As a result, the proposed rule change will better protect investors and the public interest.[10]

The Commission finds good cause to approve the proposed rule change, as amended, prior to the thirtieth day after the proposal was published for comment in the **Federal Register**. This approval allows the proposed rule change to take effect without delay. Because the proposed rule change will provide for a clear and orderly transition from NYSE Arca arbitration to NASD DR, accelerated approval is necessary to provide clarity to investors regarding the appropriate forums for pending and future arbitration claims. In light of the recent consolidation, accelerated approval of the proposed rule change also will allow NASD DR and NYSE Regulation to ensure that their arbitration programs are fully consolidated in a timely and efficient manner, without any further delay or uncertainty.

For these reasons, the Commission finds good cause, consistent with Section 19(b)(2) of the Act, to grant accelerated approval to the proposed rule change.

[9] 15 U.S.C. 78f(b)(5).

[10] In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act [11] that the proposed rule change, as modified by Amendment No. 1 (SR–NYSEArca–2007–59), be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–16396 Filed 8–20–07; 8:45 am]

BILLING CODE 8010–01–P

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56259; File No. SR–NYSEArca–2007–60]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Accelerated Approval of Proposed Rule Change and Amendment No.1 Thereto Relating to Amendments to Arca Equities Rule 12 to Provide Guidance Regarding New and Pending Arbitration Claims in Light of the Consolidation of NYSE Regulation into NASD DR

August 15, 2007.

I. Introduction

On June 26, 2007, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change amending NYSE Arca Equities Rule 12. On July 13, 2007, NYSE Arca filed Amendment No. 1 to the proposed rule change.[3] On July 23, 2007, the Commission published for comment the proposed rule change, as amended, in the **Federal Register**.[4] The Commission received no comments on the proposal. This order approves the proposed rule change, as amended, on an accelerated basis.

II. Description of the Proposal

The purpose of the rule change is to provide guidance regarding both new and pending NYSE Arca Equities Rule 12 arbitration claims in light of the consolidation of the member firm regulation function of NYSE Regulation, Inc. (''NYSE Regulation'') with the National Association of Securities Dealers, Inc. (''NASD'').[5] On July 30, 2007,[6] NYSE Regulation ceased to provide an arbitration program, and its arbitration department (''NYSE Arbitration'') was consolidated with that of NASD Dispute Resolution, Inc. (''NASD DR''). Furthermore, NYSE Arbitration Rules 600 through 639, and Rule 347, only apply to NYSE arbitration cases pending prior to August 6, 2007, and, thereafter, the NASD DR Codes of Arbitration Procedure apply to any new cases previously subject to NYSE rules.[7]

Because the consolidation has already occurred, the effective date of this rule change will be when the Commission approves this proposed rule change (SR–NYSEArca–2007–60) (''Effective Date''). As a result, on and after July 30, 2007, all arbitration claims filed prior to the Effective Date, and previously subject to NYSE Arca Equities Rule 12 or NYSE Regulation rules, will be administered by NASD DR [8] pursuant to a Regulatory Services Agreement with the New York Stock Exchange LLC (''NYSE'').

The amendments to NYSE Arca Equities Rule 12 provide that: (i) All arbitrations filed with NYSE Arca Equities after January 31, 2007 and prior to the Effective Date, shall continue to be governed by the Code of Arbitration contained in the 600 series of the NYSE Rules; (ii) arbitrations filed on or prior to January 31, 2007 shall continue to be governed by NYSE Arca Equities Rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, which supplemented the original filing, the Exchange clarified the applicability of NYSE Arca Equities Rule 12 as it was in effect on or prior to January 31, 2007.

[4] *See* Securities Exchange Act Release No. 556070 (July 13, 2007), 72 FR 40188 (July 23, 2007).

[5] On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation. *See* Securities Exchange Act Release No. 56146 (July 26, 2007), 72 FR 42190 (Aug. 1, 2007) (SR–NASD–2007–053).

[6] The consolidation of the member firm regulatory functions did not occur until July 30, 2007, when definitive agreements were signed by the NYSE and NASD. *Id.*

[7] *See* Securities Exchange Act Release No. 56208 (Aug. 6, 2007), 72 FR 45077 (Aug. 10, 2007) (SR–NYSE–2007–48) (approval order).

[8] NASD DR now administers NYSE Arbitration, which is governed by NYSE Regulation Rules 600 through 639. NASD DR also administers NYSE Arca arbitration, which is governed by Rule 12 and Arca Equities Rule 12. NASD DR is in the process of changing its name to FINRA DR; however, this change has not been finalized. Once this name change is completed, NYSE and NYSE Arca anticipate amending references to NASD in its rules from NASD to FINRA. In the meantime, this rule reflects the current name. Telephone conversation among James F. Duffy, General Counsel, NYSE Regulation; Lourdes Gonzalez, Assitant Chief Counsel—Sales Practices, Commission; and Michael Hershaft, Special Counsel, Commission (Aug. 14, 2007).

12 as it was in effect on or prior to January 31, 2007; and (iii) from and after the Effective Date, disputes between NYSE Arca Equity Trading Permit (''ETP'') holders, associated persons, and/or their customers will be arbitrated under the NASD DR Codes of Arbitration Procedure.

Arca Equities Rule 12(a) will provide detailed guidance concerning claims involving ETP Holders and/or associated persons that are asserted on and after the Effective Date. First, any dispute, claim or controversy between or among ETP Holders and/or associated persons shall be arbitrated pursuant to the NASD DR Codes of Arbitration Procedure. Second, any dispute, claim or controversy between a customer or a non-member and an ETP Holder and/or associated person arising in connection with the business of such ETP Holder and/or in connection with the activities of an associated person, shall be arbitrated pursuant to NASD DR Codes of Arbitration Procedure as provided by any duly executed and enforceable written agreement, or upon the demand of the customer or non-member. This obligation to arbitrate shall extend only to those matters that are permitted to be arbitrated under NASD DR Codes of Arbitration Procedure.

Rule 12(b) will explicitly retain NYSE Arca Equities' enforcement authority related to arbitration. Rule 12(c) also will provide that any ETP Holder and/or associated person, that fails to honor an award of arbitrators rendered under the NASD DR Codes of Arbitration Procedure, or under the auspices of any other self-regulatory organization, shall be subject to disciplinary proceedings in accordance with NYSE Arca Equities Rule 10. Rule 12(d) also will specify that the submission of any matter to arbitration as provided for under the Rule shall in no way limit or preclude any right, action or determination by NYSE Arca Equities that it would otherwise be authorized to adopt, administer or enforce.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of Section 6(b)(5) [9] of the Act, which requires, among other things, that the rules of an Exchange be designed to promote just and equitable principles of trade and to protect investors and the public interest. The Commission believes that the proposed rule change will streamline the arbitration process and, after a transitional period, provide for a unified and more efficient arbitration forum with one set of arbitration rules and administrative procedures. This will allow resources to be devoted to maintaining and improving the NASD DR program, rather than splitting resources among duplicative programs. The Commission also believes the proposed rule change will provide for a clear and orderly transition. As a result, the proposed rule change will better protect investors and the public interest.[10]

The Commission finds good cause to approve the proposed rule change, as amended, prior to the thirtieth day after the proposal was published for comment in the **Federal Register**. This approval allows the proposed rule change to take effect without delay. Because the proposed rule change will provide for a clear and orderly transition from NYSE Arca Equities arbitration to NASD DR, accelerated approval is necessary to provide clarity to investors regarding the appropriate forums for pending and future arbitration claims. In light of the recent consolidation, accelerated approval of the proposed rule change also will allow NASD DR and NYSE Regulation to ensure that their arbitration programs are fully consolidated in a timely and efficient manner, without any further delay or uncertainty.

For these reasons, the Commission finds good cause, consistent with Section 19(b)(2) of the Act, to grant accelerated approval to the proposed rule change.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act [11] that the proposed rule change, as modified by Amendment No. 1 (SR–NYSEArca–2007–60), be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–16397 Filed 8–20–07; 8:45 am]

BILLING CODE 8010–01–P

[9] 15 U.S.C. 78f(b)(5).

[10] In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56257; File No. SR–NYSEArca–2007–83]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delete Obsolete Rules Relating to the Trading of Gold and Silver Bullion

August 15, 2007

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 3, 2007, NYSE Arca, Inc. (''Exchange''), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (''NYSE Arca Equities'' or ''Corporation''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. NYSE Arca has designated this proposal as non-controversial under Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Equities Rule 4.1 (Minimum Net Capital) by deleting Commentary .02 (Trading in Gold and Silver Bullion) thereto. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Corporation has determined that Commentary .02 to NYSE Arca Equities Rule 4.1, which relates to trading in gold and silver bullion, is obsolete because the Corporation no longer trades gold and silver bullion. Therefore, the Corporation proposes to delete Commentary .02 from NYSE Arca Rule 4.1. In 2005, the Exchange filed a proposed rule change that sought to delete a similar rule related to trading options on gold and silver bullion, but failed to make the same filing for its equities rules.[5]

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,[6] in general, and Section 6(b)(5) of the Act,[7] in particular, in that it will promote just and equitable principles of trade, facilitate transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[8] and subparagraph (f)(6) of Rule 19b–4 thereunder.[9] Because the foregoing proposed rule change (1) does not significantly affect the protection of investors or the public interest, (2) does not impose any significant burden on competition, and (3) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder. As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days before doing so.

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the operative delay in this case. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because Commentary .02 to NYSE Arca Equities Rule 4.1 no longer serves any purpose, and hereby grants the Exchange's request.[10]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–NYSEArca–2007–83 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2007–83. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commissions Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2007–83 and should be submitted on or before September 11, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–16395 Filed 8–20–07; 8:45 am]

BILLING CODE 8010–01–P

[5] *See* Securities Exchange Act Release No. 51281 (March 1, 2005), 70 FR 11296 (March 8, 2005) (SR–PCX–2005–21) (seeking to delete certain obsolete rules, including Commentary .02 to PCX Rule 4.1, which relates to trading in gold and silver bullion).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56249; File No. SR–Phlx–2007–27]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change Relating to the Standardization of Rules for Equity, Index and ETF Options

August 14, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4[2] thereunder, notice is hereby given that on March 21, 2007, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been substantially prepared by the Phlx. On July 25, 2007, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend Phlx Rule 1014(c)(i)(A) relating to quote spread parameters (bid/ask differentials) and Phlx Rule 1014(g)(i)(B) relating to purchase or sale priority for orders of 100 contracts or more, to standardize the rules such that they would apply equally to options on equities, options on exchange-traded fund (''ETF'') shares, and index options.

The text of the proposed rule change is available on Phlx's Web site at (*http://www.Phlx.com/exchange/phlx-rule-fil.hlm*), at the Exchange's Office of the Secretary and the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the above-mentioned rules so that they would apply equally to options on equities, options on ETFs, and index options. Currently, Phlx's rules concerning bid/ask differentials and split-price priority in open outcry apply either exclusively to equity and ETF options, or apply differently to equity and ETF options versus index options. In order to standardize the applicability of Phlx's rules to all options traded on Phlx, the following rule changes are proposed:

Bid/Ask Differentials

Currently, Phlx Rule 1014(c)(i)(A) includes only language concerning equity options. In order to clarify the applicability of the rule to all options traded on the Exchange, including index options, and options on ETFs, the proposal would specifically list index options and options on ETFs in the rule.

Purchase or Sale Priority for Orders of 100 Contracts or More

Phlx Rule 1014(g)(i)(B) currently affords priority in open outcry to a member that purchases (sells) 50 or more option contracts of a particular series at a particular price or prices, at the next lower (higher) price, up to the equivalent number of option contracts of the same series that he purchased (sold) at the higher (lower) price or prices. The rule currently applies only to transactions in equity options (including options overlying ETFs).

The proposed amendment would delete the limitation of applicability to equity and ETF options from the rule; the rule would therefore apply to all options traded on the Exchange, including index options.

The Exchange believes that the standardization of these rules should obviate any potential confusion among customers and Exchange members concerning their applicability.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[3] in general, and furthers the objectives of Section 6(b)(5) of the Act[4] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, by adopting standardized rules that apply to all options traded on the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which Phlx consents, the Commission shall: (a) By order approve such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2007–27 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities andExchange Commission, 100 F Street, NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2007–27. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m.. Copies of the filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2007–27 and should be submitted on or before September 11, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–16392 Filed 8–20–07; 8:45 am]

BILLING CODE 8010–01–P

[5] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #10969]

Maine Disaster #ME–00010

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Maine (FEMA–1716–DR), dated August 8, 2007.

Incident: Severe Storms and Flooding.

Incident Period: July 11, 2007 through July 12, 2007.

Effective Date: August 8, 2007.

Physical Loan Application Deadline Date: October 9, 2007.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 08/08/2007, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Oxford.

The Interest Rates Are:

	Percent
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.250
Businesses And Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 10969.

(Catalog of Federal Domestic Assistance Number 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E7–16349 Filed 8–20–07; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #10966 and #10967]

New York Disaster #NY–00052

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of New York dated August 14, 2007.

Incident: Severe Storms and Flash Flooding.

Incident Period: June 19, 2007.

EFFECTIVE DATE: August 14, 2007.

Physical Loan Application Deadline Date: October 15, 2007.

Economic Injury (EIDL) Loan Application Deadline Date: May 14, 2008.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Delaware.

Contiguous Counties:

New York: Broome, Chenango, Greene, Otsego, Schoharie, Sullivan, Ulster.

Pennsylvania: Wayne.

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere:	5.750
Homeowners Without Credit Available Elsewhere:	2.875
Businesses With Credit Available Elsewhere:	8.000
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere:	4.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere:	5.250
Businesses And Non-Profit Organizations Without Credit Available Elsewhere:	4.000

The number assigned to this disaster for physical damage is 10966 6 and for economic injury is 10967 0.

The States which received an EIDL Declaration # are New York and Pennsylvania.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

August 14, 2007.

Steven C. Preston,

Administrator.

[FR Doc. E7–16347 Filed 8–20–07; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #10964 and #10965]

Ohio Disaster #OH–00011

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of OHIO dated August 14, 2007.

Incident: Severe Storms and Flooding.

Incident Period: August 7, 2007.

Effective Date: August 14, 2007.

Physical Loan Application Deadline Date: October 15, 2007.

Economic Injury (EIDL) Loan Application Deadline Date: May 14, 2008.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Cuyahoga.

Contiguous Counties:

Ohio: Geauga, Lake, Lorain, Medina, Portage, and Summit.

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere	6.250
Homeowners Without Credit Available Elsewhere	3.125
Businesses With Credit Available Elsewhere	8.000
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.250
Businesses And Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 10964 6 and for economic injury is 10965 0.

The State which received an EIDL Declaration # is Ohio.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: August 14, 2007.

Steven C. Preston,

Administrator.

[FR Doc. E7–16350 Filed 8–20–07; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 10968]

Vermont Disaster #VT–00005

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance only for the State of Vermont (FEMA–1715–DR), dated August 3, 2007.

Incident: Severe Storms and Flooding.

Incident Period: July 9, 2007 through July 11, 2007.

Effective Date: August 3, 2007.

Physical Loan Application Deadline Date: October 2, 2007.

Addresses: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 08/03/2007, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Orange, Washington, Windsor.

The Interest Rates Are:

	Percent
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.250
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 10968.

(Catalog of Federal Domestic Assistance Number 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E7–16348 Filed 8–20–07; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA 2007–0064]

Privacy Act of 1974, as Amended; Computer Matching Program (SSA/Department of Veterans Affairs (VA), Veterans Benefits Administration (VBA)—Match Number 1309

AGENCY: Social Security Administration (SSA).

ACTION: Notice of the renewal of an existing computer matching program which is scheduled to expire on October 1, 2007.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces the renewal of an existing computer matching program that SSA is currently conducting with VA.

DATES: SSA will file a report of the subject matching program with the Committee on Homeland Security and Governmental Affairs of the Senate; the Committee on Oversight and Government Reform of the House of Representatives; and the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). The renewal of the matching program will be effective as indicated below.

ADDRESSES: Interested parties may comment on this notice by either telefaxing to (410) 965–8582 or writing to the Associate Commissioner for Income Security Programs, 252 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401. All comments received will be available for public inspection at this address.

FOR FURTHER INFORMATION CONTACT: The Associate Commissioner for Income Security Programs as shown above.

SUPPLEMENTARY INFORMATION:

A. General

The Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503), amended the Privacy Act (5 U.S.C. 552a) by describing the conditions under which computer matching involving the Federal government could be performed and adding certain protections for individuals applying for and receiving Federal benefits. Section 7201 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508) further amended the Privacy Act regarding protections for such individuals.

The Privacy Act, as amended, regulates the use of computer matching by Federal agencies when records in a system of records are matched with other Federal, State or local government

records. It requires Federal agencies involved in computer matching programs to:

(1) Negotiate written agreements with the other agency or agencies participating in the matching programs;

(2) Obtain the approval of the matching agreement by the Data Integrity Boards (DIB) of the participating Federal agencies;

(3) Publish notice of the computer matching program in the **Federal Register**;

(4) Furnish detailed reports about matching programs to Congress and OMB;

(5) Notify applicants and beneficiaries that their records are subject to matching; and

(6) Verify match findings before reducing, suspending, terminating or denying an individual's benefits or payments.

B. SSA Computer Matches Subject to the Privacy Act

We have taken action to ensure that all of SSA's computer matching programs comply with the requirements of the Privacy Act, as amended.

Dated: August 3, 2007.

Manuel J. Vaz,

Acting Deputy Commissioner for Disability and Income Security Programs.

Notice of Computer Matching Program, Social Security Administration (SSA) With the Department of Veterans Affairs (VA), Veterans Benefits Administration (VBA)

A. Participating Agencies

SSA and VA.

B. Purpose of the Matching Program

The purpose of this matching program is to establish the conditions, terms and safeguards under which VA agrees to disclose VA compensation and pension payment data to SSA. This disclosure will provide SSA with information necessary to verify an individual's self-certification of eligibility for prescription drug subsidy assistance under section 1860D–14 of the Social Security Act (Act)(42 U.S.C. 1395w–114). The disclosure will also enable SSA to implement a Medicare outreach program mandated by section 1144 of title XI of the Social Security Act. Information disclosed by VA will enable SSA to identify individuals to determine their eligibility for Medicare Savings Programs (MSP) and subsidized Medicare prescription drug coverage and enable SSA, in turn, to identify these individuals to the States.

C. Authority for Conducting the Matching Program

The legal authority for SSA to conduct this matching activity is contained in section 1860D–14 (42 U.S.C. 1395w–114) and section 1144 (42 U.S.C. 1320b–14) of the Act.

D. Categories of Records and Individuals Covered by the Matching Program

VA will provide SSA with electronic files containing compensation and pension payment data from its system of records entitled the Compensation, Pension, Education and Rehabilitation Records–VA (58VA21/22). Routine use 46 for VA permits the disclosure of this information. SSA will then match VA data with SSA SOR 60–0321, the MDB.

SSA has published notice of its new system of records, which establishes as a routine use the disclosure of information in the MDB to VA only for the purpose of supporting SSA in the administration of the prescription drug subsidy program under the MMA of 2003 (No. 60–0321, published at 69 **Federal Register** 77816, December 28, 2004; and 71 **Federal Register** 42159–42164, July 25, 2006).

E. Inclusive Dates of the Matching Program

The matching program will become effective upon signing of the agreement by all parties to the agreement and approval of the agreement by the Data Integrity Boards of the respective agencies, but no sooner than 40 days after notice of the matching program is sent to Congress and the Office of Management and Budget, or 30 days after publication of this notice in the **Federal Register**, whichever date is later. The matching program will continue for 18 months from the effective date and may be extended for an additional 12 months thereafter, if certain conditions are met.

[FR Doc. E7–16465 Filed 8–20–07; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2007–0063]

Privacy Act of 1974, as Amended; Computer Matching Program (SSA/Office of Personnel Management (OPM) Match Number 1307

AGENCY: Social Security Administration (SSA).

ACTION: Notice of the renewal of an existing computer matching program which is scheduled to expire on October 1, 2007.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces the renewal of an existing computer matching program that SSA is currently conducting with OPM.

DATES: SSA will file a report of the subject matching program with the Committee on Homeland Security and Governmental Affairs of the Senate; the Committee on Oversight and Government Reform of the House of Representatives; and the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). The renewal of the matching program will be effective as indicated below.

ADDRESSES: Interested parties may comment on this notice by either telefaxing to (410) 965–8582 or writing to the Associate Commissioner for Income Security Programs, 252 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401. All comments received will be available for public inspection at this address.

FOR FURTHER INFORMATION CONTACT: The Associate Commissioner for Income Security Programs as shown above.

SUPPLEMENTARY INFORMATION:

A. General

The Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503), amended the Privacy Act (5 U.S.C. 552a) by describing the conditions under which computer matching involving the Federal government could be performed and adding certain protections for individuals applying for and receiving Federal benefits. Section 7201 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508) further amended the Privacy Act regarding protections for such individuals.

The Privacy Act, as amended, regulates the use of computer matching by Federal agencies when records in a system of records are matched with other Federal, State or local government records. It requires Federal agencies involved in computer matching programs to:

(1) Negotiate written agreements with the other agency or agencies participating in the matching programs;

(2) Obtain the approval of the matching agreement by the Data Integrity Boards (DIB) of the participating Federal agencies;

(3) Publish notice of the computer matching program in the **Federal Register**;

(4) Furnish detailed reports about matching programs to Congress and OMB;

(5) Notify applicants and beneficiaries that their records are subject to matching; and

(6) Verify match findings before reducing, suspending, terminating or denying an individual's benefits or payments.

B. SSA Computer Matches Subject to the Privacy Act

We have taken action to ensure that all of SSA's computer matching programs comply with the requirements of the Privacy Act, as amended.

Dated: July 30, 2007.

Notice of Computer Matching Program, Social Security Administration (SSA) With the Office of Personnel Management (OPM)

A. Participating Agencies

SSA and OPM.

B. Purpose of the Matching Program

The purpose of this matching program is to establish the conditions, terms and safeguards under which OPM agrees to disclose civil service benefit and payment data to SSA. This disclosure will provide SSA with information necessary to verify an individual's self-certification of eligibility for prescription drug subsidy assistance under section 1860D–14 of the Social Security Act (42 U.S.C. 1395w–114), as added by section 101 of Public Law 108–173, the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA). The disclosure will also enable SSA to implement a Medicare outreach program mandated by section 1144 of title XI of the Social Security Act. Information disclosed by OPM will enable SSA to identify individuals to determine their eligibility for Medicare Savings Programs (MSP) and subsidized Medicare prescription drug coverage and enable SSA, in turn, to identify these individuals to the States.

C. Authority for Conducting the Matching Program

The legal authority for SSA to conduct this matching activity is contained in section 1860D–14 (42 U.S.C. 1395w–114) and section 1144 (42 U.S.C. 1320b–14) of the Act.

D. Categories of Records and Individuals Covered by the Matching Program

Monthly, OPM will provide SSA with electronic files containing civil service benefit and payment data from the OPM system of records published as OPM/Central–1 (Civil Service and Insurance Records), on October 8, 1999 (64 FR 54930), as amended on May 3, 2000 (65 FR 25775). SSA will then match the OPM data with the SSA SOR (60–0321), the MDB.

SSA has published notice of its new system of records, which establishes as a routine use the disclosure of information in the MDB to OPM only for the purpose of supporting SSA in the administration of the prescription drug subsidy program under the MMA of 2003 (No. 60–0321, published at 69 **Federal Register** 77816, December 28, 2004; and 71 **Federal Register** 42159–42164, July 25, 2006).

E. Inclusive Dates of the Matching Program

The matching program will become effective upon signing of the agreement by all parties to the agreement and approval of the agreement by the Data Integrity Boards of the respective agencies, but no sooner than 40 days after notice of the matching program is sent to Congress and the Office of Management and Budget, or 30 days after publication of this notice in the **Federal Register**, whichever date is later. The matching program will continue for 18 months from the effective date and may be extended for an additional 12 months thereafter, if certain conditions are met.

[FR Doc. E7–16469 Filed 8–20–07; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2007–0062]

Privacy Act of 1974, as Amended; Computer Matching Program (SSA/Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement (HHS/ACF/OCSE)—Match Number 1306

AGENCY: Social Security Administration (SSA).

ACTION: Notice of the renewal of an existing computer matching program which is scheduled to expire on October 1, 2007.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces the renewal of an existing computer matching program that SSA is currently conducting with HHS/ACF/OCSE.

DATES: SSA will file a report of the subject matching program with the Committee on Homeland Security and Governmental Affairs of the Senate; the Committee on Oversight and Government Reform of the House of Representatives; and the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). The renewal of the matching program will be effective as indicated below.

ADDRESSES: Interested parties may comment on this notice by either telefaxing to (410) 965–8582 or writing to the Associate Commissioner for Income Security Programs, 252 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401. All comments received will be available for public inspection at this address.

FOR FURTHER INFORMATION CONTACT: The Associate Commissioner for Income Security Programs as shown above.

SUPPLEMENTARY INFORMATION:

A. General

The Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503), amended the Privacy Act (5 U.S.C. 552a) by describing the conditions under which computer matching involving the Federal government could be performed and adding certain protections for individuals applying for and receiving Federal benefits. Section 7201 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508) further amended the Privacy Act regarding protections for such individuals.

The Privacy Act, as amended, regulates the use of computer matching by Federal agencies when records in a system of records are matched with other Federal, State or local government records. It requires Federal agencies involved in computer matching programs to:

(1) Negotiate written agreements with the other agency or agencies participating in the matching programs;

(2) Obtain the approval of the matching agreement by the Data Integrity Boards (DIB) of the participating Federal agencies;

(3) Publish notice of the computer matching program in the **Federal Register**;

(4) Furnish detailed reports about matching programs to Congress and OMB;

(5) Notify applicants and beneficiaries that their records are subject to matching; and

(6) Verify match findings before reducing, suspending, terminating or denying an individual's benefits or payments.

B. SSA Computer Matches Subject to the Privacy Act

We have taken action to ensure that all of SSA's computer matching

programs comply with the requirements of the Privacy Act, as amended.

Dated: August 6, 2007.

Manuel J. Vaz,

Acting Deputy Commissioner for Disability and Income Security Programs.

Notice of Computer Matching Program, Social Security Administration (SSA) With the Health and Human Services (HHS)/Administration for Children and Families (ACF)/Office of Child Support Enforcement (OCSE)

A. Participating Agencies

SSA and OCSE.

B. Purpose of the Matching Program

The purpose of this matching program is to establish the conditions, terms and safeguards under which OCSE agrees to disclose quarterly wage and unemployment insurance data from their National Directory of New Hires database to SSA. This disclosure will provide SSA with information necessary to verify an individual's self-certification of eligibility for prescription drug subsidy assistance under section 1860D–14 of the Social Security Act (Act) 42 U.S.C. 1395w–114).

C. Authority for Conducting the Matching Program

The legal authority for SSA to conduct this matching activity is contained in section 1860D–14 (42 U.S.C. 1395w–114) of the Act.

D. Categories of Records and Individuals Covered by the Matching Program

1. Specified Data Elements Used in the Match

a. On the basis of certain identifying information as provided by SSA to OCSE, OCSE and SSA will conduct a computerized comparison of the quarterly wage payment and unemployment insurance benefit information in the National Directory of New Hires (NDNH) maintained by OCSE in its Location and Collection (LCS) system of records.

b. SSA will match this data against the Medicare database (MDB).

2. Systems of Records

The OCSE will provide SSA with electronic files containing quarterly wage and unemployment insurance data from its system of records, the Location and Collection System (ACF/OCSE, 09–90–0074). Pursuant to U.S.C. 552a(b)(3), OCSE has established routine use to disclose the subject information.

SSA will match the OCSE information with electronic files from its system of records, No. 60–0321, MDB (Medicare Database).

E. Inclusive Dates of the Matching Program

The matching program will become effective upon signing of the agreement by all parties to the agreement and approval of the agreement by the Data Integrity Boards of the respective agencies, but no sooner than 40 days after notice of the matching program is sent to Congress and the Office of Management and Budget, or 30 days after publication of this notice in the **Federal Register**, whichever date is later. The matching program will continue for 18 months from the effective date and may be extended for an additional 12 months thereafter, if certain conditions are met.

[FR Doc. E7–16472 Filed 8–20–07; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 5834]

Notice of Meeting of the Advisory Committee on International Law

A meeting of the Advisory Committee on International Law will take place on Friday, September 14, 2007, from 10 a.m. to approximately 4 p.m., in Room 1105 of the United States Department of State, 2201 C Street, NW., Washington, DC. The meeting will be chaired by the Legal Adviser of the Department of State, John B. Bellinger, III, and will be open to the public up to the capacity of the meeting room. Participants at the meeting will discuss a range of issues relating to current international legal topics, including recent developments in litigation under the Alien Tort Statute; the establishment by the United Nations of the Special Tribunal for Lebanon; recent developments in U.S. non-proliferation efforts; and the use of preventive detention to deter terrorism.

Entry to the building is controlled and will be facilitated by advance arrangements. Members of the public who wish to attend the session should, by Wednesday, September 12, 2007, notify the Office of the Assistant Legal Adviser for Claims and Investment Disputes (telephone: 202–776–8351) of their name, date of birth; citizenship (country); ID number, i.e., U.S. government ID (agency), U.S. military ID (branch), passport (country) or driver's license (state); professional affiliation, address and telephone number in order to arrange admittance. This includes admittance for government employees as well as others. All attendees must use the ''C'' Street entrance. One of the following valid IDs will be required for admittance: any U.S. driver's license with photo, a passport, or a U.S. government agency ID. Because an escort is required at all times, attendees should expect to remain in the meeting for the entire morning or afternoon session.

Dated: August 14, 2007.

Karin L. Kizer,

Attorney Adviser, Office of Claims and Investment Disputes, Office of the Legal Adviser, Executive Director Advisory, Committee on International Law, Department of State.

[FR Doc. E7–16460 Filed 8–20–07; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 5883]

Advisory Commission on Public Diplomacy; Notice of Meeting

The U.S. Advisory Commission on Public Diplomacy will hold a public meeting on September 12, 2007, in Room 150 at the National Academy of Sciences Building at 2100 C Street, NW., Washington, DC 20418. The meeting will be held from 9 a.m. to 12 noon. The Commissioners plan to discuss the human resources dimension of the State Department's public diplomacy programs and operations; and legislative branch-based public diplomacy programming.

The Advisory Commission was originally established under Section 604 of the United States Information and Exchange Act of 1948, as amended (22 U.S.C. 1469) and Section 8 of Reorganization Plan Numbered 2 of 1977. It was reauthorized pursuant to Public Law 110–21 (2007). The Commission is a bipartisan panel created by Congress in 1948 to assess public diplomacy policies and programs of the U.S. government and publicly funded nongovernmental organizations. The Commission reports its findings and recommendations to the President, the Congress and the Secretary of State and the American people. Current Commission members include Barbara M. Barrett of Arizona, who is the Chairman; Harold Pachios of Maine; Ambassador Penne Percy Korth of Washington, DC; Ambassador Elizabeth Bagley of Washington, DC; Jay T. Snyder of New York; and Maria Sophia Aguirre of Washington, DC.

Seating at this meeting is limited. To attend and for more information, please contact Carl Chan at (202) 203–7883. E-mail: *chanck@state.gov.*

Dated: August 13, 2007.

Carl Chan,

Acting Executive Director, Department of State.

[FR Doc. E7–16459 Filed 8–20–07; 8:45 am]

BILLING CODE 4710–11–P

DEPARTMENT OF STATE

[Public Notice 5884]

Federal Advisory Committee on Transformational Diplomacy; Notice of Meeting

The Secretary of State's Advisory Committee on Transformational Diplomacy (''Committee'') will conduct and open meeting on Friday, September 14, 2007, from 8 a.m. to 10:15 a.m. in Room 7516 HST, U.S. Department of State, 2201 C Street, NW., Washington, DC. The purpose of this meeting is to review progress on the proposed recommendations that the Committee will submit to the Secretary in final form at a later date and to receive briefings from Department officials.

The provisional agenda calls for the Committee to consider draft recommendations from each working group and to discuss as necessary. This meeting is open to the public from 8 a.m. until 10:15 a.m. as seating capacity allows. The Committee will meet in closed session from 10:30 a.m. until 11:30 a.m. to receive a secure briefing focused on classified information. It has been determined that this portion of the meeting will be closed to the public pursuant to Section 10 (d) of the Federal Advisory Committee Act and 5 U.S.C. 552b [c][1].

Entry to the building is controlled; to obtain pre-clearance for entry, members of the public (including government employees and Department of State employees) planning to attend should provide by no later than September 10, 2007, their name; place of birth and date of birth; citizenship (country); ID number, i.e., U.S. government ID (agency), U.S. military ID (branch), passport (country), or drivers license number (state); professional affiliation, address, and telephone number to Carlene Roy by fax (202) 647–2524, e-mail (*royc@state.gov*), or telephone (202) 647–0093. Members of the public also may file a written statement with the Committee.

One of the following valid photo IDs will be required for admittance to the State Department building: U.S. driver's license, passport, or U.S. Government agency ID. Members of the public must use the ''C'' Street entrance, after going through the exterior screening facilities. Due to escorting requirements, attendees should arrive 15 minutes before the meeting begins.

For additional information, contact Madelyn Marchessault, Office of Management Policy, at (202) 647–0093 or at *Marchessaultms@state.gov.*

Dated: August 10, 2007.

Marguerite Coffey,

Managing Director Office of Management Policy, Department of State.

[FR Doc. E7–16458 Filed 8–20–07; 8:45 am]

BILLING CODE 4710–35–P

TENNESSEE VALLEY AUTHORITY

Paperwork Reduction Act of 1995, as amended by Pub. L. 104–13; Submission for Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Tennessee Valley Authority.

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The proposed information collection described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). The Tennessee Valley Authority is soliciting public comments on this proposed collection as provided by 5 CFR Section 1320.8(d)(1). Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer: Alice D. Witt, Tennessee Valley Authority, 1101 Market Street (EB 5B), Chattanooga, TN 37402–2801; (423) 751–6832. (SC: 0019QYX)

Comments should be sent to OMB Office of Information and Regulatory Affairs, Attention: Desk Officer for Tennessee Valley Authority, no later than September 20, 2007.

SUPPLEMENTARY INFORMATION:

Type of Request: Regular submission, proposal to reinstate, with change, a previously approved collection.

Title of Information Collection: Employment Applications.

Frequency of Use: On occasion.

Type of Affected Public: Individuals.

Small Businesses or Organizations Affected: No.

Federal Budget Functional Category Code: 999.

Estimated Number of Annual Responses: 31,500.

Estimated Total Annual Burden Hours: 31,500.

Estimated Average Burden Hours per Response: 1.

Need For and Use of Information: Applications for employment are needed to collect information on qualifications, suitability for employment, and eligibility for veterans' preference. The information is used to make comparative appraisals and to assist in selections. The affected public consists of individuals who voluntarily apply for TVA employment.

Steve A. Anderson,

Manager, Business Services, Interim General Manager, Architecture, Planning & Compliance, Information Services.

[FR Doc. E7–16411 Filed 8–20–07; 8:45 am]

BILLING CODE 8120–08–P

TENNESSEE VALLEY AUTHORITY

Paperwork Reduction Act of 1995, as Amended by Pub. L. 104–13; Proposed Collection, Comment Request

AGENCY: Tennessee Valley Authority.

ACTION: Proposed collection; comment request.

SUMMARY: The proposed information collection described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). The Tennessee Valley Authority is soliciting public comments on this proposed collection as provided by 5 CFR Section 1320.8(d)(1). Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer: Alice D. Witt, Tennessee Valley Authority, 1101 Market Street (EB 5B), Chattanooga, TN 37402–2801; (423) 751–6832. (SC: 000YRFB)

Comments should be sent to the Agency Clearance Officer no later than October 22, 2007.

SUPPLEMENTARY INFORMATION:

Type of Request: Regular submission; proposal to extend without revision a currently approved collection of information (OMB control number 3316–0016).

Title of Information Collection: Farmer Questionnaire—Vicinity of Nuclear Power Plants.

Frequency of Use: On occasion.

Type of Affected Public: Individuals or households, and farms.

Small Businesses or Organizations Affected: No.

Federal Budget Functional Category Code: 271.

Estimated Number of Annual Responses: 300.

Estimated Total Annual Burden Hours: 150.

Estimated Average Burden Hours Per Response: .5.

Need For and Use of Information: This survey is used to locate, for monitoring purposes, rural residents, home gardens, and milk animals within a five mile radius of a nuclear power plant. The monitoring program is a mandatory requirement of the Nuclear Regulatory Commission set out in the technical specifications when the plants were licensed.

Steve A. Anderson,

Manager, Business Services, Interim General Manager, Architecture, Planning & Compliance, Information Services.

[FR Doc. E7–16412 Filed 8–20–07; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the statutory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Central Montana Rail, Inc.

[Docket Number FRA–2001–10948]

Central Montana Rail, Inc. (CMR) has petitioned for an extension of its temporary waiver of compliance from the requirements of Title 49 U.S.C. 21103(a), the Federal hours of service law (HSL), for train employees. This provision states that the railroad may neither require nor allow train employees to begin or remain on duty in excess of 12 hours in a 24-hour period without receiving the appropriate 8- or 10-hour statutory off-duty period. However, the HSL contains a provision (49 U.S.C. 21102(b)) that permits a railroad to seek an exemption from the 12-hour limitation if it employs no more than 15 employees subject to the statute. CMR states that it is the railroad's intent to use such a waiver only in unusual circumstances dictated by geographic remoteness, weather, or traffic peaks, and the waiver is not to be used on a daily basis.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA in writing before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2001–10948) and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://dms.dot.gov*.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or you may visit *http://dms.dot.gov*.

Issued in Washington, DC, on August 14, 2007.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E7–16404 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Informational Filing

In accordance with section 236.913 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received an informational filing from the Union Pacific Railroad Company (UP) to permit field testing of the railroad's processor-based train control systems. The informational filing is described below, including the requisite docket number where the informational filing and any related information may be found. The document is also available for public inspection; however, FRA is not accepting public comments.

Union Pacific Railroad

[Docket Number FRA–2007–27322]

UP has submitted an informational filing to FRA to permit field testing of the railroad's processor-based train control systems identified as Communications Based Train Control (CBTC) and Vital-Train Management System (V–TMS). The informational filing addresses the requirements under 49 CFR 236.913(j)(1).

Specifically, the informational filing contains a description of the CBTC/V–TMS product and an operational concepts document, pursuant to 49 CFR 236.913(j)(1). The CBTC is a locomotive-centric, non-vital system designed to be overlaid on existing methods of operation and intended to provide an improved level of safety through enforcement of authority limits, permanent speed restrictions, and temporary speed restrictions. The V–TMS is a locomotive-centric, vital train control system designed to be overlaid on existing methods of operation and intended to provide a high level of railroad safety through enforcement of authority limits, permanent speed restrictions, and temporary speed restrictions.

UP desires to commence CBTC/V–TMS field testing on or about October 1, 2007, or as soon as practicable thereafter, contingent upon FRA's acceptance and approval of the informational filing.

Interested parties are invited to review the informational filing and associated documents at the following locations:

Web site: *http://dms.dot.gov.* Follow the instructions for a simple search on the DOT electronic Docket Management System, using Docket No. 27322. All documents in the public docket that are associated with the informational filing are available on the Web site for inspection and copying.

DOT Docket Management Facility, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78). The Statement may also be found at *http://dms.dot.gov.*

Issued in Washington, DC, on August 14, 2007.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E7–16407 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2006–26283; Notice 2]

Britax Child Safety, Inc.; Denial of Petition for Decision of Inconsequential Noncompliance

Britax Child Safety, Inc. (Britax) has determined that certain child restraint systems that it produced in 2006 do not comply with paragraph S5.1.1 of 49 CFR 571.213, Federal Motor Vehicle Safety Standard (FMVSS) No. 213, *Child Restraint Systems.* Britax has filed an appropriate report pursuant to 49 CFR Part 573, ''Defect and Noncompliance Responsibility and Reports.'' Pursuant to 49 U.S.C. 30118(d) and 30120(h), Britax also has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety. Notice of receipt of the petition was published, with a 30-day public comment period, on December 15, 2006 in the **Federal Register** (71 FR 75609). The National Highway Traffic Safety Administration (NHTSA) received one comment from Advocates for Highway Safety (Advocates). To view the petition and all supporting documents, go to: *http://dms.dot.gov/search/searchFormSimple.cfm* and enter Docket No. NHTSA–2006–26283.

For further information on this decision, contact Mr. Zachary R. Fraser, Office of Vehicle Safety Compliance, NHTSA, telephone (202) 366–5754, facsimile (202) 366–7002.

Affected are a total of approximately 34,355 Marathon Child Restraint Systems (models E9L06, E9W06, and E906) produced by Britax between May 23 and July 28, 2006. Britax recommends that the Marathon be used forward-facing for children weighing between 20 and 65 pounds, and with the tether at all times. FMVSS No. 213 specifies that a child restraint recommended for use above 50 pounds be tested with a 49 CFR Part 572 Subpart S dummy. The Subpart S dummy is a Hybrid III 6 year-old dummy with weights added to the spine. Also, paragraph S5(d) specifies that each child restraint system tested with a 49 CFR Part 572 Subpart S dummy need not meet paragraph S5.1.2, *Injury Criteria* and paragraph S5.1.3, *Occupant Excursion* of FMVSS No. 213. In addition, paragraph S5.1.1 of FMVSS No. 213 requires that the child restraint system exhibit no complete separation of any load bearing structural element during dynamic testing. When the noncompliant child restraint systems were tested with the weighted 6 year-old dummy, the top tether hook opened and released from the top tether anchor. Britax has corrected the problem that caused the tether hook to release so that it will not be repeated in future production.

Britax believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. Britax states that the system has ''excellent biomechanical performance * * * even with the opening of the system's top tether hook.'' Britax says that the systems ''exceed expectation with head excursion well below the limit for products in which this performance is actually measured,'' even though the noncompliant systems are not required to meet head excursion limits. Britax also points out that there was a lower HIC and lower chest acceleration with the top tether hook open than when not open, and ''[t]hese results demonstrate that the opening of the top tether dissipates some of the occupant energy and thereby reduc[es] overall biomechanical injury measures.''

Britax concludes that the open top tether hook is inconsequential to the system working. Britax states, ''The biomechanical results and performance of the other structural components of the Marathon prove that the *system* [emphasis in original] does what is it intended to do—that is, save children's lives.''

Advocates commented by expressing their concern about the potential negative impacts on public confidence that failures of this type in actual use and an agency decision granting inconsequential noncompliance could have on the rate of tether use. Advocates also asserted that publicity that may accompany the failure of an upper tether could have a negative impact on consumer confidence and complicate the agency's efforts to educate the public regarding the use of tethers.

NHTSA Decision

In reaching our decision, NHTSA has carefully reviewed the subject petition, the Advocates' comments and a similar petition (which Britax attempts to distinguish from its petition) that was submitted to NHTSA in 2002 by another child restraint systems manufacturer, Dorel Juvenile Group (Dorel). (To view the Dorel petition and all supporting documents, go to: NHTSA Docket No. NHTSA–2002–13014.)

As part of its reasoning, Britax argued that because the Britax Marathon system displayed ''excellent biomechanical performance * * * even with the opening of the system's top tether hook'' during the NHTSA testing that the noncompliance is inconsequential to motor vehicle safety. NHTSA does not agree with this line of reasoning. As Britax acknowledges, even though the Britax Marathon system met other dynamic test requirements, it did not meet paragraph S5.1.1(a) of FMVSS No. 213 because the system's top tether hook opened and released from the top tether anchorage. The agency has consistently viewed tether strap separation as a load bearing structural failure. A tether strap structural failure is similar to vehicle LATCH anchorage failure; a failure of either one will not provide full occupant protection for children. In requiring upper tethers and anchors, NHTSA noted that, ''the tether is especially effective at reducing head excursion and the potential for head impacts.'' 64 FR 10786. By definition, the child restraint anchorage system consists of both the lower anchorages and the tether. 49 CFR 571.225 S3. This line of reasoning is consistent with NHTSA's decision to deny the previously referenced Dorel petition. Here, because the seat was recommended for weights greater than 50 pounds, the injury criteria applicable in other situations did not apply. This makes structural integrity all the more important. As Britax itself notes (petition at page 2), where the injury criteria do not apply, ''there is a reliance on the structural integrity of the restraint to ensure safety of the child occupant * * *''

The agency has taken enforcement action for a similar failure. In 2001, the agency notified Britax of a potential noncompliance due to the detachment of a tether strap during dynamic testing of one of its child restraint models. Britax initiated a recall campaign to provide owners of the affected model with repair kits. In its current petition, Britax stated it did not believe that the failure that resulted in the 2001 recall should be compared to the current failure. Britax's argument for this is that the 2001 failure had the potential for increased forward movement of the head and therefore potential for exceeding head excursion limits whereas the current Marathon ''exceeds its biomechanical requirements and expectations.'' We disagree with this reasoning and believe that the Marathon, while not required to meet a

head excursion requirement when tested with the weighted 6 year-old dummy, also has the potential for increased forward movement of the head in excess of the required limit in the event of a top tether failure. We note that, as the Britax explanation makes clear, the head excursion limit (720 mm) was exceeded in one out of the three tests the company performed. In that test, the tether hook opened. In the other two tests performed by Britax, the tether hook did not open and the head excursions were substantially less. Furthermore, lower biomechanical responses would naturally occur as a result of increased excursion due to a top tether failure.

Finally, NHTSA agrees with Advocates that granting this petition would send a mixed message to the public regarding the use of tethers and would be contradictory to NHTSA's mission to promote greater use of LATCH and tether.

In consideration of the foregoing, NHTSA has decided that the petitioner has not met its burden of persuasion that the noncompliance described is inconsequential to motor vehicle safety. Accordingly, Britax's petition is hereby denied, and the petitioner must notify according to 49 U.S.C. 30118 and remedy according to 49 U.S.C. 30120.

Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: August 15, 2007.

Daniel C. Smith,

Associate Administrator for Enforcement.

[FR Doc. E7–16408 Filed 8–20–07; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Applications for Modification of Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for modification of special permit.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Request of modifications of special permits (e.g. to provide for additional hazardous materials, packaging design changes, additional mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix ''M'' denote a modification request. These applications have been separated from the new application for special permits to facilitate processing.

DATES: Comments must be received on or before September 5, 2007.

ADDRESS COMMENTS TO: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC or at *http://dms.dot.gov*.

The notice of receipt of applications for modification of special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on August 14, 2007.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

MODIFICATION SPECIAL PERMITS

Application number	Docket number	Applicant	Regulation(s) affected	Nature of special permit thereof
7835–M		Richem Company, Inc., Albuquerque, NM.	49 CFR 177.848(d)	To modify the special permit to authorize additional bulk and non-bulk containers for transporting class 8 liquids.
8554–M		Orica USA Inc., Watkins, CO	49 CFR 173.62; 173.240; 173.242; 173.93; 173.114a; 173.154; 176.83; 176.415; 177.848(d).	To modify the special permit to authorize the transportation in commerce of certain Division 1.5D explosives in the same vehicle with Division 5.1 oxidizers.
8723–M		Dyno Nobel, Inc., Salt Lake City, UT	49 CFR 172.101; 173.62; 173.242; 176.83; 177.848.	To modify the special permit to authorize the transportation in commerce of an additional Division 5.1 hazardous material.
8723–M		Austin Powder Company, Cleveland, OH.	49 CFR 172.101; 173.62; 173.242; 176.83; 177.848.	To modify the special permit to authorize the transportation in commerce of an additional Division 5.1 hazardous material.
11194–M		Carleton Technologies, Inc., Westminster, MD.	49 CFR 173.302(a); 173.304(a); 175.3.	To modify the special permit to authorize the transportation in commerce of additional Division 2.2 gases.

MODIFICATION SPECIAL PERMITS—Continued

Application number	Docket number	Applicant	Regulation(s) affected	Nature of special permit thereof
11579–M	.....	Senex Explosives, Inc., Cuddy, PA	49 CFR 177.848(e)(2); 177.848(g)(3).	To modify the special permit to authorize the transportation of additional Class 3 materials and the use of several DOT specification and non-DOT specification bulk packagings.
13169–M	RSPA–2002–13894.	Conocophillips, Alaska, Inc., Anchorage, AK.	49 CFR 172.101(9B)	To modify the special permit to allow the transportation in commerce of certain Class 9 materials in UN 31A intermediate bulk containers which exceed quantity limitations when shipped by air.
14393–M	PHMSA–2006–25797.	Hamilton, Sundstrand, Windsor Locks, CT.	49 CFR 173.306(e)(iii), (iv), (v) and (vi); 173.307(a)(4)(iv).	To modify the special permit to authorize the transportation in commerce of new supplemental cooling unit refrigeration machines with alternative safety devices as a component part of an aircraft.
14418–M	PHMSA–2006–26182.	Department of Defense, Ft. Eustis, VA.	49 CFR 172.301; 172.400; 172.504(a).	To modify the special permit to authorize the transportation in commerce of an additional Division 4.3 hazardous material.

[FR Doc. 07–4073 Filed 8–20–07; 8:45 am]
BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Application for Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before September 20, 2007.

ADDRESSES COMMENTS TO: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC or at *http://dms.dog.gov.*

This notice of receipt of applications for special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on August 14, 2007.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

NEW SPECIAL PERMITS

Application number	Docket number	Applicant	Regulation(s) affected	Nature of special permits thereof
14543–N	.....	LBM Techno Gas, Langenfeld	49 CFR 173.304(a)(2)	To authorize the transportation in commerce of DOT 39 Specification cylinders, containing a Division 2.2 gas, with a filling density which exceeds those presently authorized. (modes 1, 2, 3, 4)
14544–N	.....	DS Containers, Inc., Batavia, IL ...	49 CFR 173.306(a)(3)(v)	To authorize the transportation in commerce of Division 2.1 hazardous materials in certain non-refillable aerosol containers which are not subject to the hot water bath test. (modes 1, 2, 3)

NEW SPECIAL PERMITS—Continued

Application number	Docket number	Applicant	Regulation(s) affected	Nature of special permits thereof
14545–N		UCLA Film and Television Archive, Hollywood, CA.	49 CFR 173.183	To authorize the one-way transportation in commerce of cellulose nitrate motion picture film from two locations in Hollywood, CA to climate-controlled film vaults in Santa Clarita, CA in alternative packaging. (mode 1)
14546–N		BOC Gases, Murray Hill, NJ	49 CFR 180.209	To authorize a longer requalification period for DOT 3AL 6061 specification cylinders. (modes 1, 2, 3)
14547–N		Olin Corporation, Winchester Division, East Alton, IL.	49 CFR 173.62(b)	To authorize the one-way transportation in commerce of scrap/waste cartridges, small arms in a non-DOT specification bulk packaging. (mode 1)
14548–N		International Air Transport Association, Montreal.	49 CFR 175.10(15)	To authorize the transportation in commerce of wheelchairs or other battery-powered mobility aids equipped with a non-spillable battery when carried as checked baggage, provided the battery meets certain provisions in 49 CFR, the battery terminals are protected from short circuits, and the battery is securely attached to the wheelchair or mobility aid. (mode 5)
14549–N		Greif, Inc., Delaware, OH	49 CFR 180.350(b)	To authorize the manufacture and supply of rigid inner receptacles for use in repaired composite IBCs that is not manufactured by the applicant. (modes 1, 2, 3)
14550–N		Air Liquide Electronics Materials, F–71106, Chalon-sur-Saone, Cedix.	49 CFR 173.301, 173.304, and 173.304a.	To authorize the filling, for export only, of non-DOT specification pressure vessels containing a liquefied flammable gas, and the return of the pressure vessels to the U.S., for purposes of refilling for export only, when containing a residue of that hazardous material. (modes 1, 2, 3)
14554–N		PHI, Inc., Lafayette, LA	49 CFR 172.101, Column (9B)	To authorize the transportation in commerce of certain forbidden explosives by helicopter to various mountain sites in Antarctica as directed by the National Science Foundation of the US Government. (mode 4)
14556–N		Alcoa, Inc	49 CFR 173.240(c)	To authorize the transportation in commerce of certain PG III hazardous materials in non-DOT specification bulk flexible packaging meeting Industrial Packaging Type 1 (IP–1). (modes 1, 2, 3)
14560–N		ICL Performance Products L.P., St. Louis, MO.	49 CFR 179.103	To authorize the transportation in commerce of Division 4.2 hazardous materials in tank cars fitted with an alternative means of fittings protection. (mode 2)

[FR Doc. 07–4074 Filed 8–20–07; 8:45 am]
BILLING CODE 4909–60–M

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designation of Entities Pursuant to Executive Order 12978

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of 46 newly-designated individuals and entities whose property and interests in property are blocked pursuant to Executive Order 12978 of October 21, 1995, ''Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers.'' In addition, OFAC is publishing changes to the identifying information associated with three persons previously designated pursuant to Executive Order 12978.

DATES: The designation by the Director of the Office of Foreign Assets Control of the 46 individuals and entities identified in this notice pursuant to Executive Order 12978 is effective on August 15, 2007.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on demand service, tel.: (202) 622–0077.

On October 21, 1995, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 12978 (60 FR 54579, October 24, 1995) (the ''Order''). In the Order, the President declared a national emergency to deal with the threat posed by significant foreign narcotics traffickers centered in Colombia and the harm that they cause in the United States and abroad.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of Treasury, in consultation with the Attorney General and Secretary of State, to play a significant role in international narcotics trafficking centered in Colombia; or (3) to materially assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to this order; and (4) persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated pursuant to this Order.

On August 15, 2007, the Director of the Office of Foreign Assets Control, in consultation with the Attorney General and Secretary of State, as well as the Secretary of Homeland Security, designated 46 entities and individuals whose property and interests in property are blocked pursuant to the Order.

The list of additional designees is as follows:

1. ALFONSO BARRERA RIOS Y CIA. S. EN C.S., Calle 14 Oeste No. 2B1–45 apto. 302E, Cali, Colombia; NIT # 900101150–5 (Colombia) [SDNT].

2. ALVARO ENRIQUE BARRERA RIOS Y CIA. S. EN C.S., Calle 14 Oeste No. 2B1–45 apto. 302E, Cali, Colombia; NIT # 900105952–3 (Colombia) [SDNT].

3. AMADOR CEDIEL, Fernando, c/o APVA S.A., Cali, Colombia; c/o CECEP EDITORES S.A., Cali, Colombia; c/o CECEP S.A., Cali, Colombia; c/o NEGOCIOS Y CAPITALES S.A., Pereira, Colombia; c/o RFA CONSULTORES Y AUDITORES LTDA., Cali, Colombia; c/o WORLD LINE SYSTEM S.A., Palmira, Valle, Colombia; Avenida 9A No. 25N–30, Cali, Colombia; DOB 12 Oct 1962; POB Sogamoso, Boyaca, Colombia; Cedula No. 16683047 (Colombia); Passport AG830763 (Colombia) (individual) [SDNT].

4. APVA S.A., Calle 5A No. 22–13, Cali, Colombia; NIT # 805010421–0 (Colombia) [SDNT].

5. ARQUITECTOS UNIDOS LTDA., Calle 22N No. 5A–75, Cali, Colombia; NIT # 805022512–4 (Colombia) [SDNT].

6. ASESORIAS OCUPACIONALES LTDA., Carrera 66 No. 11–129, Cali, Colombia; NIT # 800040728–6 (Colombia) [SDNT].

7. BARRERA MARIN, Alvaro, c/o APVA S.A., Cali, Colombia; c/o BARRERA RIOS NEGOCIOS INMOBILIARIOS E.U., Cali, Colombia; c/o CECEP EDITORES S.A., Cali, Colombia; c/o CECEP S.A., Cali, Colombia; c/o CIDCA, Bogota, Colombia; c/o COMERCIALIZADORA DE BIENES Y SERVICIOS ADMINISTRATIVOS Y FINANCIEROS S.A., Cali, Colombia; c/o ENSAMBLADORA COLOMBIANA AUTOMOTRIZ S.A., Barranquilla, Colombia; c/o NEGOCIOS Y CAPITALES S.A., Pereira, Colombia; c/o WORLD LINE SYSTEM S.A., Palmira, Valle, Colombia; Calle 56D No. 28B–73, Barrio Las Mercedes, Palmira, Valle, Colombia; DOB 21 Nov 1940; POB Sevilla, Valle, Colombia; Cedula No. 6451857 (Colombia); Passport AG003135 (Colombia) (individual) [SDNT].

8. BARRERA RIOS NEGOCIOS INMOBILIARIOS E.U., Carrera 22 No. 5A–21, Cali, Colombia; NIT # 805030626–9 (Colombia) [SDNT].

9. BARRERA RIOS, Alfonso, c/o ALFONSO BARRERA RIOS Y CIA S. EN C.S., Cali, Colombia; c/o APVA S.A., Cali, Colombia; c/o BARRERA RIOS NEGOCIOS INMOBILIARIOS E.U., Cali, Colombia; c/o CECEP EDITORES S.A., Cali, Colombia; c/o CECEP S.A., Cali, Colombia; c/o ENSAMBLADORA COLOMBIANA AUTOMOTRIZ S.A., Barranquilla, Colombia; c/o NEGOCIOS Y CAPITALES S.A., Pereira, Colombia; c/o WORLD LINE SYSTEM S.A., Palmira, Valle, Colombia; Calle 14 Oeste No. 2B1–45 apto. 302E, Cali, Colombia; DOB 08 Dec 1975; POB Cali, Colombia; Cedula No. 79648943 (Colombia); Passport AJ963037 (Colombia) (individual) [SDNT].

10. BARRERA RIOS, Alvaro Enrique, c/o ALFONSO BARRERA RIOS Y CIA. S. EN C.S., Cali, Colombia; c/o ALVARO ENRIQUE BARRERA RIOS Y CIA S. EN C.S., Cali, Colombia; c/o APVA S.A., Cali, Colombia; c/o BARRERA RIOS NEGOCIOS INMOBILIARIOS E.U., Cali, Colombia; c/o CECEP EDITORES S.A., Cali, Colombia; c/o CECEP S.A., Cali, Colombia; c/o COMERCIALIZADORA DE BIENES Y SERVICIOS ADMINISTRATIVOS Y FINANCIEROS S.A., Cali, Colombia; c/o ENSAMBLADORA COLOMBIANA AUTOMOTRIZ S.A., Barranquilla, Colombia; c/o NEGOCIOS Y CAPITALES S.A., Pereira, Colombia; c/o WORLD LINE SYSTEM S.A., Palmira, Valle, Colombia; Carrera 54A No. 5A–21, Cali, Colombia; DOB 05 Dec 1968; POB Cali, Colombia; Cedula No. 16758185 (Colombia); Passport AJ149349 (Colombia) (individual) [SDNT].

11. BARRERA RIOS, Victoria Eugenia, c/o ALFONSO BARRERA RIOS Y CIA. S. EN C.S., Cali, Colombia; c/o APVA S.A., Cali, Colombia; c/o CECEP EDITORES S.A., Cali, Colombia; c/o CECEP S.A., Cali, Colombia; c/o

ENSAMBLADORA COLOMBIANA AUTOMOTRIZ S.A., Barranquilla, Colombia; c/o NEGOCIOS Y CAPITALES S.A., Pereira, Colombia; c/o WORLD LINE SYSTEM S.A., Palmira, Valle, Colombia; Transversal 18 No. 127–43 Torre 4 apto. 1201, Bogota, Colombia; DOB 11 Dec 1970; POB Cali, Colombia; Cedula No. 66818996 (Colombia); Passport AI939751 (Colombia) (individual) [SDNT].

12. BENOIT SANTAMARIA, Alvaro Jose, c/o BENOIT VELEZ AGROPECUARIA LA VEREDA Y CIA. S.C.S., Pereira, Colombia; Calle 24 No. 7–29 apto. 413, Pereira, Colombia; DOB 23 Oct 1964; POB Cali, Colombia; Cedula No. 16704710 (Colombia); Passport AH283771 (Colombia) (individual) [SDNT].

13. BENOIT VELEZ AGROPECUARIA LA VEREDA Y CIA. S.C.S., Carrera 4 No. 26–14, Pereira, Colombia; NIT # 816005088–0 (Colombia) [SDNT].

14. CAMPO LIBRE A LA DIVERSION E.U. (a.k.a. PARQUE YAKU; a.k.a. YAKU E.U.), Calle 15 No. 27–33, Yumbo, Valle, Colombia; NIT # 805026848–1 (Colombia) [SDNT].

15. CECEP EDITORES S.A., Calle 5A No. 22–13, Cali, Colombia; Carrera 22 No. 5A–21, Cali, Colombia; NIT # 805018858–1 (Colombia) [SDNT].

16. CECEP S.A. (f.k.a. CENTRO COLOMBIANO DE ESTUDIOS PROFESIONALES LTDA.), Avenida 6 No. 28–102, Cali, Colombia; Calle 9B No. 29A–67, Cali, Colombia; NIT # 890315495–4 (Colombia) [SDNT].

17. CIDCA (a.k.a. CENTRO INVESTIGACION DOCENCIA Y CONSULTORIA ADMINISTRATIVA), Calle 61 No. 11–09 Chapinero, Bogota, Colombia; Carrera 5 No. 23–16, Bogota, Colombia; NIT # 860404579–7 (Colombia) [SDNT].

18. COMERCIALIZADORA DE BIENES Y SERVICIOS ADMINISTRATIVOS Y FINANCIEROS S.A. (f.k.a. RENTAS Y ADMINISTRACIONES S.A.), Calle 6 No. 39–25 Local 206, Cali, Colombia; NIT # 800200471–6 (Colombia) [SDNT].

19. CONSULTORIAS FINANCIERAS S.A. (a.k.a. COFINANZAS), Carrera 3 No. 12–40 ofc. 1001, Cali, Colombia; NIT # 805017446–6 (Colombia) [SDNT].

20. CRIADERO SANTA GERTRUDIS S.A., Callejon Zapatoca Km. 1 Via Jamundi, Jamundi, Valle, Colombia; NIT # 805014721–3 (Colombia) [SDNT].

21. ENSAMBLADORA COLOMBIANA AUTOMOTRIZ S.A. (a.k.a. E.C.A. S.A.), Carrera 39 No. 43–75, Barranquilla, Colombia; NIT # 817000791–1 (Colombia) [SDNT].

22. ESPITIA ORTIZ, Mauricio Arturo (a.k.a. SPITIA, Mauricio), c/o ESVA S.C.S., Cali, Colombia; c/o M S CONSTRUCTORES LTDA., Cali, Colombia; c/o SPITIA VALENCIA LTDA., Cali, Colombia; c/o ARQUITECTOS UNIDOS LTDA., Cali, Colombia; Carrera 25 F No. 7–15 Oeste, Cali, Colombia; Carrera 42 No. 8–36, Cali, Colombia; Spain; DOB 29 Dec 1959; POB Barranquilla, Colombia; Cedula No. 16634827 (Colombia); Passport AJ424421 (Colombia) (individual) [SDNT].

23. ESVA S.C.S. (a.k.a. FLEXX GYM), Carrera 42 No. 8–36, Cali, Colombia; NIT # 805019977–4 (Colombia) [SDNT].

24. FAJARDO, Mary Victoria, c/o APVA S.A., Cali, Colombia; c/o CECEP EDITORES S.A., Cali, Colombia; c/o CECEP S.A., Cali, Colombia; c/o NEGOCIOS Y CAPITALES S.A., Pereira, Colombia; c/o WORLD LINE SYSTEM S.A., Palmira, Valle, Colombia; Cali, Colombia; Cedula No. 31923020 (Colombia) (individual) [SDNT].

25. FRANCO RUIZ, Nestor Raul, Carrera 142 No. 18A–80 Casa 23, Cali, Colombia; Avenida 5AN No. 51N–27, Cali, Colombia; DOB 21 Aug 1967; POB Cali, Colombia; Cedula No. 16744648 (Colombia); Passport AF828495 (Colombia) (individual) [SDNT].

26. FRANCO RUIZ, Ruben Alberto, c/o CAMPO LIBRE A LA DIVERSION E.U., Yumbo, Valle, Colombia; Avenida 5N No. 51–57, Cali, Colombia; Calle 34N No. 3CN–62, Cali, Colombia; DOB 18 Feb 1964; POB Cali, Colombia; Cedula No. 16702454 (Colombia); Passport AH070927 (Colombia) (individual) [SDNT].

27. GIRALDO VELASCO, Hector Fabio, c/o CRIADERO SANTA GERTRUDIS S.A., Jamundi, Valle, Colombia; DOB 17 Mar 1965; Cedula No. 16711573 (Colombia) (individual) [SDNT].

28. M S CONSTRUCTORES LTDA., Calle 22N No. 5AN–75, Cali, Colombia; NIT # 800206430–1 (Colombia) [SDNT].

29. NEGOCIOS Y CAPITALES S.A., Avenida 30 de Agosto No. 34–51, Pereira, Colombia; NIT # 800101701–0 (Colombia) [SDNT].

30. PARRA DUQUE, Guillermo, Carrera 3 Oeste No. 11–168, Cali, Colombia; DOB 30 Dec 1964; POB Cali, Colombia; Cedula No. 16824664 (Colombia); Passport AF776832 (Colombia) (individual) [SDNT].

31. QUINONES MELO Y CIA. LTDA., Carrera 3 No. 11–55 ofc. 206, Cali, Colombia; NIT # 890327616–0 (Colombia) [SDNT].

32. QUINONES, Benedicto (a.k.a. QUINONEZ, Benedicto), c/o QUINONES MELO Y CIA. LTDA., Cali, Colombia; DOB 25 Jun 1946; POB Cali, Colombia; Cedula No. 14934266 (Colombia); Passport 14934266 (Colombia) (individual) [SDNT].

33. RAMIREZ GARCIA, Hernan Felipe, c/o CONSULTORIAS FINANCIERAS S.A., Cali, Colombia; Calle 7 No. 51–37, Cali, Colombia; DOB 09 Jun 1969; POB Cali, Colombia; Cedula No. 16772586 (Colombia); Passport AI848476 (Colombia) (individual) [SDNT].

34. RAMIREZ LENIS, Jhon Jairo, Carrera 4C No. 34–27, Cali, Colombia; DOB 19 Jul 1966; Cedula No. 79395056 (Colombia) (individual) [SDNT].

35. RAMIREZ RIVERA, Gustavo, c/o UNIDAD CARDIOVASCULAR LTDA., Cali, Colombia; Avenida 4 Oeste No. 6–103, Cali, Colombia; Calle 25 N No. 5BN–16, Cali, Colombia; DOB 05 Apr 1968; POB Medellin, Colombia; Cedula No. 16281514 (Colombia); Passport AJ077853 (Colombia) (individual) [SDNT].

36. RAMIREZ RIVERA, Sergio Alberto, Cali, Colombia; DOB 14 Jan 1964; POB Cali, Colombia; Cedula No. 16694220 (Colombia); Passport AF771317 (Colombia) (individual) [SDNT].

37. RENGIFO VALVERDE, Fabian Francisco, c/o APVA S.A., Cali, Colombia; c/o CECEP S.A., Cali, Colombia; c/o CECEP EDITORES S.A., Cali, Colombia; c/o NEGOCIOS Y CAPITALES S.A., Pereira, Colombia; c/o RFA CONSULTORES Y AUDITORES LTDA., Cali, Colombia; c/o WORLD LINE SYSTEM S.A., Palmira, Valle, Colombia; Cali, Colombia; DOB 18 Oct 1963; Cedula No. 16690994 (Colombia) (individual) [SDNT].

38. RFA CONSULTORES Y AUDITORES LTDA., Avenida 6 Norte No. 23N–85, Cali, Colombia; NIT # 805025427–1 (Colombia) [SDNT].

39. ROSERO ANGULO, German, Mexico; Calle 40 No. 27–59, Cali, Colombia; DOB 07 Oct 1964; POB Ipiales, Narino, Colombia; Cedula No. 16708846 (Colombia); Passport AF832289 (Colombia) (individual) [SDNT].

40. SPITIA VALENCIA LTDA., Calle 9 No. 44–59, Cali, Colombia; NIT # 805006598–1 (Colombia) [SDNT].

41. UNIDAD CARDIOVASCULAR LTDA. (a.k.a. UNICA LTDA.), Calle 25 No. 5BN–08, Cali, Colombia; NIT # 800232679–8 (Colombia) [SDNT].

42. VALERO JIMENEZ, Alejandro, c/o UNIDAD CARDIOVASCULAR LTDA., Cali, Colombia; Transversal 18 No. 102–42 apto. 401, Bogota, Colombia; 826 SW Canary Terrace, Port St. Lucie, FL 34953; DOB 25 Oct 1967; POB Cali, Colombia; Cedula No. 16746340 (Colombia); Passport P059298 (Colombia) (individual) [SDNT].

43. VALERO JIMENEZ, Luis Hernan, Avenida 4N No. 19N–34, Cali, Colombia; Spain; DOB 22 Sep 1965; Cedula No. 16723237 (Colombia); Passport 16723237 (Colombia) (individual) [SDNT].

44. VALERO SANCHEZ, Francisco Javier, c/o ASESORIAS OCUPACIONALES LTDA., Cali, Colombia; c/o UNIDAD CARDIOVASCULAR LTDA., Cali, Colombia; Cedula No. 2436976 (Colombia) (individual) [SDNT].

45. VILLA VINASCO, Armando Alonso, Calle Angel Larra, 4, Madrid 28027, Spain; Miranda, Cauca, Colombia; DOB 24 Oct 1960; Cedula No. 16645357 (Colombia) (individual) [SDNT].

46. WORLD LINE SYSTEM S.A., Calle 46 No. 45A–38, Palmira, Valle, Colombia; Avenida 6 Norte No. 23N–85, Cali, Colombia; NIT # 815003764–9 (Colombia) [SDNT].

Dated: August 15, 2007.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E7–16374 Filed 8–20–07; 8:45 am]

BILLING CODE 4811–42–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2004–46; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice and request for comments.

SUMMARY: This document contains corrections to a notice and request for comments (Revenue Procedure 2004–46) that was published in the **Federal Register** on Tuesday, August 7, 2007 (72 FR 44227) inviting the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections.

FOR FURTHER INFORMATION CONTACT: Allan Hopkins at (202) 622–6665 (not a toll-free number), or through the internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The notice and request for comments that is the subject of the correction is required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

Need for Correction

As published, the comment request for Revenue Procedure 2004–46 contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the comment request for Revenue Procedure 2004–46, which was the subject of FR Doc. E7–15268, is corrected as follows:

1. On page 44227, column 1, in the preamble, under the caption ''Summary:'', second line from bottom of the paragraph, the language ''Revenue Procedure 2004–45, Relief'' is corrected to read ''Revenue Procedure 2004–46, Relief''.

2. On page 44227, column 1, in the preamble, under the caption ''Supplementary Information:'', fourth line, the language ''Procedure 2004–45.'' is corrected to read ''Procedure 2004–46.''.

3. On page 44227, column 1, in the preamble, under the caption ''Supplementary Information:'', fifth line, the language ''*Abstract:* Revenue Procedure 2004–45'' is corrected to read ''*Abstract:* Revenue Procedure 2004–46''.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E7–16372 Filed 8–20–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Earned Income Tax Credit Issue Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Earned Income Tax Credit Issue Committee will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Monday, September 24, 2007.

FOR FURTHER INFORMATION CONTACT: Audrey Y. Jenkins at 1–888–912–1227 (toll-free), or 718–488–2085 (non toll-free).

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Earned Income Tax Credit Issue Committee will be held Monday, September 24, 2007 from 10:30 a.m. to 11:30 a.m. via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. Notification of intent to attend the meeting must be made with Audrey Y. Jenkins. For information or to confirm attendance, Ms. Jenkins may be reached at 1–888–912–1227 or (718) 488–2085. Written comments may be sent to Ms. Jenkins, TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201 or post comments to the Web site: *www.improveirs.org.*

The agenda will include various IRS issues.

Dated: August 15, 2007.

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E7–16360 Filed 8–20–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 1 Committee of the Taxpayer Advocacy Panel (Including the States of New York, Connecticut, Massachusetts, Rhode Island, New Hampshire, Vermont and Maine)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 1 Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, September 18, 2007.

FOR FURTHER INFORMATION CONTACT: Audrey Y. Jenkins at 1–888–912–1227 (toll-free), or 718–488–2085 (non toll-free).

SUPPLEMENTARY INFORMATION: An open meeting of the Area 1 Committee of the Taxpayer Advocacy Panel will be held Tuesday, September 18, 2007 from 9 a.m. to 10 a.m. ET via a telephone conference call. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 718–488–2085, or write

Audrey Y. Jenkins, TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Audrey Y. Jenkins. Ms. Jenkins can be reached at the above telephone numbers or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: August 15, 2007.

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E7–16363 Filed 8–20–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Ad Hoc Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Ad Hoc Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, September 13, 2007 at 2 p.m. ET.

FOR FURTHER INFORMATION CONTACT: Inez De Jesus at 1–888–912–1227, or 954–423–7977.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Ad Hoc Committee of the Taxpayer Advocacy Panel will be held Thursday, September 13, 2007 at 2 p.m. ET via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7977, or write Inez De Jesus, TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Inez De Jesus. Ms. De Jesus can be reached at 1–888–912–1227 or 954–423–7977, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include: Various IRS issues.

Dated: August 14, 2007.

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E7–16364 Filed 8–20–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed Agency Information Collection Activities; Comment Request—Community Reinvestment Act

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before October 22, 2007.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 170 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Celeste Anderson, Senior Project Manager, Compliance and Consumer Protection, (202) 906–7990, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Community Reinvestment Act.

OMB Number: 1550–0012.

Form Number: N/A.

Regulation Requirement: 12 CFR 563e.

Description: This submission covers an extension of OTS's currently approved information collection in 12 CFR part 563e. The submission involves no change to the regulations or to the information collection.

OTS needs the information collected to fulfill its obligations under the Community Reinvestment Act (CRA) (12 U.S.C. 2901 *et seq.*) to evaluate and assign ratings to the performance of institutions, in connection with helping to meet the credit needs of their communities, including low- and moderate-income neighborhoods, consistent with safe and sound banking practices. OTS uses the information in the examination process and in evaluating applications for mergers, branches, and certain other corporate activities. Financial institutions maintain and provide the information to OTS.

Type of Review: Revisions to a currently approved collection.

Affected Public: Businesses or other for-profit; individuals.

Estimated Number of Respondents: 838.

Estimated Number of Responses: 838.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 76,463 hours.

Clearance Officer: Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: August 15, 2007.

Deborah Dakin,

Senior Deputy Chief Counsel, Regulations and Legislation Division.

[FR Doc. 07–4097 Filed 8–20–07; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on OIF/OEF Veterans and Families; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on OIF/OEF Veterans and Families will meet on September 11–13, 2007, at the Department of Veterans Affairs' Medical Center in Minneapolis, Minnesota. The meeting will be held in the auditorium of that facility and will be open to the public.

On September 11, the session will begin at 9:30 a.m. and end at 12 noon. On September 12, the session will begin at 9 a.m. and end at 2 p.m. On September 13, the session will begin at 9 a.m. and end at 3:30 p.m.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the full spectrum of health care, benefits delivery and related family support issues that confront servicemembers during their transition from active duty to veteran status and during their post-service years. The Committee will focus on the concerns of all men and women with active military service in Operation Iraqi Freedom and/or Operation Enduring Freedom, but will pay particular attention to severely disabled veterans and their families.

The agenda for the September 11–13 meeting will include briefings by each of the two subcommittees on recent site visits, an update on recent legislation affecting veterans and veterans' benefits, and an update on recommendations from the President's Task Force on Returning Global War on Terror Heroes. The Committee will also discuss its findings and recommendations, its general workplan, next steps and future meeting dates.

The meeting will include time reserved for public comments. Individuals wishing to make oral statements must pre-register not later than September 4, 2007 by contacting Tiffany Glover by e-mail at *tiffany.glover@va.gov*, and by submitting a 1–2 page summary of their statements for inclusion in the official record of the meeting. Oral statements by the public will be limited to five minutes each and will be received at 11:30 a.m.–12 p.m. on September 11, and at 3 p.m.–3:30 p.m. on September 13. The public may also submit written statements for the Committee's review to the Advisory Committee on OIF/OEF Veterans and Families (008), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

Anyone seeking additional information should contact Ronald Thomas, Esq., Designated Federal Officer, at (202) 273–5182.

By Direction of the Secretary.

Dated: August 14, 2007.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. 07–4080 Filed 8–20–07; 8:45 am]

BILLING CODE 8320–01–M

Federal Register

Tuesday,
August 21, 2007

Part II

Department of Commerce

Patent and Trademark Office

37 CFR Part 1

Changes To Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications; Final Rule

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket Nos.: PTO–P–2005–0022; PTO–P–2005–0023]

RINs 0651–AB93; 0651–AB94

Changes To Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (Office) is revising the rules of practice in patent cases relating to continuing applications and requests for continued examination practices, and for the examination of claims in patent applications. The Office is revising the rules of practice to require that any third or subsequent continuing application that is a continuation application or a continuation-in-part application, and any second or subsequent request for continued examination in an application family, be filed to obtain consideration of an amendment, argument, or evidence, and be supported by a showing as to why the amendment, argument, or evidence sought to be entered could not have been previously submitted. The Office is also revising the rules of practice to provide that an applicant must provide an examination support document that covers all of the claims in an application if the application contains more than five independent claims or more than twenty-five total claims. The Office is also revising the rules of practice with respect to multiple applications that have the same claimed filing or priority date, substantial overlapping disclosure, a common inventor, and common ownership. These changes will allow the Office to conduct a better and more thorough and reliable examination of patent applications.

DATES: *Effective Date:* November 1, 2007. For applicability and compliance dates see **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: The Office of Patent Legal Administration, by telephone at (571) 272–7704, by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, or by facsimile to (571) 273–0100, marked to the attention of the Office of Patent Legal Administration.

SUPPLEMENTARY INFORMATION: The Office is revising the rules of practice in patent cases relating to continued examination filings (continuing applications and requests for continued examination), multiple applications containing patentably indistinct claims, and the examination of claims in applications.

The Office is revising the rules of practice for continuation applications, continuation-in-part applications and requests for continued examination. Under these revisions, an applicant may file two continuation applications (or continuation-in-part applications), plus a request for continued examination in the application family, without any justification. An application family includes the initial application and its continuation or continuation-in-part applications. Applicant may file any additional continuation application, continuation-in-part application, or request for continued examination with a justification. Specifically, the Office is revising the rules of practice to require a justification for any third or subsequent continuing application that is a continuation application or a continuation-in-part application, and any second or subsequent request for continued examination in an application family. The third or subsequent continuing application or request for continued examination must be filed with a petition showing why the amendment, argument, or evidence sought to be entered could not have been previously submitted.

The Office is also revising the rules of practice for divisional applications. Under these revisions, an applicant is permitted to file a divisional application of an application for the claims to a non-elected invention that has not been examined if the application was subject to a requirement for restriction. The divisional application need not be filed during the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. Thus, applicant may file the divisional application during the pendency of the application that was subject to a requirement for restriction or the pendency of any continuing application of such an application. Applicant may also file two continuation applications of the divisional application plus a request for continued examination in the divisional application family, without any justification. A divisional application family includes the divisional application and its continuation applications. In addition, applicant may file any additional continuation application or request for continued examination in the divisional application family with a petition and adequate justification.

The Office is also revising the rules of practice for the examination of claims in an application to provide that if the number of independent claims is greater than five or the number of total claims is greater than twenty-five, the Office will require the applicant to help focus examination by providing additional information to the Office in an examination support document covering all of the claims (whether in independent or dependent form) in the application.

The Office is also revising the rules of practice with respect to multiple applications that have patentably indistinct claims and a common assignee by either requiring that all patentably indistinct claims in such applications be submitted in a single application or effectively treating the multiple applications as a single application.

These changes will mean more effective and efficient examination for the typical applicant without any additional work on the part of most applicants. However, in the applications that place an extensive burden on the Office, the applicant will be required to help focus examination by providing additional information to the Office.

Applicability Dates: The changes to 37 CFR 1.75, 1.142(c), and 1.265 are applicable to any nonprovisional application filed under 35 U.S.C. 111(a) on or after November 1, 2007, and to any nonprovisional application entering the national stage after compliance with 35 U.S.C. 371 on or after November 1, 2007. The changes to 37 CFR 1.75, 1.142(c), and 1.265 are also applicable to any nonprovisional application filed before November 1, 2007, in which a first Office action on the merits was not mailed before November 1, 2007.

The changes to 37 CFR 1.117 are applicable to any nonprovisional application filed before, on, or after November 1, 2007, with respect to any fee under 37 CFR 1.16(h), (i), or (j) or 1.492(d), (e), or (f) paid on or after December 8, 2004.

The changes to 37 CFR 1.78(a), 1.78(d)(1), 1.495 and 1.704(c)(11) are applicable only to any application, including any continuing application, filed under 35 U.S.C. 111(a) on or after November 1, 2007, or any application entering the national stage after compliance with 35 U.S.C. 371 on or after November 1, 2007. Except as otherwise indicated in this final rule, any application filed under 35 U.S.C. 111(a) on or after November 1, 2007, or any application entering the national stage after compliance with 35 U.S.C.

371 on or after November 1, 2007, seeking to claim the benefit under 35 U.S.C. 120, 121, or 365(c) and 37 CFR 1.78 of a prior-filed nonprovisional application or international application must either: (1) Meet the requirements specified in one of 37 CFR 1.78(d)(1)(i) through (d)(1)(v); or (2) include a grantable petition under 37 CFR 1.78(d)(1)(vi).

With respect to applications that claim the benefit under 35 U.S.C. 120, 121, or 365(c) only of nonprovisional applications or international applications filed before August 21, 2007: an application is not required to meet the requirements set forth in 37 CFR 1.78(d)(1) if: (1) The application claims the benefit under 35 U.S.C. 120, 121, or 365(c) only of nonprovisional applications filed before August 21, 2007 or applications entering the national stage after compliance with 35 U.S.C. 371 before August 21, 2007; and (2) there is no other application filed on or after August 21, 2007 that also claims the benefit under 35 U.S.C. 120, 121, or 365(c) of such prior-filed nonprovisional applications or international applications.

The changes to 37 CFR 1.114 are applicable to any application in which a request for continued examination is filed on or after November 1, 2007. Specifically, a petition under 37 CFR 1.114(g) must accompany any request for continued examination filed on or after November 1, 2007, in an application in which a request for continued examination has previously been filed, or in a continuation application or continuation-in-part application of an application in which a request for continued examination has previously been filed, or in an application whose benefit is claimed in a continuation application or continuation-in-part application in which a request for continued examination has previously been filed.

The changes to 37 CFR 1.17, 1.26, 1.52, 1.53, 1.76, 1.78 (except 1.78(a) and 1.78(d)(1)), 1.104, 1.105, 1.110, 1.136, 1.142(a), and 1.145 are applicable to any nonprovisional application pending on or after November 1, 2007.

Compliance Date: For applications filed before November 1, 2007, applicants must comply with the requirements in 37 CFR 1.78(f)(1) within the time periods specified in 37 CFR 1.78(f)(1)(ii), or by February 1, 2008, whichever is later, and applicants must comply with the requirements in 37 CFR 1.78(f)(2) within the time periods specified in 37 CFR 1.78(f)(2)(iii), or by February 1, 2008, whichever is later.

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I. Background

In view of the need for a better focused and effective examination process to reduce the large and growing backlog of unexamined applications while maintaining or improving the quality of issued patents, the Office published two notices in January of 2006 proposing changes to the practice for continuing applications, requests for continued examination, multiple applications containing patentably indistinct claims, and the examination of claims in applications. *See Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims,* 71 FR 48 (Jan. 3, 2006), 1302 *Off. Gaz. Pat. Office* 1318 (Jan. 24, 2006) (proposed rule) (hereinafter ''Continuing Applications Proposed Rule'') and *Changes to Practice for the Examination of Claims in Patent Applications,* 71 FR 61 (Jan. 3, 2006), 1302 *Off. Gaz. Pat. Office* 1329 (Jan. 24, 2006) (proposed rule) (hereinafter ''Claims Proposed Rule'').

Both the Continuing Applications Proposed Rule and the Claims Proposed Rule requested public comments and provided a comment period of four months to give the public an opportunity to submit written comments. The Office provided this extended comment period to ensure that the public would have sufficient time to submit written comments on the proposed changes to the rules of practice and to ensure that the Office would receive comments from all interested persons and organizations. In addition to the notices and requests for written comments, the Office conducted public meetings including town hall meetings and presentations at various locations in the United States to discuss the proposed changes and obtain feedback from the public. The Office received over five hundred written comments from government agencies, universities, intellectual property organizations, industry, law firms, individual patent practitioners, and the general public. The Office has spent nearly one year carefully analyzing and considering all of the written comments that were received. The comments and the Office's responses to the comments are provided in Section III, Response to Comments. In response to the comments, the Office has made appropriate modifications to the proposed changes to balance the interests of the public, patent owners, applicants, practitioners, and other interested parties with the need to reduce the large and growing backlog of unexamined patent applications, improve the quality of issued patents, and make the patent examination process more effective.

Under the proposed changes, applicants would have been permitted to file one of the following without any

justification: A continuation application, a continuation-in-part application, or a request for continued examination. By contrast, this final rule permits applicants to file two continuation applications or continuation-in-part applications, plus a single request for continued examination in an application family, without any justification. Applicant may file any additional continuing application or request for continued examination with a justification. Under the proposed changes, about eleven percent of the applications and requests for continued examination filed in fiscal year 2006 would have required a justification, where under the changes being adopted in this final rule less than three percent of the applications and requests for continued examination filed in fiscal year 2006 would have required a justification.

The proposed changes would have permitted applicants to file a divisional application of an application for the claims to a non-elected invention if the application is subject to a requirement for restriction and the divisional application is filed during the pendency of that application. However, this final rule permits applicant to file a divisional application of an application if the application is subject to a requirement for restriction and the divisional application meets the copendency requirement of 35 U.S.C. 120. Thus, this final rule allows applicants to file divisional applications in series whereas the proposed rule would have required applicants to file divisional applications in parallel. This final rule also permits applicant to file two continuation applications of a divisional application, plus a request for continued examination in the divisional application family, without any justification. Under the proposed changes, about thirteen percent of divisional applications filed in fiscal year 2006 would need to have been filed earlier, where the changes being adopted in this final rule would not have required any of the divisional applications filed in fiscal year 2006 to have been filed earlier.

The proposed changes would have required applicant to provide an examination support document before the first Office action on the merits if applicant designated more than ten representative claims including all of the independent claims in the application for initial examination. The Office received a substantial number of comments from the public opposing this ''representative claims'' examination approach and suggesting that the Office should simply adopt a threshold to invoking the examination support document requirement based upon whether an application contains more than a given number of independent and total claims. The Office took those comments into consideration and adopted a similar approach. This final rule requires an applicant to submit an examination support document before the issuance of a first Office action on the merits of an application to assist in the patentability determination when the applicant presents more than five independent claims or more than twenty-five total claims in an application. This final rule also encourages applicant to submit all of the claims that are patentably indistinct in one single application and requires applicant to identify multiple applications that contain patentably indistinct claims (same as the proposed rule). Therefore, for each invention, an applicant is permitted to present up to fifteen independent claims and seventy-five total claims via an initial application and two continuation or continuation-in-part applications without providing either an examination support document or justification, as long as those applications are either prosecuted serially or contain patentably distinct claims. An examination support document must include a preexamination search statement, a listing of references deemed most closely related to the subject matter of each of the claims, an identification of all of the claim limitations that are disclosed in the references, a detailed explanation particularly pointing out how each of the independent claims is patentable over the cited references, and a showing of where each claim limitation finds support under 35 U.S.C. 112, ¶ 1, in the application and any prior-filed application. The examination support document will assist the Office in the examination process and the determination of patentability of the invention by providing the most relevant prior art and other useful information.

Under the proposed changes, about one percent of the applications filed in fiscal year 2006 would have required either the cancellation of one or more independent claims or an examination support document. Furthermore, about eighty percent of the applications filed in fiscal year 2006 would have required either a designation of dependent claims for initial examination or an examination support document. Under the changes being adopted in this final rule, less than eight percent of the applications filed in fiscal year 2006 would have required either the cancellation of one or more independent claims or an examination support document. In addition, less than twenty-five percent of the applications filed in fiscal year 2006 would have required either the cancellation of one or more dependent claims or an examination support document. However, by prosecuting an initial application and two continuation applications serially, about ninety-five percent of the applications filed in fiscal year 2006 would not have required either the cancellation of any claims or an examination support document.

A. Changes to Practice for Continued Examination Filings

The volume of continued examination filings (including both continuing applications and requests for continued examination) and duplicative applications that contain ''conflicting'' or patentably indistinct claims, is having a crippling effect on the Office's ability to examine ''new'' (*i.e.*, non-continuing) applications. Continued examination filings, other than divisional applications, as a percentage of overall filings, has increased from about 11.4 percent in fiscal year 1980, to about 18.9 percent in fiscal year 1990, to 21.9 percent in fiscal year 2000, to 29.4 percent in fiscal year 2006. The cumulative effect of these continued examination filings is too often to divert patent examining resources from the examination of new applications disclosing new technology and innovations, to the examination of applications that are a repetition of prior applications that have already been examined and have either issued as patents or become abandoned. In addition, when the continued examination process fails to reach a final resolution, and when multiple applications containing claims to patentably indistinct inventions are filed, the public is left with an uncertainty as to what the set of patents resulting from the initial application will cover. Thus, these practices impose a burden on innovation both by retarding the Office's ability to examine new applications and by undermining the function of claims to notify the public as to what technology is or is not available for use.

Commentators have noted that an applicant's use of the unrestricted continuing application and request for continued examination practices may preclude the Office from ever finally rejecting an application or even from ever finally allowing an application. *See* Mark A. Lemley and Kimberly A. Moore, *Ending Abuse of Patent*

Continuations, 84 B.U. L. Rev. 63, 64 (2004). The burden imposed by the repetitive filing of applications (as continuing applications) on the Office (as well as on the public) is not a recent predicament. *See To Promote the Progress of Useful Arts, Report of the President's Commission on the Patent System,* at 17–18 (1966) (recommending changes to prevent the repetitive filing of dependent (*i.e.*, continuing) applications). Unrestricted continued examination filings and multiple applications containing patentably indistinct claims, however, are now having such an impact on the Office's ability to examine new applications that it is appropriate for the Office to clarify the applicant's duty to advance applications to final action by placing some conditions on the filing of multiple continuing applications, requests for continued examination, and other multiple applications to the same invention. *See* 35 U.S.C. 2(b) (authorizes the Office to establish regulations, not inconsistent with law, which shall govern the conduct of proceedings in the Office, and shall facilitate and expedite the processing of patent applications). The changes in this final rule will permit the Office to apply the patent examining resources otherwise consumed by these applications to the examination of new applications and thereby reduce the backlog of unexamined applications.

The Office also notes that not every application as filed particularly points out and distinctly claims what the applicant regards as his or her invention. For example, this may occur where the applicant's attorney or agent has not adequately reviewed or revised the application documents received from the applicant. Applicants frequently file literal translations of foreign documents as applications, resulting in problems with compliance with U.S. patent law, such as the written description requirement, as well as problems with formatting and presentation of the claims. In these situations, examination of what applicants actually regard as their invention may not begin until after one or more continued examination filings. Applicants should not rely on an unlimited number of continued examination filings to correct deficiencies in the claims and disclosure that applicant or applicant's representative could have corrected earlier. In addition, while only a small minority of applications are a third or subsequent continuing application, it appears that some applicants and practitioners have used multiple continued examination filings as a strategy to delay the conclusion of examination. The Office, however, considers such a strategy to be a misuse of continued examination practice. Specifically, the Office considers such a strategy to be inconsistent with an applicant's and practitioner's duty under 37 CFR 10.18(b)(2)(i) not to submit an application or other filing to cause unnecessary delay or needless increase in the cost of prosecution before the Office. This misuse of continued examination practice also prejudices the public by keeping applications in pending status while awaiting developments in similar or parallel technology and then later amending their applications to cover these developments. The courts have permitted the addition of claims, when supported under 35 U.S.C. 112, ¶ 1, to encompass products or processes later discovered in the marketplace. *See PIN/NIP, Inc.* v. *Platt Chemical Co.,* 304 F.3d 1235, 1247, 64 U.S.P.Q.2d 1344, 1352 (Fed. Cir. 2002). However, the practice of maintaining continuing applications to delay the conclusion of examination for the purpose of adding claims after such discoveries is inconsistent with the duty under 37 CFR 10.18(b)(2)(i) not to submit filings to cause unnecessary delay or needless increase in the cost of prosecution before the Office.

The Office, in light of its backlog and anticipated continued increase in application filings, is making every effort to become more efficient. Achieving greater efficiency requires the cooperation of those who provide the input into the examination process, the applicants and their representatives.

In the Continuing Applications Proposed Rule, the Office proposed to change the rules of practice to require that: (1) Any second or subsequent continued examination filing (continuation or continuation-in-part application or request for continued examination) include a showing that the amendment, argument, or evidence could not have been submitted prior to the close of prosecution after a single continuation or continuation-in-part application or request for continued examination; and (2) multiple applications that have the same claimed filing or priority date, substantial overlapping disclosure, a common inventor, and a common assignee include either an explanation of how the claims are patentably distinct, or a terminal disclaimer and explanation of why patentably indistinct claims have been filed in multiple applications.

In response to the comments on the proposed changes to the practices for continued examination filings, the Office has modified these provisions relative to proposed changes. Under this final rules, an applicant may instead file two continuation applications (or two continuation-in-part applications, or one continuation application and one continuation-in-part application), plus a request for continued examination in any one of the initial application or two continuation or continuation-in-part applications, without any justification. Any additional continuation application, continuation-in-part application, or request for continued examination, however, must be filed to obtain consideration of an amendment, argument, or evidence, and be supported by a showing as to why the amendment, argument, or evidence sought to be entered could not have been previously submitted. This final rule would also ease the burden of examining multiple applications that have the same claimed filing or priority date, substantial overlapping disclosure, a common inventor, and common assignee by requiring that all patentably indistinct claims in such applications be submitted in a single application absent good and sufficient reason.

As discussed previously, the unrestricted continued examination practice and the filing of multiple applications containing patentably indistinct claims are impairing the Office's ability to examine new applications without real certainty that these practices effectively advance prosecution, improve patent quality, or serve the typical applicant or the public. These changes to the rules in title 37 of the CFR are intended to ensure that continued examination filings are used efficiently to move applications forward. The Office expects that the changes to the rules of practice in this final rule will: (1) Lead to more focused and efficient examination, improve the quality of issued patents, result in patents that issue faster, and give the public earlier notice of what the patent claims cover; and (2) address the growing practice of filing (by a common applicant or assignee) multiple applications containing patentably indistinct claims.

35 U.S.C. 111(a) and 120, respectively, permit an applicant to file a nonprovisional application and to claim the benefit of a prior-filed nonprovisional application. Similarly, 35 U.S.C. 363 and 365(c), respectively, permit an applicant to file an international application under Patent Cooperation Treaty (PCT) Article 11 and 35 U.S.C. 363 and, if the international application designates the United States of America, to claim the benefit of a prior-filed international application

designating the United States of America or a prior-filed nonprovisional application. Similarly again, 35 U.S.C. 111(a) and 365(c) permit an applicant to file a nonprovisional application (filed under 35 U.S.C. 111(a)) and to claim the benefit of a prior-filed international application designating the United States of America (under 35 U.S.C. 365(c)).

35 U.S.C. 120 is generally considered the statutory basis for continuing application practice. *See Symbol Techs., Inc.* v. *Lemelson Med.,* 277 F.3d 1361, 1365, 161 U.S.P.Q.2d 1515, 1518 (Fed. Cir. 2002) (35 U.S.C. 120 and 121 form the backbone of modern continuation and divisional application practice) (*Symbol I*). Nothing in 35 U.S.C. 120 or its legislative history suggests that the Office must or even should permit an applicant to file an unlimited number of continuing applications without any justification.

The practice of filing ''continuation applications'' arose early in Office practice mainly as a procedural device to effectively permit the applicant to amend an application after a rejection and receive an examination of the ''amended'' (or new) application. *See In re Bogese,* 22 U.S.P.Q.2d 1821, 1824 (Comm'r Pats. 1991) (*Bogese I*). The concept of a continuation application per se was first recognized in *Godfrey* v. *Eames,* 68 U.S. (1 Wall.) 317, 325–26 (1864). *See Bogese I,* 22 U.S.P.Q.2d at 1824. 35 U.S.C. 120 is a codification of the continuation application practice recognized in *Godfrey* v. *Eames*. *See id.* (citing *In re Hogan,* 559 F.2d 595, 603, 194 U.S.P.Q. 527, 535 (C.C.P.A. 1977)).

An applicant should understand, however, that he or she does not have an unfettered right to file multiple continuing applications without making a good faith attempt to claim the applicant's invention. 35 U.S.C. 2(b) gives the Director the inherent authority to promulgate regulations to ensure that applicants prosecute applications in good faith. Moreover, by assuming that an unlimited number of continuations are available, applicants have slipped into unfocused practices in prosecution that impede the Office's ability to conduct effective examination. Such practices likewise cause delays in prosecution and increase the cost of examination, both of which are contrary to an applicant's duties under the rules of conduct before the Office set forth in 37 CFR Part 10.

The changes in this final rule do not set a *per se* limit on the number of continuing applications. Nor are the changes intended to address extreme cases of prosecution laches or to codify *In re Bogese,* 303 F.3d 1362, 1369, 64 U.S.P.Q.2d 1448, 1453 (Fed. Cir. 2002) (*Bogese II*). Rather, the rules require that applicants who file multiple continuing applications from the same initial application show that the third and following applications, and any second or subsequent request for continued examination in an application family, be filed to obtain consideration of an amendment, argument, or evidence that could not have been previously submitted.

Likewise, the Office is putting conditions on request for continued examination practice. 35 U.S.C. 132(b) provides for the request for continued examination practice set forth in § 1.114. Unlike continuation application practice, the request for continued examination practice was recently added to title 35, United States Code, in section 4403 of the American Inventors Protection Act of 1999 (AIPA). *See* Public Law 106–113, 113 Stat. 1501, 1501A–560 (1999). 35 U.S.C. 132(b) provides, *inter alia,* that the Office ''shall prescribe regulations to provide for the continued examination of applications for patent at the request of the applicant.'' Nothing in 35 U.S.C. 132(b) or its legislative history suggests that the Office must or even should permit an applicant to file an unlimited number of requests for continued examination in an application. Therefore, this final rule allows applicants to file their first request for continued examination in an application family without any justification, but requires applicants to justify the need for any further requests for continued examination in light of the past prosecution.

The Office appreciates that appropriate continued examination practice permits an applicant to obtain further examination and advance an application to final action. The unrestricted continued examination practice, however, does not provide adequate incentives to assure that the exchanges between an applicant and the examiner during the examination process are efficient. The marginal value vis-à-vis the patent examination process as a whole of exchanges between an applicant and the examiner during the examination process tends to decrease after each additional continued examination filing. The Office resources absorbed by the examination of additional continued examination filings are diverted away from the examination of new applications, thus increasing the backlog of unexamined applications.

The Office also appreciates that applicants sometimes use continued examination practice to obtain further examination rather than file an appeal to avoid the delays that historically have been associated with the appeal process. The Office, however, has taken major steps to eliminate such delays. First, the Board of Patent Appeals and Interferences (BPAI) has radically reduced the inventory of pending appeals and appeal pendency during the last five fiscal years. Second, the Office has adopted an appeal conference program to review the rejections in applications in which an appeal brief has been filed. *See Manual of Patent Examining Procedure* (MPEP) § 1207.01 (8th ed. 2001) (Rev. 5, August 2006). Third, the Office has also adopted a pre-appeal brief conference program to permit an applicant to request that a panel of examiners review the rejections in his or her application prior to the filing of an appeal brief. *See New Pre-Appeal Brief Conference Program,* 1296 *Off. Gaz. Pat. Office* 67 (July 12, 2005), and *Extension of the Pilot Pre-Appeal Brief Conference Program,* 1303 *Off. Gaz. Pat. Office* 21 (Feb. 7, 2006). These changes provide for a relatively expeditious review of rejections in an application under appeal. Thus, for an applicant faced with a rejection that he or she feels is improper, the appeal process offers a more effective resolution than seeking continued examination before the examiner.

This final rule also provides that an applicant may file a divisional application directed to each non-elected invention that has not been examined if the prior-filed application is subject to a requirement for restriction. The divisional application need not be filed during the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. This final rule also permits applicant to file two continuation applications of a divisional application plus a request for continued examination in the divisional application family, without any justification. This final rule, however, does not permit a ''divisional'' application to be filed if it is not the result of a requirement for restriction in the prior-filed application (a so-called ''voluntary'' divisional application). Such a ''voluntary'' divisional application would be a continuation application, and subject to the requirements for continuation applications, under the changes in this final rule.

B. Changes to Practice for Examination of Claims in Patent Applications

A number of patent applications contain a large number of claims, which makes efficient and effective

examination of such applications problematic. The Office previously requested comments in 1998 on a proposal to limit the number of independent and total claims that would be examined in an application. *See Changes to Implement the Patent Business Goals,* 63 FR 53497, 53506–08 (Oct. 5, 1998), 1215 *Off. Gaz. Pat. Office* 87, 95–97 (Oct. 27, 1998). Specifically, in 1998, the Office requested comments on a proposal to change the rules of practice to: (1) Limit the number of total claims that will be examined (at one time) in an application to forty; and (2) limit the number of independent claims that will be examined (at one time) in an application to six. *See Changes to Implement the Patent Business Goals,* 63 FR at 53506, 1215 *Off. Gaz. Pat. Office* at 95. Under the 1998 proposal, if the applicant presented more than forty total claims or six independent claims for examination at one time, the Office would withdraw the excess claims from consideration, and require the applicant to cancel those claims. See id. The Office, however, ultimately decided not to proceed with a proposed change to § 1.75 to place an absolute limit on the number of total and independent claims that would be examined in an application. *See Changes to Implement the Patent Business Goals,* 64 FR 53771, 53774–75 (Oct. 4, 1999), 1228 *Off. Gaz. Pat. Office* 15, 17–18 (Nov. 2, 1999).

Applications which contain a large number of claims, however, continue to absorb an inordinate amount of patent examining resources, as they are extremely difficult to properly process and examine. As a result, contrary to the proposal under consideration in 1998, the Claims Proposed Rule sought a change to the practice for examination of claims that would not place a limit on the number of total or independent claims that may be presented for examination in an application. The Office proposed in the Claims Proposed Rule to revise the practice for the examination of claims in an application as follows: (1) The Office would give an initial examination only to the representative claims, namely, all of the independent claims and only the dependent claims that are expressly designated for initial examination; and (2) if the number of representative claims is greater than ten, the Office would require the applicant to help focus examination by submitting an examination support document covering all of the representative claims. *See Changes to Practice for the Examination of Claims in Patent Applications,* 71 FR at 61–69, 1302 *Off. Gaz. Pat. Office* at 1329–35.

The Office received a substantial number of comments from the public opposing the proposed ''representative claims'' examination approach and suggesting that the Office should simply adopt a strategy based upon whether an application contains more than a given number of independent and total claims. As a result of the public comments on the Claims Proposed Rule, the Office is not adopting the ''representative claims'' examination approach.

Instead, this final rule provides that if the number of independent claims is greater than five or the number of total claims is greater than twenty-five, the applicant must help focus examination by providing an examination support document covering all of the claims in the application (whether in independent or dependent form) before the issuance of a first Office action on the merits of an application. An applicant may present up to five independent claims and twenty-five total claims in an initial application and each continuation or continuation-in-part application without providing either an examination support document or justification, as long as those applications are either prosecuted serially or contain patentably distinct claims. Thus, an applicant may present up to fifteen independent claims and seventy-five total claims to a single patentably distinct invention via an initial application and two continuation or continuation-in-part applications that are filed and prosecuted serially without providing either an examination support document or a justification. Furthermore, an applicant may present up to fifteen independent claims and seventy-five total claims via a divisional application and its two continuation applications without providing either an examination support document or a justification, if the Office issues a restriction requirement in the prior-filed application. Thus, the change to the practice for examination of claims adopted in this final rule avoids placing a limit on the number of total or independent claims that may be presented for examination in an application, but does require an applicant who presents more than five independent claims or more than twenty-five total claims in an application to help focus examination by providing additional information to the Office in an examination support document.

If an applicant thinks fifteen independent claims or seventy-five total claims to an invention is not sufficient, or if applicant wishes to present more than five independent claims or twenty-five total claims in any one application, then applicant has the option of presenting as many independent and total claims as desired by providing an examination support document. The examination support document will assist the examiner in examining the application and determining the patentability of a claimed invention by providing the most relevant prior art and other useful information. Specifically, the examination support document will assist the examiner in understanding the invention and interpreting the claims before conducting a prior art search. The examination support document will also assist the examiner in evaluating the prior art cited by the applicant and in determining whether a claim limitation has support in the original disclosure and in any prior-filed application. An examination support document must be filed before the issuance of a first Office action on the merits of an application. This is so that the information concerning the invention will be available when the Office begins the examination process, and thus avoids the piecemeal examination that would result if the examination support document were not provided until after the first Office action on the merits in the application.

C. Changes to Practice for Patent Applications Containing Patentably Indistinct Claims

The changes in this final rule also require that applicants provide additional information to the Office when they file multiple applications containing ''conflicting'' or patentably indistinct claims. The rules of practice provided that ''[w]here two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application.'' *See* 37 CFR 1.78(b) (2006).

This final rule provides that an applicant must identify other pending applications or patents that are commonly owned, have a common inventor, and have a claimed filing or priority date within two months of the claimed filing or priority date of the application. This requirement does not supplant an applicant's duty to bring other applications that are ''material to patentability'' of an application (*e.g.*, applications containing patentably indistinct claims) to the attention of the examiner. *See Dayco Prod., Inc.* v. *Total*

Containment, Inc., 329 F.3d 1358, 1365–69, 66 U.S.P.Q.2d 1801, 1806–08 (Fed. Cir. 2003); *see also* MPEP § 2001.06(b). Thus, applicants are cautioned against intentionally filing related applications outside of this two-month window in an attempt to avoid the requirement to identify other applications that are material to the patentability of the application at issue. *See Cargill, Inc.* v. *Canbra Foods, Ltd.*, 476 F.3d 1359, 1367–68, 81 U.S.P.Q.2d 1705, 1711 (Fed. Cir. 2007) (there is no such thing as a good faith intent to deceive).

This final rule provides that if there are other pending applications or patents that are commonly owned and have a common inventor, substantial overlapping disclosures, and the same claimed filing or priority date, the Office will presume that the applications contain patentably indistinct claims. In such a situation, the applicant must either rebut this presumption by explaining how the applications contain patentably distinct claims, or submit the appropriate terminal disclaimers and explain why two or more pending applications containing ''conflicting'' or patentably indistinct claims should be maintained.

The Office proposed a provision that if an application contains at least one claim that is patentably indistinct from at least one claim in one or more other applications or patents, the Office would (if certain conditions were met) treat the independent claims and the dependent claims designated for initial examination in the first application and in each of such other applications or patents as present in each of the applications for purposes of determining whether the applicant would be required to submit an examination support document. *See Changes to Practice for the Examination of Claims in Patent Applications*, 71 FR at 64, 68, 1302 *Off. Gaz. Pat. Office* at 1331, 1334. This final rule provides that if multiple applications, including applications having a continuity relationship, contain patentably indistinct claims, the Office will treat the multiple applications as a single application for purposes of determining whether each of the multiple applications exceeds the five independent claim and twenty-five total claim threshold. This provision is to preclude an applicant from submitting multiple applications with claims that are patentably indistinct, each with five or fewer independent claims or twenty-five or fewer total claims, for the purposes of avoiding the requirement to submit an examination support document in compliance with § 1.265. The Office, however, will not count the claims in issued patents that contain patentably indistinct claims in determining whether a pending application exceeds the five independent claim and twenty-five total claim threshold. Nevertheless, those patentably indistinct claims would still be subject to a double patenting rejection.

D. Retention of First Action Final Practice and Changes in Second Action Final Practice

The Office has a first action final rejection practice under which the first Office action in a continuing application, or in the prosecution of a request for continued examination, may be made final under certain circumstances. *See* MPEP § 706.07(b) and 706.07(h), paragraph VIII. The Office proposed to eliminate this practice in continuing applications under 35 U.S.C. 120, 121, or 365(c) and in requests for continued examination under 35 U.S.C. 132(b) as unnecessary in view of the proposed changes to continuing applications and requests for continued examination practice that would permit an applicant to file only one continuing application or request for continued examination without any justification. *See Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims*, 71 FR at 51, 1302 *Off. Gaz. Pat. Office* at 1321. This final rule, however, provides that an applicant may file a request for continued examination in either the initial application or either of the two continuing applications without any justification. Therefore, the Office is retaining its first action final rejection practice. Applicants, however, are reminded that it would not be proper for the Office to make a first Office action final in a continuing application or after a request for continued examination if the application contains material which was presented after final rejection or the close of prosecution but was denied entry because: (1) new issues were raised that required further consideration and/or search; or (2) the issue of new matter was raised. *See* MPEP § 706.07(b) and 706.07(h). Thus, applicants may guard against first action final rejection in a continuing application or after a request for continued examination by first seeking entry of the amendment, argument, or new evidence under § 1.116.

The Office is also not changing the final action practice for the Office action following a submission under § 1.129(a). *See Changes to the Transitional Procedures for Limited Examination After Final Rejection in Certain Applications Filed Before June 8, 1995*, 70 FR 24005 (May 6, 2005), 1295 *Off. Gaz. Pat. Office* 22 (Jun. 7, 2005) (notice).

The Office is revising second action final practice as it pertains to second or subsequent Office actions that include a new double patenting rejection (either statutory or obviousness-type double patenting). Double patenting can arise when a party (or parties to a joint research agreement under the Cooperative Research and Technology Enhancement Act of 2004 (CREATE Act), Public Law 108–453, 118 Stat. 3596 (2004)) has filed multiple patent applications containing patentably indistinct claims. The applicant (or the owner of the application) is in a far better position than the Office to determine whether there are one or more other applications or patents containing patentably indistinct claims. For this reason, when an applicant files multiple applications that are substantially the same, the applicant is responsible for assisting the Office in resolving potential double patenting situations, rather than taking no action until faced with a double patenting rejection. Thus, if an Office action must include a double patenting rejection, it is because the applicant has not met his or her responsibility to resolve the double patenting situation. Therefore, the inclusion of a new double patenting rejection in a second or subsequent Office action will not preclude the Office action from being made final.

The Office is also revising second action final practice as it pertains to second or subsequent Office actions that include a new ground of rejection necessitated by a showing that a claim element that does not use the phrase ''means for'' or ''step for'' is nevertheless a means- (or step-) plus-function claim element under 35 U.S.C. 112, ¶ 6. The Office revised the examination guidelines for means- (or step-) plus-function claim elements under 35 U.S.C. 112, ¶ 6, in June of 2000. *See Supplemental Examination Guidelines for Determining the Applicability of 35 U.S.C. 112, ¶ 6*, 65 FR 38510 (June 21, 2000), 1236 *Off. Gaz. Pat. Office* 98 (July 25, 2000) (2000 Examination Guidelines); *see also Interim Supplemental Examination Guidelines for Determining the Applicability of 35 U.S.C. 112, ¶ 6*, 64 FR 41392 (July 30, 1999). The 2000 Examination Guidelines for means- (or step-) plus-function claim elements under 35 U.S.C. 112, ¶ 6, have been incorporated into the MPEP. *See* MPEP sections 2181–2184 (8th ed. 2001) (Rev. 5, August 2006). The 2000 Examination

Guidelines set forth a three-prong procedure for determining whether a claim element is a means- (or step-) plus-function claim element under 35 U.S.C. 112, ¶ 6. *See Supplemental Examination Guidelines for Determining the Applicability of 35 U.S.C. 112, ¶ 6*, 65 FR at 38514, 1236 *Off. Gaz. Pat. Office* at 101. The 2000 Examination Guidelines provide that if a claim element does not include the phrase ''means for'' or ''step for'' as provided in the first prong of the three-prong procedure and the applicant wishes to have the claim element treated under 35 U.S.C. 112, ¶ 6, in a proceeding before the Office, the applicant has two options: (1) Amend the claim to include the phrase ''means for'' or ''step for''; or (2) show that even though the phrase ''means for'' or ''step for'' is not used, the claim element is written as a function to be performed and does not recite sufficient structure, material, or acts which would preclude application of 35 U.S.C. 112, ¶ 6. *See Supplemental Examination Guidelines for Determining the Applicability of 35 U.S.C. 112, ¶ 6*, 65 FR at 38514, 1236 *Off. Gaz. Pat. Office* at 101. To avoid any unnecessary delay in the prosecution of the application, an applicant who wishes to have a claim element treated under 35 U.S.C. 112, ¶ 6, should either use the phrase ''means for'' or ''step for'' in the claim element or provide the necessary showing before the examination of the application begins so that the examiner can properly interpret the claims in the application and make a patentability determination. Furthermore, because submitting a showing is tantamount to an amendment of the claim to include the phrase ''means for'' or ''step for,'' a showing will be treated as an amendment of the claim for second action final purposes. Thus, the inclusion of a new rejection in a second or subsequent Office action necessitated by a showing submitted by applicant will not preclude the Office from making the second or subsequent Office action final.

This final rule requires applicant to identify any claims in a continuation-in-part application for which the subject matter is disclosed in the manner provided by 35 U.S.C. 112, ¶ 1, in the prior-filed application. *See* § 1.78(d)(3) and the discussion of § 1.78(d)(3). Any claim in the continuation-in-part application for which the subject matter is not identified as being disclosed in the manner provided by 35 U.S.C. 112, ¶ 1, in the prior-filed application will be treated as entitled only to the actual filing date of the continuation-in-part application, and will be subject to prior art based on the actual filing date of the continuation-in-part application. To avoid any unnecessary delay in the prosecution of the application, applicant should provide the identification before the examiner begins to conduct a prior art search. If the failure to identify the claims for which the subject matter is disclosed in the manner provided by 35 U.S.C. 112, ¶ 1, in the prior-filed application causes the examiner to include a new prior art rejection in a second or subsequent Office action, the inclusion of the new prior art rejection will not preclude the Office action from being made final.

Therefore, the Office is revising second action final practice to provide that a second or any subsequent Office action on the merits may be made final, except when the Office action contains a new ground of rejection that is not: (1) Necessitated by applicant's amendment of the claims, including amendment of a claim to eliminate unpatentable alternatives; (2) necessitated by applicant's providing a showing that a claim element that does not use the phrase ''means for'' or ''step for'' is written as a function to be performed and does not otherwise preclude application of 35 U.S.C. 112, ¶ 6; (3) based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p); (4) based upon double patenting (statutory or obviousness-type double patenting); or (5) necessitated by applicant's identification of the claim or claims in a continuation-in-part application for which the subject matter is disclosed in the manner provided by 35 U.S.C. 112, ¶ 1, in the prior-filed application. The provision in MPEP § 904.02 that a search should cover the claimed subject matter and should also cover the disclosed features which might reasonably be expected to be claimed does not preclude an examiner from making the second or any subsequent Office action on the merits final if the Office action contains a new ground of rejection that was necessitated solely by applicant's amendment of the claims to eliminate an unpatentable alternative. An examiner cannot be expected to foresee whether or how an applicant will amend a claim to overcome a rejection except in very limited circumstances (*e.g.*, where the examiner suggests how applicant can overcome a rejection under 35 U.S.C. 112, ¶ 2).

II. Discussion of Specific Rules

Title 37 of the Code of Federal Regulations, part 1, is amended as follows:

Section 1.17 (patent application and reexamination processing fees): Section 1.17(f) is amended to include a reference to: (1) Petitions under § 1.78(d)(1)(vi) for a continuing application not provided for in §§ 1.78(d)(1)(i) through (d)(1)(v); and (2) petitions under § 1.114(g) for a request for continued examination not provided for in § 1.114(f). *See* discussion of §§ 1.78 and 1.114.

Section 1.26 (refunds): Section 1.26(a) is amended to add the phrase ''[e]xcept as provided in § 1.117 or § 1.138(d)'' to the sentence ''[a] change of purpose after the payment of a fee, such as when a party desires to withdraw a patent filing for which the fee was paid, including an application, an appeal, or a request for an oral hearing, will not entitle a party to a refund of such fee.'' The ''change of purpose'' provision of § 1.26(a) is directed to the provision in 35 U.S.C. 42(d) authorizing a refund of ''any fee paid by mistake or any amount paid in excess of that required.'' 35 U.S.C. 42(d). Sections 1.117 and 1.138(d), however, are directed to the provisions in 35 U.S.C. 41(a)(2) and (d)(1)(D) as amended by the Consolidated Appropriations Act, 2005 (Consolidated Appropriations Act) that permit the Office to develop procedures to refund search fees or excess claims fees under certain limited conditions. *See* Public Law 108–447, 118 Stat. 2809 (2004). Section 1.26(b) is amended to change ''except as otherwise provided in this paragraph or in § 1.28(a)'' to ''except as otherwise provided in this paragraph, or in § 1.28(a), § 1.117(b), or § 1.138(d)''. This change is for consistency with § 1.117(b) and § 1.138(d), which also specify time periods within which certain refunds must be requested.

Section 1.52 (language, paper, writing, margins, compact disc specifications): Section 1.52(d)(2) is amended to refer to § 1.78(b) concerning the requirements for claiming the benefit of a provisional application in a nonprovisional application. Section 1.52(d)(2) is also amended to provide that if a provisional application is filed in a language other than English and the benefit of such provisional application is claimed in a nonprovisional application, an English language translation of the non-English language provisional application will be required in the provisional application. This change conforms § 1.52(d)(2) to the September 2005 revision to the provisions in § 1.78 for claiming the benefit of a provisional application. *See Provisions for Claiming the Benefit of a Provisional Application With a Non-English Specification and Other Miscellaneous Matters*, 70 FR 56119,

56121, 56128 (Sept. 26, 2005), 1299 *Off. Gaz. Pat. Office* 142, 143–44, 150 (Oct. 25, 2005) (final rule). With respect to claiming the benefit of a provisional application that was filed in a language other than English, § 1.78(b)(5) now provides that: (1) If the prior-filed provisional application was filed in a language other than English and both an English-language translation of the prior-filed provisional application and a statement that the translation is accurate were not previously filed in the prior-filed provisional application, applicant will be notified and given a period of time within which to file the translation and the statement in the prior-filed provisional application; (2) if the notice is mailed in a pending nonprovisional application, a timely reply to such a notice must include the filing in the nonprovisional application of either a confirmation that the translation and statement were filed in the provisional application, or an amendment or supplemental application data sheet withdrawing the benefit claim, or the nonprovisional application will be abandoned; and (3) the translation and statement may be filed in the provisional application, even if the provisional application has become abandoned.

Section 1.53 (application number, filing date, and completion of application): Section 1.53(b) and (c)(4) are amended to refer to § 1.78, rather than specific paragraphs of § 1.78. Section 1.53(b)(1) is also amended to provide that continuation or divisional applications naming an inventor not named in the prior application must be filed under § 1.53(b) (this provision was formerly in § 1.53(b)(2)), and to reference § 1.78(a)(2) for the definition of a divisional application and § 1.78(a)(3) for the definition of a continuation application. Section 1.53(b)(2) is amended to reference § 1.78(a)(4) for the definition of a continuation-in-part application.

Section 1.75 (claims): Section 1.75(b) is amended to provide for the revised practice for the examination of claims in an application. Section 1.75(b) (introductory text) provides for the requirements of a dependent claim. Section 1.75(b)(1) provides for the five independent claim and twenty-five total claim threshold for invoking the examination support document requirement. Section 1.75(b)(2) provides for claims in dependent form that are effectively independent claims. Section 1.75(b)(3) provides for situations in which an examination support document has not been provided in an application that exceeds the five independent claim and twenty-five total claim threshold. Section 1.75(b)(4) provides that the total number of claims present in all of the copending commonly owned applications that contain patentably indistinct claims may not exceed the five independent claim and twenty-five total claim threshold. Section 1.75(b)(5) provides that claims withdrawn from consideration will not, unless they are reinstated or rejoined, be taken into account in determining whether an application exceeds the five independent claim and twenty-five total claim threshold. Section 1.75(c) is amended to provide that multiple dependent claims and claims depending from a multiple dependent claim will be considered to be that number of claims to which direct reference is made in the multiple dependent claim for claims counting purposes.

Section 1.75(b) (introductory text) is amended to set forth the existing provisions concerning dependent claims in § 1.75(c), namely, that ''[o]ne or more claims may be presented in dependent form, referring back to and further limiting another claim or claims in the same application.'' Section 1.75(b) (introductory text) is also amended to clarify that a dependent claim is required to incorporate by reference all the limitations of the previous claim to which it refers and to specify a further limitation of the subject matter of the previous claim. *See Pfizer Inc.* v. *Ranbaxy Labs. Ltd.*, 437 F.3d 1284, 1292, 79 U.S.P.Q.2d 1583, 1589–90 (Fed. Cir. 2006) (a dependent claim is required to include all the limitations of the claim from which it depends and the failure to incorporate by reference all the limitations is a violation of 35 U.S.C. 112, ¶ 4, and renders the dependent claim invalid).

Section 1.75(b)(1) provides that an applicant must file an examination support document in compliance with § 1.265 that covers each claim (whether in independent or dependent form) before the issuance of a first Office action on the merits of the application if the application contains or is amended to contain more than five independent claims or more than twenty-five total claims. Section 1.75(b)(1) also provides that the application may not contain or be amended to contain more than five independent claims or more than twenty-five total claims if an examination support document in compliance with § 1.265 has not been filed before the issuance of a first Office action on the merits of an application. The examination support document in compliance with § 1.265 is required to be filed before the issuance of the first Office action on the merits of the application because the information provided by the applicant in the examination support document will assist the examiner in understanding the invention of the application, determining the effective filing date of each claim, interpreting the claims before a prior art search, understanding the state of the art and the most closely related prior art cited by the applicant, and determining the patentability of the claims. Applicant is permitted to present more than five independent claims or more than twenty-five total claims in a continuing application, if the applicant files an examination support document in compliance with § 1.265 before the first Office action on the merits of the continuing application, regardless of whether an examination support document has been filed in the prior-filed application.

Claims withdrawn from consideration under §§ 1.141 through 1.146 or § 1.499 as drawn to a non-elected invention or inventions are not taken into account in determining whether an application exceeds this five independent claim and twenty-five total claim threshold. *See* § 1.75(b)(5) and discussion of § 1.75(b)(5).

Section 1.75(b)(2) concerns claims in dependent form that are effectively independent claims. Section 1.75(b)(2) provides that a claim that refers to another claim but does not incorporate by reference all the limitations of the claim to which such claim refers will be treated as an independent claim for fee calculation purposes under § 1.16 (or § 1.492) and for purposes of § 1.75(b). The Office must treat such claims as independent claims because 35 U.S.C. 112, ¶ 4, provides (*inter alia*) that a dependent claim ''shall be construed to incorporate by reference all the limitations of the claim to which it refers.'' *See* 35 U.S.C. 112, ¶ 4. For examples of such claims, see: *In re Thorpe*, 777 F.2d 695, 696, 227 U.S.P.Q. 964, 965 (Fed. Cir. 1985) (''product by process'' claim 44); *In re Kuehl,* 475 F.2d 658, 659, 177 U.S.P.Q. 250, 251 (C.C.P.A. 1973) (claim 6); and *Ex parte Rao,* 1995 WL 1747720, *1 (BPAI 1998) (claim 8). Section 1.75(b)(2) also provides that a claim that refers to a claim of a different statutory class of invention will be treated as an independent claim for fee calculation purposes under § 1.16 (or § 1.492) and for purposes of § 1.75(b). For examples of such claims, see: *Thorpe,* 777 F.2d at 696, 227 U.S.P.Q. at 965 (''product by process'' claim 44); *Ex parte Porter,* 25 U.S.P.Q.2d 1144, 1145 (BPAI 1992) (claim 6); and *Ex parte Blattner,* 2

U.S.P.Q.2d 2047, 2047–48 (BPAI 1987) (claim 14).

Section 1.75(b)(3) provides that the applicant will be notified if the application contains or is amended to contain more than five independent claims or more than twenty-five total claims but the applicant has not complied with the requirements set forth in § 1.75(b)(1) or 1.75(b)(4) (*e.g.*, an examination support document in compliance with § 1.265 has been omitted). Section 1.75(b)(3) also provides that if the non-compliance appears to have been inadvertent, the notice will set a two-month time period that is not extendable under § 1.136(a) within which, to avoid abandonment of the application, the applicant must comply with the requirements set forth in § 1.75(b). Again, claims withdrawn from consideration under §§ 1.141 through 1.146 or § 1.499 as drawn to a non-elected invention or inventions are not taken into account in determining whether an application exceeds this five independent claim and twenty-five total claim threshold. *See* § 1.75(b)(5) and discussion of § 1.75(b)(5).

If a notice under § 1.75(b)(3) is mailed before the first Office action on the merits of an application and it appears that the omission of an examination support document was inadvertent, the notice will set a two-month time period within which the applicant must: (1) File an examination support document in compliance with § 1.265 that covers each claim (whether in independent or dependent form); or (2) amend the application such that it contains no more than five independent claims and no more than twenty-five total claims. Section 1.75(b)(3) provides that this two-month time period is not extendable under § 1.136(a) and that the failure to reply to such a notice will result in abandonment of the application. Due to the increase in patent pendency that would result from the routine granting of extensions in the situation in which an application contains or is amended to contain more than five independent claims or more than twenty-five total claims but the applicant has not complied with the requirements set forth in § 1.75(b)(1) or 1.75(b)(4) (*e.g.*, an examination support document in compliance with § 1.265 has been omitted), the Office is limiting extensions of this two-month time period in § 1.75(b)(3) to those for which there is sufficient cause (§ 1.136(b)).

Once the Office issues a notice under § 1.75(b)(3), the applicant may not simply submit a suggested alternative requirement for restriction under § 1.142(c), but instead must: (1) File an examination support document in compliance with § 1.265 that covers each claim (whether in independent or dependent form); or (2) amend the application such that it contains no more than five independent claims and no more than twenty-five total claims.

If an examination support document in compliance with § 1.265 as required under § 1.75(b) was not filed before the issuance of a first Office action on the merits of an application, an amendment that results in the application containing more than five independent claims or more than twenty-five total claims will be treated as non-responsive. Specifically, if the non-compliance with § 1.75(b) appears to have been inadvertent, the Office would give the applicant a two-month time period that is not extendable under § 1.136(a) within which to provide an amendment that does not result in the application containing more than five independent claims or more than twenty-five total claims. *See* § 1.135(c) (''[w]hen reply by the applicant is a *bona fide* attempt to advance the application to final action, and is substantially a complete reply to the non-final Office action, but consideration of some matter or compliance with some requirement has been inadvertently omitted, applicant may be given a new time period for reply under § 1.134 to supply the omission.'').

Section 1.75(b)(4) provides for the situation in which: (1) A nonprovisional application contains at least one claim that is patentably indistinct from at least one claim in one or more other pending nonprovisional applications; and (2) the nonprovisional application and the one or more other pending nonprovisional applications either are owned by the same person or are subject to an obligation of assignment to the same person. In this situation, § 1.75(b)(4) provides that the Office will treat the claims in the first nonprovisional application and in each of such other pending nonprovisional applications as being present in each of the pending nonprovisional applications for purposes of § 1.75(b). That is, if the conditions specified in § 1.75(b)(4) are present, the Office will treat each such nonprovisional application as having the total number of claims present in all of such applications (and not just the claim that is patentably indistinct) for purposes of determining whether an examination support document is required by § 1.75(b). For example: If application ''A'' contains only one claim that is patentably indistinct from the claims in application ''B'', application ''A'' and application ''B'' are owned by the same company, and each application contains three independent claims and twenty total claims, the Office will treat each application as having six independent claims and forty total claims in determining whether each application exceeds the five independent claim and twenty-five total claim threshold set forth in § 1.75(b). In this example, an examination support document would be required in each application before the issuance of a first Office action on the merits of the application. To avoid the provisions of § 1.75(b)(4), applicant may present all of the patentably indistinct claims in application ''B'' by canceling the patentably indistinct claim from application ''A''. As discussed previously, § 1.75(b)(4) is to preclude an applicant from submitting multiple applications to the same subject matter (with claims that are patentably indistinct), each with five or fewer independent claims or twenty-five or fewer total claims, for the purpose of avoiding the requirement to submit an examination support document in compliance with § 1.265.

Under § 1.75(b)(4), the Office will count the claims in the copending nonprovisional applications containing patentably indistinct claims (including applications having a continuity relationship) but not in issued patents containing patentably indistinct claims, in determining whether each such application exceeds the five independent claim or twenty-five total claim threshold for invoking the examination support document requirement. An applicant may present up to five independent claims and twenty-five total claims in an initial application and each continuing application, provided that continuing applications that contain patentably indistinct claims are not prosecuted in parallel with the initial application or each other. Thus, an applicant may present up to fifteen independent claims and seventy-five total claims to a single invention via an initial application and two continuing applications that are filed and prosecuted serially without providing either an examination support document or a justification. In addition, an applicant may prosecute a divisional application (an application containing claims that are patentably distinct from the claims to the invention prosecuted in the initial application) in parallel with the initial application or its continuation or continuation-in-part applications without the claims in the divisional application being taken into account in determining whether the initial application or its continuation or continuation-in-part applications

exceed the five independent claim or twenty-five total claim threshold for invoking the examination support document requirement.

Section 1.75(b)(4) also provides that the total number of claims present in all of such copending nonprovisional applications containing patentably indistinct claims may not exceed five independent claims or twenty-five total claims unless an examination support document in compliance with § 1.265 is filed before the issuance of a first Office action on the merits of the application containing patentably indistinct claims.

The provisions of § 1.75(b)(4) do not depend upon the relative filing dates of the nonprovisional application and the one or more other nonprovisional applications. The provisions of § 1.75(b)(4) apply regardless of whether the filing dates of the applications are the same, are within two months of each other (*cf.* § 1.78(f)(1) and (f)(2)), or are not within two months of each other. In other words, the provision of § 1.75(b)(4) does not depend on the filing dates of the respective applications. In addition, the provisions of § 1.75(b)(4) are applicable regardless of any continuity relationship between the applications (*e.g.*, the provision applies if a parent application is still pending at the time the child application is under examination). For applications having a continuity relationship, the prior application must be pending at the time the continuing application is filed. *See* 35 U.S.C. 120 (requires that a continuing application be filed before the patenting or abandonment of or termination of proceedings on the prior application). The Office, however, will treat the application as no longer pending for purposes of § 1.75(b)(4) if: (1) A notice of allowance is issued, unless the application is withdrawn from issue (§ 1.313); (2) the Office recognizes the application is abandoned; (3) a notice of appeal to the U.S. Court of Appeals for the Federal Circuit under 35 U.S.C. 141 is filed, unless the appeal is terminated; or (4) a civil action under 35 U.S.C. 145 or 146 is commenced, unless the civil action is terminated.

Section 1.75(b)(4) as adopted in this final rule differs from proposed § 1.75(b)(4) in that it does not provide that the Office may require elimination of the patentably indistinct claims from all but one of the applications. Such a provision would be a substantial duplicate of § 1.78(f)(3) as adopted in this final rule, which provides that if the conditions set forth in § 1.75(b)(4) exist, the Office may require elimination of the patentably indistinct claims from all but one of the applications in the absence of good and sufficient reason for there being two or more such nonprovisional applications containing patentably indistinct claims.

Section 1.75(b)(5) provides that claims withdrawn from consideration under §§ 1.141 through 1.146 or § 1.499 as drawn to a non-elected invention or inventions will not, unless they are reinstated or rejoined, be taken into account in determining whether an application exceeds the five independent claim and twenty-five total claim threshold set forth in §§ 1.75(b)(1), (b)(3), and (b)(4). Thus, claims withdrawn from consideration as the result of an Office-initiated requirement under § 1.142, 1.146, or 1.499 (regardless of whether the election is with or without traverse), or as the result of the acceptance of a suggested restriction requirement under § 1.142(c), are not taken into account in determining whether an application exceeds the five independent claim and twenty-five total claim threshold. In addition, claims withdrawn from consideration in an application (*e.g.*, the initial application) as the result of either an Office-initiated requirement under § 1.142, 1.146, or 1.499, or the acceptance of a suggested restriction requirement under § 1.142(c), are not taken into account in determining whether a copending application (*e.g.*, a continuation application of the initial application) contains a claim that is patentably indistinct from a claim in such application for purposes of § 1.75(b)(4).

Section 1.142(c) as adopted in this final rule provides that the applicant may submit a suggested requirement for restriction if two or more independent and distinct inventions are claimed in the application. Section 1.142(c) further provides that any suggested requirement for restriction must be filed before the earlier of the first Office action on the merits or any Office action that contains a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction (including an election of species) under 35 U.S.C. 121 in the application. Section 1.142(c) provides that any suggested requirement for restriction must also be accompanied by an election without traverse of an invention to which there are no more than five independent claims and no more than twenty-five total claims, and identify the claims to the elected invention. If the applicant submits a suggested restriction requirement, the suggested restriction requirement is accepted, and there are five or fewer independent claims and twenty-five or fewer total claims to the elected invention (as required by § 1.142(c)), the Office will simply treat the non-elected claims as withdrawn from consideration and proceed to act on the application (assuming the application is otherwise in condition for action). The Office action will set out the requirement for restriction under § 1.141(a), *e.g.*, in the manner that an Office action on the merits would contain a written record of a requirement for restriction previously made by telephone. *See* MPEP section 810. Applicants are reminded, however, that the Office may refund excess claims fees only for claims that are canceled prior to the issuance of a first Office action on the merits of the application. *See* 35 U.S.C. 41(a)(2) (''[t]he Director may, by regulation, provide for a refund of any part of the fee specified in [35 U.S.C. 41(a)(2)] for any claim that is canceled before an examination on the merits, as prescribed by the Director, has been made of the application under [35 U.S.C.] 131'').

If the applicant files a suggested requirement for restriction in an application containing more than five independent claims or more than twenty-five total claims, the applicant will also be notified if the suggested restriction requirement is not accepted. The refusal to accept a suggested requirement for restriction may result in the examiner making a different restriction requirement or making no restriction requirement.

If the examiner makes a restriction requirement (which includes an election of species requirement) different from the suggested restriction requirement, the applicant will be notified of the restriction requirement. The applicant will be given a two-month time period that is not extendable under § 1.136(a) within which the applicant must make an election consistent with the Office-issued restriction requirement in order to avoid abandonment of the application. Once the Office issues a requirement for restriction, the applicant may not simply submit a suggested alternative requirement for restriction under § 1.142(c). Instead, the applicant must make an election (with or without traverse) responsive to the Office-issued requirement for restriction. If an application subject to an Office-issued requirement for restriction contains more than five independent claims or more than twenty-five total claims, the reply must also either: (1) Amend the application to contain no more than five independent claims and no more than twenty-five total claims to the elected invention and/or species; or (2) include an examination support document in compliance with § 1.265 that covers

each claim (whether in independent or dependent form) pending in the application.

If the examiner does not make a restriction requirement, the applicant will simply be given a notice under § 1.75(b)(3). That notice will set a two-month time period that is not extendable under § 1.136(a) within which, to avoid abandonment of the application, the applicant must: (1) Amend the application to contain no more than five independent claims and no more than twenty-five total claims; or (2) file an examination support document in compliance with § 1.265 that covers each claim (whether in independent or dependent form) pending in the application. *See* § 1.75(b)(3).

Section 1.75(b)(5) also provides that claims reinstated (*e.g.*, as a result of a request for reconsideration of the requirement) or rejoined (*e.g.*, upon allowance of a generic claim) in the application are taken into account in determining whether an application exceeds the five independent claim and twenty-five total claim threshold. As discussed previously, unless an examination support document in compliance with § 1.265 was filed before the issuance of a first Office action on the merits of an application, the application must remain at or under the five independent claim and twenty-five total claim threshold. Therefore, if an examination support document was not filed before the issuance of a first Office action on the merits of the application, and the reinstatement or rejoinder of non-elected claims results in the application containing more than five independent claims or more than twenty-five total claims, the Office will give the applicant a two-month time period within which to amend the application to contain five or fewer independent claims and twenty-five or fewer total claims. *See* § 1.75(b)(3). This two-month time period is not extendable under § 1.136(a). The failure to file such an amendment will result in abandonment of the application.

Since claims reinstated or rejoined in the application are taken into account in determining whether an application exceeds the five independent claim and twenty-five total claim threshold, applicants cannot rely upon a requirement for restriction to avoid submitting an examination support document before the issuance of a first Office action on the merits of an application. This is especially true where: (1) The applicant traverses the requirement for restriction; (2) the requirement for restriction may be conditional, such as a requirement for election of species in an application that contains a claim that is generic to all of the claimed species (hereafter ''generic claim'') (*see* MPEP section 809), or a requirement for restriction in an application that contains a linking claim (*e.g.*, a subcombination claim linking plural combinations); or (3) the applicant plans to request rejoinder of the claims to the non-elected invention (*see* MPEP § 821.04 *et seq.*). Thus, applicants are advised to file an examination support document in the application before the first Office action on the merits if they anticipate the occurrence of any of the aforementioned three situations. Furthermore, applicants cannot rely upon the requirement for restriction to file a divisional application because the Office will withdraw the requirement for restriction, including an election of species, if the non-elected claims are reinstated or rejoined.

Applicant is not permitted to file a divisional application of a prior-filed application that is no longer subject to a restriction requirement. Under § 1.78(a)(2) and 1.78(d)(1)(ii), the prior-filed application to which a divisional application claims the benefit must be subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121. Sections 1.78(a)(2) and 1.78(d)(1)(ii) also require a divisional application to contain only claims directed to a non-elected invention that has not been examined.

For an application that contains a generic claim in which a requirement for an election of species has been made, applicants should conclude prosecution (in the initial application and its continuation or continuation-in-part applications), including exhaustion of any available appeals, as to the generic claim before ever filing a divisional application to a non-elected species. If applicant no longer wants to pursue the generic claim, applicant may file a divisional application directed to a non-elected species. If an applicant files a divisional application directed to a non-elected species, applicant should: (1) Cancel the claims to the non-elected species and the generic claim in the prior-filed application before rejoinder or reinstatement occurs; (2) not present the non-elected claims and the generic claim in any continuation or continuation-in-part application of the initial application; and (3) not present the generic claim in the divisional application or any other continuation application of the divisional application (because the generic claim has been examined in the initial application and it is patentably indistinct from the claims of the non-elected species).

When an application contains a generic claim and the examiner makes a provisional restriction requirement, requiring an election of species for initial search and examination purposes, the applicant must elect a single species. (The requirement is provisional because the restriction will be withdrawn upon allowance of the generic claim.) The examiner will determine the patentability of the elected species and generic claim. Upon the allowance of the generic claim, the provisional restriction requirement will be withdrawn, as explained above. The claims of the non-elected species then will be rejoined. The Office will count the rejoined claims together with the other pending claims to determine whether the application exceeds the five independent claim and twenty-five total claim threshold set forth § 1.75(b)(1). *See* § 1.75(b)(5). If the application contains more than five independent claims and twenty-five total claims (counting the rejoined claims) and the applicant did not file an examination support document in compliance with § 1.265 before the issuance of a first Office action on the merits in the application, then the applicant must amend the application to contain no more than five independent claims and no more than twenty-five total claims. *See* § 1.75(b)(1). Therefore, applicants cannot rely upon a provisional requirement for restriction to avoid submitting an examination support document before the issuance of the first Office action on the merits in the application.

Furthermore, upon the allowance of a claim that is generic to all of the claimed species (either in the initial application or any continuing application), the application is no longer subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121. In such a situation, if applicant had filed a ''divisional'' application to the non-elected species following the provisional restriction in the prior-filed application, that ''divisional'' application would no longer be proper under §§ 1.78(a)(2) and 1.78(d)(1)(ii). This is because the ''divisional'' application would not meet the conditions set forth in §§ 1.78(a)(2) and 1.78(d)(1)(ii). If applicant wishes to maintain the application, then applicant must delete or correct the benefit claim to indicate that the application is a continuation application, provided the requirements set forth in § 1.78(d)(1)(i) can be

satisfied. In such case, the Office will treat the application as one of the two continuation applications of the prior-filed application permitted under § 1.78(d)(1)(i). But, if the prior-filed application already has its benefit claimed in two other nonprovisional applications, applicant must delete the benefit claim in the application. *See* § 1.78(d)(1)(i). Therefore, applicant is cautioned not file a divisional application drawn to a non-elected species if a generic claim is pending in the initial application or any continuing application of the initial application and could be found allowable.

When an application subject to an election of species is allowed with no claim that is generic to all of the claimed species being found to have been allowable, the applicant will be notified that the Office considers the requirement that the application be restricted to a single species to be final. At that point, the applicant may cancel the claims to the non-elected species and the generic claim in the prior-filed application and file a divisional application in accordance with § 1.78(d)(1)(ii) to the non-elected species. However, if the applicant later files a continuing application of the initial application or the divisional application presenting one or more generic claims in such later application, the Office will consider the requirement that the initial application be restricted to a single species to no longer be final. Should that occur, the ''divisional'' application directed to the non-elected species would not be proper under §§ 1.78(a)(2) and 1.78(d)(1)(ii) for the reasons explained above. Thus, applicants should conclude prosecution, including exhaustion of any available appeals, as to the generic claim before ever filing a divisional application to a non-elected species. In other words, applicants cannot rely upon a requirement that an application containing a generic claim will be restricted to a single species to permit filing one or more divisional applications until the applicant has concluded prosecution with respect to any generic claims.

Under the Office's rejoinder practice, an applicant may request rejoinder of claims to a non-elected invention that depend from or otherwise require all the limitations of an allowable claim. *See* MPEP § 821.04 *et seq.* This ''rejoinder'' practice was developed in light of the Federal Circuit's decisions in *In re Ochiai*, 71 F.3d 1565, 37 U.S.P.Q.2d 1127 (Fed. Cir. 1995), and *In re Brouwer*, 77 F.3d 422, 37 U.S.P.Q.2d 1663 (Fed. Cir. 1996), and the enactment of 35 U.S.C. 103(b) in The Biotechnology Process Act of 1995 (Pub. L. 104–41, 109 Stat. 351 (1995)). *See Guidance on Treatment of Product and Process Claims in light of In re Ochiai, In re Brouwer, and 35 U.S.C. 103(b)*, 1184 *Off. Gaz. Pat. Office* 86 (Mar. 26, 1996). Applicants may retain claims to a non-elected invention in an application for possible rejoinder in the event of the allowance of a claim to the elected invention. However, as discussed previously, the Office will count rejoined claims towards the five independent claim and twenty-five total claim threshold in § 1.75(b)(1). *See* § 1.75(b)(5). If applicant cancels all of the claims directed to a non-elected invention before rejoinder occurs and files a divisional application, the restriction requirement will not be withdrawn and the non-elected process claims that are now canceled will not be rejoined. This will preserve applicant's rights under 35 U.S.C. 121 and § 1.78(d)(1)(ii). *See* MPEP § 821.04(b).

Section 1.75(c) is amended to provide for multiple dependent claims only. Dependent claims are now provided for in § 1.75(b). Section 1.75(c) further provides that multiple dependent claims and claims that depend from a multiple dependent claim will be considered to be that number of claims to which direct reference is made in the multiple dependent claim for purposes of § 1.75(b) (as well as § 1.16 or 1.492).

The changes to § 1.75 are applicable to any application (including any reissue application) filed under 35 U.S.C. 111(a) on or after November 1, 2007, and to any nonprovisional application entering the national stage after compliance with 35 U.S.C. 371 on or after November 1, 2007, as well as to any application (including any reissue application) in which a first Office action on the merits (§ 1.104) was not mailed before November 1, 2007. The Office will provide an applicant who filed a nonprovisional application under 35 U.S.C. 111(a) before November 1, 2007, or a nonprovisional application that entered the national stage after compliance with 35 U.S.C. 371 before November 1, 2007, and who would be affected by the changes in the final rule, with an opportunity to submit: (1) An examination support document under § 1.265; (2) a new set of claims such that the application contains five or fewer independent claims and twenty-five or fewer total claims; or (3) a suggested restriction requirement under § 1.142(c). Specifically, the Office will issue a notice setting a two-month time period that is extendable under § 1.136(a) or (b) within which the applicant must exercise one of these options in order to avoid abandonment of the application. The Office, however, may combine such a notice with a requirement for restriction, in which case the applicant must make an election responsive to the restriction requirement and, if there are more than five independent claims or more than twenty-five total claims drawn to the elected invention, the applicant must also: (1) File an examination support document in compliance with § 1.265; or (2) amend the application such that it contains five or fewer independent claims and twenty-five or fewer total claims drawn to the elected invention. Thus, if such a notice is combined with a requirement for restriction, the applicant does not have the option of replying to such notice with a suggested restriction requirement under § 1.142(c).

With respect to the application of the changes to § 1.75 in this final rule to a reissue application, an examination support document under § 1.265 will not be required pursuant to § 1.75(b) in a reissue application if the reissue application does not seek to change the claims in the patent being reissued. A change in the claims in the patent being reissued is sought either by an amendment to or addition of a claim or claims, or by an amendment to the specification which changes a claim or claims.

Section 1.76 (application data sheet): Section 1.76(b)(5) is amended to refer to §§ 1.78(b)(3) and (d)(3) for consistency with the changes to § 1.78. Section 1.76(b)(5) is also amended to clarify that the relationship of the applications is not required for a benefit claim under 35 U.S.C. 119(e) and to delete ''the status (including patent number if available)''. Such information is not necessary for claiming the benefit of a prior-filed application under 35 U.S.C. 119(e), 120, 121, or 365(c).

Section 1.78 (claiming benefit of earlier filing date and cross-references to other applications): Section 1.78 is reorganized as follows: (1) § 1.78(a) defines ''continuing application'', ''continuation application'', ''divisional application'', and ''continuation-in-part application''; (2) § 1.78(b) contains provisions relating to claims under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application; (3) § 1.78(c) contains provisions relating to delayed claims under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application; (4) § 1.78(d) contains provisions relating to claims under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed nonprovisional or international application; (5) § 1.78(e) contains provisions relating to delayed claims under 35 U.S.C. 120, 121, or 365(c) for

the benefit of a prior-filed nonprovisional or international application; (6) § 1.78(f) contains provisions relating to applications naming at least one inventor in common and containing patentably indistinct claims; (7) § 1.78(g) contains provisions relating to applications or patents under reexamination naming different inventors and containing patentably indistinct claims; (8) § 1.78(h) contains provisions pertaining to the treatment of parties to a joint research agreement under the CREATE Act; and § 1.78(i) provides that the time periods set forth in § 1.78 are not extendable.

Section 1.78(a)(1) defines a ''continuing application'' as a nonprovisional application or international application designating the United States of America that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of a prior-filed nonprovisional application or international application designating the United States of America. Section 1.78(a)(1) provides that an application that does not claim the benefit under 35 U.S.C. 120, 121, or 365(c) of a prior-filed application, is not a continuing application even if the application claims the benefit under 35 U.S.C. 119(e) of a provisional application, claims priority under 35 U.S.C. 119(a)–(d) or 365(b) to a foreign application, or claims priority under 35 U.S.C. 365(a) or (b) to an international application designating at least one country other than the United States of America. A continuing application must be a continuation application, a divisional application, or a continuation-in-part application. *See* MPEP § 201.11 (''To specify the relationship between the applications, applicant must specify whether the application is a continuation, divisional, or continuation-in-part of the prior application. Note that the terms are exclusive. An application cannot be, for example, both a continuation and a divisional or a continuation and a continuation-in-part of the same application.'').

Section 1.78(a)(2) defines a ''divisional application'' as a continuing application that discloses and claims only an invention or inventions that were disclosed and claimed in a prior-filed application, but were subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121 in the prior-filed application, and were not elected for examination and were not examined in any prior-filed application. This definition is more precise than the definition of ''divisional application'' currently found in MPEP § 201.06. MPEP § 201.06 defines a divisional application as an application for an independent and distinct invention, which discloses and claims only subject matter that was disclosed in the prior-filed nonprovisional application. Section 1.78(a)(2), however, limits the definition of ''divisional application'' to an application that claims only an invention or inventions that were subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121 in the prior-filed application and not elected for examination and not examined in any prior-filed application. *See* 35 U.S.C. 121 (''[i]f two or more independent and distinct inventions are claimed in one application, the Director may require the application to be restricted to one of the inventions [and i]f the other invention is made the subject of a divisional application which complies with the requirements of [35 U.S.C.] 120 * * *.''). The Office will revise the definition of divisional application in MPEP § 201.06 in the next revision of the MPEP. An application that claims the benefit of a prior-filed divisional application as defined in § 1.78(a)(2), and claims the same patentable invention as the prior-filed divisional application, would not be a divisional application as defined by § 1.78(a)(2). Instead, such an application would be a continuation application.

Section 1.78(a)(3) defines a ''continuation application'' as a continuing application as defined in § 1.78(a)(1) that discloses and claims only an invention or inventions that were disclosed in the prior-filed application. *See* MPEP § 201.07 (defines a continuation application as an application that discloses (or discloses and claims) only subject matter that was disclosed in the prior-filed nonprovisional application).

Section 1.78(a)(4) defines a ''continuation-in-part application'' as a continuing application as defined in § 1.78(a)(1) that discloses subject matter that was not disclosed in the prior-filed application. *See* MPEP § 201.08 (a continuation-in-part repeats some substantial portion or all of the earlier nonprovisional application and adds matter not disclosed in the prior-filed nonprovisional application).

Section 1.78(b) addresses claims under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application. Under 35 U.S.C. 119(e)(1), a provisional application must disclose the invention claimed in at least one claim of the later-filed application in the manner provided by 35 U.S.C. 112, ¶ 1, for the later-filed application to receive the benefit of the filing date of the provisional application. *See New Railhead Mfg., L.L.C.* v. *Vermeer Mfg. Co.,* 298 F.3d 1290, 1294, 63 U.S.P.Q.2d 1843, 1846 (Fed. Cir. 2002) (for a nonprovisional application to actually receive the benefit of the filing date of the provisional application, ''the specification of the provisional [application] must 'contain a written description of the invention and the manner and process of making and using it, in such full, clear, concise, and exact terms,' 35 U.S.C. 112 ¶ 1, to enable an ordinarily skilled artisan to practice the invention claimed in the nonprovisional application''). Section 1.78(b), however, does not also state (as did former § 1.78(a)(4)) that the provisional application must disclose the invention claimed in at least one claim of the later-filed application in the manner provided by 35 U.S.C. 112, ¶ 1, because it is not necessary for the rules of practice to restate provisions of a statute.

Section 1.78(b)(1) provides that the nonprovisional application or international application designating the United States of America must be filed not later than twelve months after the date on which the provisional application was filed, and that this twelve-month period is subject to 35 U.S.C. 21(b) and § 1.7(a). 35 U.S.C. 21(b) and § 1.7(a) provide that when the day, or the last day, for taking any action (*e.g.*, filing a nonprovisional application within twelve months of the date on which the provisional application was filed) or paying any fee in the Office falls on Saturday, Sunday, or a Federal holiday within the District of Columbia, the action may be taken, or fee paid, on the next succeeding secular or business day. Section 1.78(b) otherwise contains the provisions of former § 1.78(a)(4) and (a)(5).

Sections 1.78(b)(2) through (b)(5) contain the provisions of former 1.78(a)(4) and (a)(5). Section 1.78(c) contains provisions relating to delayed claims under 35 U.S.C. 119(e) for benefit of prior-filed provisional applications. Section 1.78(c) contains the provisions of former § 1.78(a)(6).

Section 1.78(d) contains provisions relating to claims under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed nonprovisional or international application.

Section 1.78(d)(1) provides conditions under which an application may claim the benefit under 35 U.S.C. 120, 121, or 365(c) and § 1.78 of a prior-filed nonprovisional application or international application designating the United States of America. Section 1.78(d)(1) also provides that the Office

will refuse to enter, or will delete if present, any specific reference to a prior-filed application that is not permitted by § 1.78(d)(1). If the claim for the benefit of a prior-filed nonprovisional application or international application designating the United States of America is not permitted by § 1.78(d)(1), the Office will refuse benefit. Section 1.78(d) also provides that the entry of or failure to delete a specific reference to a prior-filed application that is not permitted by § 1.78(d)(1) does not constitute a waiver of the provisions of § 1.78(d)(1). The grant of a petition under § 1.78(d)(1)(vi) or waiver of a requirement of § 1.78(d)(1) would be only by an explicit decision by an official who has been delegated the authority to decide such a petition or waiver. It would not occur by implication due to the entry of or failure to delete a specific reference to a prior-filed application that is not permitted by § 1.78(d)(1).

These provisions of § 1.78(d)(1) were included in the proposed changes to § 1.78(d)(3). *See Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims,* 71 FR at 54, 60, 1302 *Off. Gaz. Pat. Office* at 1323, 1328.

Section 1.78(d)(1)(i) provides for continuation applications or continuation-in-part applications that do not claim the benefit of a divisional application (either directly or indirectly). Section 1.78(d)(1)(i) permits such a continuation application or continuation-in-part application of a prior-filed nonprovisional application or international application designating the United States of America if: (1) The application is a continuation application as defined in § 1.78(a)(3) or a continuation-in-part application as defined in § 1.78(a)(4) that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of no more than two prior-filed applications; and (2) any application whose benefit is claimed under 35 U.S.C. 120, 121, or 365(c) in such nonprovisional application has its benefit claimed in no more than one other nonprovisional application. This does not include any nonprovisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii), (d)(1)(iii) or (d)(1)(vi).

Section 1.78(d)(1)(i) permits an applicant to continue prosecution of an application via two continuation applications (in parallel or serially), a continuation application and a continuation-in-part application (in parallel or serially), or two continuation-in-part applications (in parallel or serially). Applicants choosing to file applications (whether continuing or non-continuing) in parallel are reminded that § 1.75(b)(4) provides that, if certain conditions are met, the Office will treat each such application as having the total number of claims present in all of such applications for purposes of determining whether an examination support document is required by § 1.75(b). *See* also § 1.78(f) concerning additional provisions that are applicable if there are multiple applications that have the same claimed filing or priority date, substantial overlapping disclosure, a common inventor, and common assignee.

If an application is identified as a continuation-in-part application, however, § 1.78(d)(3) provides that the applicant must identify the claim or claims in the continuation-in-part application for which the subject matter is disclosed in the manner provided by 35 U.S.C. 112, ¶ 1, in the prior-filed application. *See* discussion of § 1.78(d)(3). Any claims in the continuation-in-part application that are not identified under § 1.78(d)(3) as supported by the prior-filed application will be subject to prior art based on the actual filing date of the continuation-in-part application.

For a continuation-in-part application that contains one or more claims for which the subject matter is not disclosed in the manner provided by 35 U.S.C. 112, ¶ 1, in the prior-filed application, § 1.78(d)(1)(i) will permit an applicant to continue prosecution of the claims that are directed solely to subject matter added in such continuation-in-part application via two continuation applications (or a continuation application and a continuation-in-part application, or two continuation-in-part applications). However, the ''additional'' continuation or continuation-in-part applications cannot claim the benefit of the prior-filed application relative to the first continuation-in-part application. The subject matter of at least one claim of a later-filed application must be disclosed in the prior-filed application in the manner provided by 35 U.S.C. 112, ¶ 1, for the later-filed application to actually receive the benefit of the filing date of the prior-filed application under 35 U.S.C. 120. *See Studiengesellschaft Kohle m.b.H.* v. *Shell Oil Co.,* 112 F.3d 1561, 1564–65, 42 U.S.P.Q.2d 1674, 1677–78 (Fed. Cir. 1997). In addition, the term of any resulting patent will be measured under 35 U.S.C. 154(a)(2) from the filing date of the prior-filed application, even if the later-filed application never receives any benefit from the prior-filed application. *See Abbott Labs.* v. *Novopharm Ltd.,* 104 F.3d 1305, 1309, 41 U.S.P.Q.2d 1535, 1537 (Fed. Cir. 1997) (rejecting patentee's argument that it should not be bound by the filing date of the prior-filed application because the later-filed application never received any actual benefit from the prior-filed application). Thus, the Office will not require that such ''additional'' continuation or continuation-in-part applications contain a showing that all of the claims are directed solely to subject matter added in the first continuation-in-part application. Rather, § 1.78(d)(1)(i) permits the ''additional'' continuation or continuation-in-part application to claim the benefit of the first continuation-in-part application, but does not permit the ''additional'' continuation or continuation-in-part application to also claim the benefit of the prior-filed initial application (the prior-filed application relative to the first continuation-in-part application). For example, consider an applicant who files: (1) An initial application ''A''; (2) a first continuation-in-part application ''B'' that claims the benefit of application ''A''; (3) a second continuation (or continuation-in-part) application ''C'' that claims the benefit of applications ''B'' and ''A''; and (4) an additional continuation (or continuation-in-part) application ''D'' that claims the benefit of applications ''C'' and ''B''. Under § 1.78(d)(1)(i), application ''D'' may claim the benefit of application ''C'' and continuation-in-part application ''B'', but may not claim any benefit of application ''A'' (except as permitted under § 1.78(d)(1)(vi)).

Applicants are permitted to file two continuation or continuation-in-part applications (§ 1.78(d)(1)) and one request for continued examination (§ 1.114) without any justification. The provisions of § 1.78(d)(1) are independent of the provisions of § 1.114. Therefore, the filing of a request for continued examination does not preclude an applicant from filing two continuation or continuation-in-part applications. In addition, an applicant may not agree to forgo a continuation application (or continuation-in-part application) to obtain a second or third request for continued examination, nor can an applicant agree to forgo a request for continued examination in exchange for a third continuation or continuation-in-part application. For example, an applicant cannot file a second request for continued examination without any justification instead of filing one of the two permitted continuation applications; and an applicant cannot file three continuation applications

instead of filing a request for continued examination. Of course, applicant may seek by petition a third or subsequent continuation or continuation-in-part application or a second or subsequent request for continued examination.

The Office, however, is implementing an optional streamlined continuation application procedure under which an applicant may request to have a continuation application filed on or after November 1, 2007, placed on an examiner's amended (Regular Amended) docket. The examiner will normally pick up for action a continuation application that has been placed on the examiner's amended (Regular Amended) docket faster (*e.g.*, within a few months from the date the application is docketed) than an application placed on the examiner's new continuing application (New Special) docket. The following conditions must be met for the continuation application to be placed on an examiner's amended (Regular Amended) docket rather than on the new continuing application (New Special) docket: (1) The application must disclose and claim only an invention or inventions that were disclosed and claimed in the prior-filed application; (2) the applicant must agree that any election in response to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121, including an election of species requirement, in the prior-filed application carries over to the continuation application; (3) the prior-filed application must be under a final Office action (§ 1.113) or under appeal at the time of filing the continuation application; (4) the prior-filed application must be expressly abandoned upon filing of the continuation application, with a letter of express abandonment under § 1.138 being concurrently filed in the prior-filed application; and (5) applicant must request that the continuation application be placed on an examiner's amended (Regular Amended) docket. This procedure is not applicable to design applications because the continued prosecution application procedures of § 1.53(d) currently provide design applicants with an optional streamlined continuation application procedure.

The optional streamlined continuation application procedure, however, does require that the applicant provide a continuation application filed under 35 U.S.C. 111(a) and § 1.53(b) (and not a request for continued examination under 35 U.S.C. 132(b) and § 1.114 or a continued prosecution application under § 1.53(d)). Thus, the applicant must file a continuation application that meets the conditions set forth in 35 U.S.C. 111(a) and § 1.53(b) to be accorded a filing date. The continuation application must also be complete under § 1.51(b) or completed under § 1.53(f). The Office will not docket an application for examination until the application is complete (§§ 1.51(b) and 1.53(f)) and in condition for publication (§ 1.211). *See* § 1.53(h). Thus, any delay in submitting the filing fee and oath or declaration (or copy of the oath or declaration from the prior-filed application under § 1.63(d)) will delay the docketing of a continuation application even if the applicant has requested that the continuation application be given streamlined docketing.

This optional streamlined continuation application procedure concerns only the placement of the continuation application on an examiner's amended (Regular Amended) docket. The continuation application is otherwise treated as a new application for patent. For example, (1) the application filing fees including the basic filing fee, search and examination fees, and any required excess claims fees (and not the request for continued examination fee set forth in § 1.17(e)) are required; (2) the continuation application will be assigned a new application number; and (3) the continuation application is subject to the patent term provisions of 35 U.S.C. 154(b) and § 1.702 *et seq.* as a new continuation application (and not a request for continued examination in the prior-filed application).

Section 1.78(d)(1)(ii) provides for divisional applications of an application for the claims to a non-elected invention that has not been examined if the application was subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121. The divisional application need not be filed during the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. This final rule also permits applicant to file two continuation applications of a divisional application plus a request for continued examination in the divisional application family, without any justification. *See* §§ 1.78(d)(1)(iii) and 1.114(f).

Specifically, § 1.78(d)(1)(ii) permits a divisional application of a prior-filed nonprovisional application or international application designating the United States of America under the following conditions. First, the divisional application must be a divisional application as defined in § 1.78(a)(2) that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of a prior-filed application that was subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121. Second, the divisional application must contain only claims directed to an invention or inventions that were identified in the requirement to comply with the requirement of unity of invention or requirement for restriction but were not elected for examination and were not examined in the prior-filed application or in any other nonprovisional application. The ''not elected for examination and were not examined in any other nonprovisional application'' requirement does not apply to any continuation application that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of the divisional application and satisfies the conditions set forth in § 1.78(d)(1)(iii) or (d)(1)(vi).

Section 1.78(d)(1)(ii)(A) permits an applicant to obtain examination of claims that were withdrawn from consideration in the prior-filed application due to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121. Thus, § 1.78(d)(1)(ii)(A) permits a divisional application filed as a result of a requirement to comply with the requirement of unity of invention under PCT Rule 13 or requirement for restriction under 35 U.S.C. 121 in the prior-filed application. Section 1.78(d)(1)(ii)(A), however, does not permit a divisional application not filed as a result of such a requirement in the prior-filed application. Thus, § 1.78(d)(1)(ii)(A) permits so-called ''involuntary'' divisional applications but does not permit so-called ''voluntary'' divisional applications.

Section 1.78(d)(1)(ii)(B) does not permit the filing of a set of parallel divisional applications containing claims to the same invention. Applicant, however, may serially prosecute up to two continuation applications that contain claims to the same invention as is claimed in a prior-filed divisional application if the continuation application satisfies the conditions of § 1.78(d)(1)(iii).

As discussed previously, applicants cannot rely upon a requirement for restriction including an election of species to file a divisional application in situations where: (1) The applicant traverses the requirement for restriction;

(2) the requirement for restriction may be conditional, such as a requirement for election of species in an application that contains a claim that is generic to all of the claimed species (*see* MPEP section 809); and (3) the claims to the non-elected invention may be rejoined at the request of the applicant (*see* MPEP § 821.04 *et seq.*). *See* the discussion of § 1.75(b)(5). This is because when the requirement for restriction is withdrawn in the prior-filed application, any divisional application that has been filed as the result of the restriction requirement of the prior-filed application will not be proper under §§ 1.78(a)(2) and 1.78(d)(1)(ii). Applicant is not permitted to file a divisional application of a prior-filed application that is no longer subject to a restriction requirement. Under §§ 1.78(a)(2) and 1.78(d)(1)(ii), the prior-filed application to which a divisional application claims the benefit must be subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121. Sections 1.78(a)(2) and 1.78(d)(1)(ii) also require a divisional application to contain only claims directed to a non-elected invention that has not been examined.

For an application that contains a generic claim in which a requirement for an election of species has been made, applicants should conclude prosecution of the generic claim in the initial application and its continuation or continuation-in-part applications, including exhaustion of any available appeals, before even filing a divisional application to a non-elected species. If applicant no longer wants to pursue the generic claim, applicant may file a divisional application directed to a non-elected species. If applicant files a divisional application directed to a non-elected species, applicant must: (1) Cancel the claims to the non-elected species and the generic claim in the prior-filed application before a rejoinder or reinstatement occurs; (2) not present the non-elected claims and the generic claim in any continuation or continuation-in-part application of the initial application; and (3) not present the generic claim in the divisional application or any continuation application of the divisional application.

Under the Office's rejoinder practice, an applicant may request rejoinder of claims to a non-elected invention that depend from or otherwise require all the limitations of an allowable claim. *See* MPEP § 821.04 *et seq.* Applicants may retain claims to a non-elected invention in an application for possible rejoinder in the event of the allowance of a claim to the elected invention. If applicant cancels all of the claims directed to a non-elected invention before rejoinder occurs and files a divisional application, the restriction requirement will not be withdrawn and the non-elected claims that are now canceled will not be rejoined. This will preserve applicant's rights under 35 U.S.C. 121 and § 1.78(d)(1)(ii). *See* MPEP § 821.04(b).

Section 1.78(d)(1)(iii) provides for continuation applications that claim the benefit of a divisional application (either directly or indirectly). Section 1.78(d)(1)(iii) permits such a continuation application of a prior-filed nonprovisional application or international application designating the United States of America if: (1) The application is a continuation application as defined in § 1.78(a)(3) that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of a divisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii); (2) the application discloses and claims only an invention or inventions that were disclosed and claimed in the divisional application; (3) the application claims the benefit of only the divisional application, any application to which such divisional application claims benefit under 35 U.S.C. 120, 121, or 365(c) in compliance with the conditions set forth in § 1.78(d)(1)(ii), and no more than one intervening prior-filed nonprovisional application (*i.e.*, only one continuation application of the divisional application filed between the divisional application and the second continuation application of the divisional application); and (4) no more than one other nonprovisional application claims the benefit of the divisional application. This does not include any other divisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii) or any nonprovisional application that claims the benefit of such divisional application and satisfies the conditions set forth in § 1.78(d)(1)(iii) or (d)(1)(vi). Section 1.78(d)(1)(iii) permits an applicant to continue prosecution of a divisional application via two continuation applications (in parallel or serially). The Office, however, will treat each application prosecuted in parallel as having the total number of claims present in all of such applications for purposes of determining whether an examination support document is required by § 1.75(b) provided that the continuation application contains at least one claim that is patentably indistinct from at least one claim in the divisional application.

Section 1.78(d)(1)(iii) does not permit a continuation-in-part of a divisional application. Section 1.78(d)(1)(iii) is designed to permit an applicant to complete prosecution with respect to an invention or inventions that were disclosed and claimed in a divisional application, and not to permit an applicant to seek patent protection for a new invention that merely bears some relationship to an invention or inventions that were disclosed and claimed in a divisional application. Section 1.78(d)(1)(i) provides a mechanism for applicants to seek patent protection for a new invention that is an improvement of an invention or inventions that were disclosed and claimed in an initial or continuing (including a divisional) application.

The provisions of §§ 1.78(d)(1)(i) through (d)(1)(iii) are illustrated with the following example: (1) There is an initial application ''A'' that is subject to a restriction requirement under 35 U.S.C. 121 and § 1.141 *et seq.*; (2) a continuation application ''B'' of application ''A''; (3) a further continuation application ''C'' which claims the benefit of continuation application ''B'' and initial application ''A''; (4) a divisional application ''D'' (based upon the restriction requirement under 35 U.S.C. 121 and § 1.141 *et seq.* in application ''A''), which claims the benefit of continuation application ''C'', continuation application ''B'', and initial application ''A''; (5) a continuation application ''E'' of divisional application ''D'', which claims the benefit of divisional application ''D'', continuation application ''C'', continuation application ''B'', and initial application ''A''; and (6) a further continuation application ''F'' of continuation application ''E'', which claims the benefit of continuation application ''E'', divisional application ''D'', continuation application ''C'', continuation application ''B'', and initial application ''A''.

Under § 1.78(d)(1)(i), application ''C'' is either a continuation application under § 1.78(a)(3) or a continuation-in-part application under § 1.78(a)(4) that claims the benefit of no more than two prior-filed applications ''B'' and ''A''. In addition, applications ''B'' and ''A'' whose benefit is claimed in application ''C'' have their benefit claimed in no more than one other application (not including divisional application ''D'' or continuation applications ''E'' and ''F'' of the divisional application ''D''). That is, the benefit of application ''A'' is claimed in only one other application ''B'' (not including divisional application ''D'' or continuation

applications ''E'' and ''F'' of the divisional application ''D''), and the benefit of application ''B'' is claimed in only one other application ''C'' (not including divisional application ''D'' or continuation applications ''E'' and ''F'' of the divisional application ''D'').

Under § 1.78(d)(1)(ii), nonprovisional application ''D'' is a divisional application under § 1.78(a)(2) since it claims the benefit of prior-filed application ''A'' that was subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121. Divisional application ''D'' may contain only claims directed to an invention identified in the requirement to comply with the requirement of unity of invention or requirement for restriction but were not elected for examination in prior-filed application ''A'' or in any other nonprovisional application (applications ''B and ''C''), except for a nonprovisional application (applications ''E'' and ''F'') that claims the benefit of divisional application ''D'' and satisfies the conditions of § 1.78(d)(1)(iii). That is, divisional application ''D'' may contain only claims directed to an invention or inventions that were identified in such requirement to comply with the requirement of unity of invention or requirement for restriction but were not elected for examination in any other application except for its continuation applications ''E'' and ''F''. Finally, the divisional application ''D'' claims the benefit of the prior-filed applications (applications ''A'', ''B'', and ''C'').

Under § 1.78(d)(1)(iii), nonprovisional application ''F'' is a continuation application under § 1.78(a)(3) that claims the benefit of divisional application ''D''. Application ''D'' is a divisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii). The nonprovisional application ''F'' may disclose and claim only an invention that was disclosed and claimed in divisional application ''D''. The nonprovisional application ''F'' claims the benefit of only divisional application ''D'', the applications to which divisional application ''D'' claims benefit in compliance with the conditions of § 1.78(d)(1)(ii) (applications ''A'', ''B'', and ''C''), and no more than one intervening prior-filed nonprovisional application (application ''E''). Divisional application ''D'' whose benefit is claimed in nonprovisional application ''E'' and in nonprovisional application ''F'' has its benefit claimed in no more than one other nonprovisional application. That is, with respect to application ''F'', divisional application ''D'' has its benefit claimed in no more than one other nonprovisional application (application ''E''), and with respect to application ''E'', divisional application ''D'' has its benefit claimed in no more than one other nonprovisional application (application ''F'').

Section 1.78(d)(1)(iv) pertains to the situation in which an applicant files a bypass continuation (or continuation-in-part) application rather than paying the basic national fee (entering the national stage) in an international application in which a Demand for international preliminary examination (PCT Article 31) has not been filed, and the international application does not claim the benefit of any other nonprovisional application or international application designating the United States of America. Section 1.78(d)(1)(iv) provides that in this situation the applicant may file ''one more'' continuation application (or continuation-in-part application) without there being a requirement for a petition and showing under § 1.78(d)(1)(vi). A ''bypass'' continuation (or continuation-in-part) application is an application for patent filed under 35 U.S.C. 111(a) that claims the benefit of the filing date of an earlier international application designating the United States of America that did not enter the national stage under 35 U.S.C. 371. *See* H.R. Rep. No. 107–685, at 222 (2002).

Specifically, § 1.78(d)(1)(iv) provides that a continuation application or continuation-in-part application is permitted if the following conditions are met: (1) The application claims benefit under 35 U.S.C. 120 or 365(c) of a prior-filed international application designating the United States of America, and a Demand has not been filed and the basic national fee (§ 1.492(a)) has not been paid in the prior-filed international application and the prior-filed international application does not claim the benefit of any other nonprovisional application or international application designating the United States of America; (2) the application is a continuation application as defined in § 1.78(a)(3) or a continuation-in-part application as defined in § 1.78(a)(4) that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of no more than three prior-filed applications; and (3) any application whose benefit is claimed under 35 U.S.C. 120, 121, or 365(c) in such nonprovisional application has its benefit claimed in no more than two other nonprovisional applications. This does not include any nonprovisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii), (d)(1)(iii) or (d)(1)(vi).

Section 1.78(d)(1)(v) pertains to the situation in which an applicant files a continuation (or continuation-in-part) application to correct informalities rather than completing an application for examination under § 1.53 (*i.e.*, the prior-filed application became abandoned due to the failure to timely reply to an Office notice issued under § 1.53(f)). The prior-filed nonprovisional application, however, must be entitled to a filing date and have paid therein the basic filing fee within the pendency of the application. *See* § 1.78(d)(2). Section 1.78(d)(1)(v) provides that in this situation the applicant may file ''one more'' continuation application (or continuation-in-part application) without there being a requirement for a petition and showing under § 1.78(d)(1)(vi). Specifically, § 1.78(d)(1)(v) provides that a continuation application or continuation-in-part application is permitted if the following conditions are met: (1) The application claims benefit under 35 U.S.C. 120 or 365(c) of a prior-filed nonprovisional application filed under 35 U.S.C. 111(a), and the prior-filed nonprovisional application became abandoned due to the failure to timely reply to an Office notice issued under § 1.53(f) and does not claim the benefit of any other nonprovisional application or international application designating the United States of America; (2) the application is a continuation application as defined in § 1.78(a)(3) or a continuation-in-part application as defined in § 1.78(a)(4) that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of no more than three prior-filed applications; and (3) any application whose benefit is claimed under 35 U.S.C. 120, 121, or 365(c) in such nonprovisional application has its benefit claimed in no more than two other nonprovisional applications. This does not include any nonprovisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii), (d)(1)(iii) or (d)(1)(vi).

Section 1.78(d)(1)(vi) provides that a continuing nonprovisional application that is filed to obtain consideration of an amendment, argument, or evidence that could not have been submitted during the prosecution of the prior-filed application, and does not satisfy the conditions set forth in § 1.78(d)(1)(i), (ii), (iii), (iv) or (v), may claim the benefit under 35 U.S.C. 120, 121, or 365(c) of such prior-filed application. Under § 1.78(d)(1)(vi), a petition must be filed in such nonprovisional application that is accompanied by the fee set forth in § 1.17(f) and a showing

that the amendment, argument, or evidence sought to be entered could not have been submitted during the prosecution of the prior-filed application. This will permit an applicant to continue prosecution of an application via a continuing application to obtain consideration of an amendment, argument, or evidence that could not have been submitted during the prosecution of the prior-filed application. Section 1.78(d)(1)(vi) sets forth the time period within which such a petition must be provided: (1) If the later-filed continuing application is an application filed under 35 U.S.C. 111(a), within four months from the actual filing date of the later-filed application; and (2) if the continuing application is a nonprovisional application which entered the national stage from an international application after compliance with 35 U.S.C. 371, within four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in the international application.

With respect to the application of the changes to § 1.78 in this final rule to a reissue application, benefit claims under 35 U.S.C. 120, 121, or 365(c) in the application for patent that is being reissued will not be taken into account in determining whether a continuing reissue application claiming the benefit under 35 U.S.C. 120, 121, or 365(c) of the reissue application satisfies one or more of the conditions set forth in §§ 1.78(d)(1)(i) through 1.78(d)(1)(vi). However, an applicant may not use the reissue process to add to the original patent benefit claims under 35 U.S.C. 120, 121, or 365(c) that do not satisfy one or more of the conditions set forth in §§ 1.78(d)(1)(i) through 1.78(d)(1)(vi), if the application for the original patent was filed on or after November 1, 2007.

Section 1.78(d)(2) provides that each prior-filed application must name as an inventor at least one inventor named in the later-filed application. In addition, each prior-filed application must either be: (1) An international application entitled to a filing date in accordance with PCT Article 11 and designating the United States of America; or (2) a nonprovisional application under 35 U.S.C. 111(a) that is entitled to a filing date as set forth in § 1.53(b) or § 1.53(d) for which the basic filing fee set forth in § 1.16 has been paid within the pendency of the application (provisions from former § 1.78(a)(1)).

Section 1.78(d)(3) is amended to include the parenthetical ''(*i.e.*, whether the later-filed application is a continuation, divisional, or continuation-in-part of the prior-filed nonprovisional application or international application)'' to clarify in the rules of practice what is meant by the requirement that an applicant identify the relationship of the applications. *See* MPEP § 201.11.

Section 1.78(d)(3) also provides that if an application is identified as a continuation-in-part application, the applicant must identify the claim or claims in the continuation-in-part application for which the subject matter is disclosed in the manner provided by 35 U.S.C. 112, ¶ 1, in the prior-filed application. Any claim in the continuation-in-part application for which the subject matter is not identified as being disclosed in the manner provided by 35 U.S.C. 112, ¶ 1, in the prior-filed application will be treated as entitled only to the actual filing date of the continuation-in-part application, and will be subject to prior art based on the actual filing date of the continuation-in-part application. As discussed previously, to avoid any unnecessary delay in the prosecution of the application, applicant should provide the identification before the examiner begins to conduct a prior art search. If the failure to identify the claims for which the subject matter is disclosed in the manner provided by 35 U.S.C. 112, ¶ 1, in the prior-filed application causes the examiner to include a new prior art rejection in a second or subsequent Office action, the inclusion of the new prior art rejection will not preclude the Office action from being made final.

This final rule eliminates from § 1.78(d) the provision that the prior-filed application disclose the invention claimed in at least one claim of the later-filed application in the manner provided by 35 U.S.C. 112, ¶ 1. For a later-filed application to receive the benefit of the filing date of a prior-filed application, 35 U.S.C. 120 requires that the prior-filed application must disclose the invention claimed in at least one claim of the later-filed application in the manner provided by 35 U.S.C. 112, ¶ 1. The Office, however, does not make a determination as to whether a prior-filed application discloses the invention claimed in a claim of the later-filed application in the manner provided by 35 U.S.C. 112, ¶ 1, unless that determination is necessary to determine the patentability of such claim. *See* MPEP § 201.08 (''Unless the filing date of the earlier nonprovisional application is actually needed * * *, there is no need for the Office to make a determination as to whether the requirement of 35 U.S.C. 120, that the earlier nonprovisional application discloses the invention of the second application in the manner provided by 35 U.S.C. 112, ¶ 1, is met and whether a substantial portion of all of the earlier nonprovisional application is repeated in the second application in a continuation-in-part situation. Accordingly, an alleged continuation-in-part application should be permitted to claim the benefit of the filing date of an earlier nonprovisional application if the alleged continuation-in-part application complies with the * * * formal requirements of 35 U.S.C. 120.'').

Section 1.78(d)(4) and (d)(5) contain the provisions of former § 1.78(a)(2).

Section 1.78(d)(6) provides that cross-references to applications for which a benefit is not claimed must be located in a paragraph separate from the paragraph containing the references to applications for which a benefit is claimed. Including cross-references to applications for which a benefit is not claimed in the same paragraph as the paragraph containing the references to applications for which a benefit is claimed may lead to the Office inadvertently scheduling the application for publication under 35 U.S.C. 122(b) and § 1.211 *et seq.* on the basis of the cross-referenced applications having the earliest filing date.

Section 1.78(e) contains provisions relating to delayed claims under 35 U.S.C. 120, 121, or 365(c) for benefit of prior-filed nonprovisional or international applications. Section 1.78(e) contains the provisions of former § 1.78(a)(3).

Section 1.78(f) contains provisions relating to applications and patents naming at least one inventor in common.

Section 1.78(f)(1)(i) provides that the applicant in a nonprovisional application that has not been allowed (§ 1.311) must identify by application number (*i.e.*, series code and serial number) and patent number (if applicable) each other pending or patented nonprovisional application, in a separate paper, for which the following conditions are met: (1) The application has a filing date that is the same as or within two months of the filing date of the other pending or patented application, taking into account any filing date for which a benefit is sought under title 35, United States Code; (2) the application names at least one inventor in common with the other pending or patented application; and (3) the application is owned by the same person, or subject to an obligation of assignment to the same person, as the other pending or patented application. This identification requirement would also apply to each identified application because the identifying application has

a filing date that is the same as or within two months of the filing date of the identified application and vice versa.

The phrase ''taking into account any filing date for which a benefit is sought under title 35, United States Code'' in § 1.78(f)(1)(i)(A) means any filing date for which a benefit (or priority) is sought or claimed under 35 U.S.C. 111, 119, 120, 121, 363, or 365. *Cf.* 35 U.S.C. 122(b)(1)(A) (requires publication of patent applications ''promptly after the expiration of a period of 18 months from the earliest filing date for which a benefit is sought under this title'' (emphasis added), meaning eighteen months from the earliest filing date for which a benefit or priority is sought or claimed under 35 U.S.C. 111, 119, 120, 121, 363, or 365). Thus, if an application claims the benefit of or priority to other applications, ''the filing date of [the application], taking into account any filing date for which a benefit is sought under title 35, United States Code,'' is the actual filing date of the application as well as the filing date of each application to which the application claims a benefit or priority. For example, if an application has a filing date of December 1, 2006, and claims the benefit of a nonprovisional application that was filed on June 1, 2004, and claims the priority of a foreign application that was filed on June 1, 2003, for purposes of §§ 1.78(f)(1) and (f)(2) the filing date of the application ''taking into account any filing date for which a benefit is sought under title 35, United States Code,'' is December 1, 2006, June 1, 2004, and June 1, 2003.

The phrase ''owned by the same person, or subject to an obligation of assignment to the same person'' in § 1.78(f)(1)(i)(C) (and in § 1.78(f)(2)(i)(C) and 1.78(f)(3)) has the same meaning as it does in 35 U.S.C. 103(c). *See* MPEP § 706.02(l)(2) for a discussion of the definition of this phrase as it is used in 35 U.S.C. 103(c).

The phrase ''has not been allowed'' in § 1.78(f)(1)(i) (and in § 1.78(f)(2)(ii) and (iii)) means a notice of allowance under § 1.311 has not been mailed in the application, or a notice of allowance under § 1.311 has been mailed in the application but the application has been withdrawn from issue. Thus, the identification of such one or more other pending or patented nonprovisional applications under § 1.78(f)(1)(i) is not required in an application in which a notice of allowance has been mailed, unless the application is withdrawn from issue.

Section 1.78(f)(1)(ii) also provides that one or more other nonprovisional applications under § 1.78(f)(1)(i) must be identified within the later of: (1) Four months from the actual filing date of a nonprovisional application filed under 35 U.S.C. 111(a); (2) four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in a nonprovisional application entering the national stage from an international application under 35 U.S.C. 371; or (3) two months from the mailing date of the initial filing receipt in the other nonprovisional application that is required to be identified under § 1.78(f)(1)(i).

Section 1.78(f)(2)(i) provides that a rebuttable presumption shall exist that a nonprovisional application contains at least one claim that is not patentably distinct from at least one of the claims in the one or more other pending or patented nonprovisional applications if: (1) The application has a filing date that is the same as the filing date of another pending application or patent, taking into account any filing date for which a benefit is sought; (2) the application names at least one inventor in common with the other pending application or patent; (3) the application is owned by the same person, or subject to an obligation of assignment to the same person, as the other pending application or patent; and (4) the application contains substantially overlapping disclosure as the other pending application or patent. Section 1.78(f)(2)(i) further provides that substantial overlapping disclosure exists if the other pending or patented nonprovisional application has written description support under 35 U.S.C. 112, ¶ 1, for at least one claim in the nonprovisional application.

If these conditions exist, the applicant must under § 1.78(f)(2)(ii) in the nonprovisional application, unless the nonprovisional application has been allowed (§ 1.311), within the time period specified in § 1.78(f)(2)(iii) either: (1) Rebut this presumption by explaining how the application contains only claims that are patentably distinct from the claims in each of such other pending applications or patents; or (2) submit a terminal disclaimer in accordance with § 1.321(c). In addition, § 1.78(f)(2)(ii)(B) provides that where one or more other pending nonprovisional applications containing patentably indistinct claims have been identified, the applicant must explain why there are two or more pending nonprovisional applications naming at least one inventor in common and owned by the same person, or subject to an obligation of assignment to the same person, which contain patentably indistinct claims. Unless applicant presents good and sufficient reasons for such multiple applications, the Office may require elimination of the patentably indistinct claims from all but one of the applications. *See* § 1.78(f)(3).

As discussed previously, for applications having a continuity relationship, the prior application must be pending at the time the continuing application is filed. *See* 35 U.S.C. 120 (requires that a continuing application be filed before the patenting or abandonment of or termination of proceedings on the prior application). An applicant is not required to provide an explanation under § 1.78(f)(2)(ii)(B) for a continuation application or continuation-in-part application of a prior-filed application that has been allowed, provided that the prior-filed application is not withdrawn from issue. Furthermore, where the other nonprovisional application containing patentably indistinct claims is allowed, the Office will not count the claims of the allowed application in determining whether the total number of claims present in all of the copending nonprovisional applications containing patentably indistinct claims exceeds the five independent claim and twenty-five total claim threshold under § 1.75(b)(4). *See* the discussion of § 1.75(b)(4). A terminal disclaimer in accordance with § 1.321(c) will, however, be required in each nonprovisional application containing patentably indistinct claims to overcome any obviousness-type double patenting rejection.

Under § 1.78(f)(2)(iii), the actions specified in § 1.78(f)(2)(ii) (if required) must be taken within the later of: (1) Four months from the actual filing date of a nonprovisional application filed under 35 U.S.C. 111(a); (2) four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in a nonprovisional application entering the national stage from an international application under 35 U.S.C. 371; (3) the date on which a claim that is not patentably distinct from a claim in one or more other pending or patented applications is presented; or (4) two months from the mailing date of the initial filing receipt in the one or more other pending or patented applications.

The requirement under § 1.78(f)(2)(ii) for taking one of the actions specified in § 1.78(f)(2)(ii) does not apply to the applicant in the application in which a notice of allowance has been mailed, unless the application is withdrawn from issue (§ 1.313). For example, if an applicant filed a continuation application after a notice of allowance has been mailed in the prior-filed application, the applicant must either rebut the presumption under

§ 1.78(f)(2)(i) or submit a terminal disclaimer in accordance with § 1.321(c) within the time period set forth in § 1.78(f)(2)(iii) in the continuation application. Under § 1.78(f)(2)(ii), the applicant, however, is not required to rebut the presumption or submit a terminal disclaimer in the allowed prior-filed application. Nevertheless, a terminal disclaimer in accordance with § 1.321(c) will be required in each nonprovisional application containing patentably indistinct claims to overcome any obviousness-type double patenting rejection.

As discussed previously, when an applicant files multiple applications that are substantially the same, the applicant is responsible for assisting the Office in resolving potential double patenting situations, rather than taking no action until faced with a double patenting rejection. Thus, if an Office action must include a double patenting rejection (either statutory or obviousness-type double patenting), it is because the applicant has not met his or her responsibility to resolve the double patenting situation. Therefore, the inclusion of a new double patenting rejection in a second or subsequent Office action will not preclude the Office action from being made final.

Section 1.78(f)(3) applies when there are two or more commonly owned (owned by the same person, or are subject to an obligation of assignment to the same person) nonprovisional applications containing patentably indistinct claims. Under § 1.78(f)(3), unless applicant presents good and sufficient reasons for such multiple applications, the Office may require elimination of the patentably indistinct claims from all but one of the applications. Section 1.78(f)(3) contains provisions similar to former § 1.78(b). The Office expects to apply this provision primarily in situations covered by § 1.78(f)(2)(ii), under which applicants must explain why it is necessary that there are two or more pending nonprovisional applications naming at least one inventor in common and owned by the same person, or subject to an obligation of assignment to the same person, which contain patentably indistinct claims. The Office, however, may require that an applicant provide good and sufficient reason whenever there are two or more pending nonprovisional applications with such common ownership or assignment obligation and patentably indistinct claims, regardless of the relative filing dates of the applications. Section 1.78(f)(3) does not apply to the claims in a patent.

The following are two examples where an applicant may have a good and sufficient reason under § 1.78(f)(3) for there being two or more pending nonprovisional applications that contain patentably indistinct claims: (1) An applicant filed a continuation application after the mailing of a notice of allowance in the prior-filed application, but the allowance of the prior-filed application was subsequently withdrawn by the Office; or (2) an interference was declared in an application that contains both claims corresponding to the count and claims not corresponding to the count, the BPAI suggests that the claims not corresponding to the count be canceled from the application in interference and pursued in a separate application, and the applicant filed a continuation application to present the claims not corresponding to the count. These examples are merely illustrative and not exhaustive.

Section 1.78(g) addresses applications or patents under reexamination that name different inventors and contain patentably indistinct claims. Section 1.78(g) contains the provisions of former § 1.78(c), except that ''conflicting claims'' is changed to ''patentably indistinct claims'' for clarity and for consistency with the language of § 1.78(f).

Section 1.78(h) covers the situation in which parties to a joint research agreement are treated (in essence) as a common owner for purposes of 35 U.S.C. 103 by virtue of the CREATE Act. Section 1.78(h) provides that if an application discloses or is amended to disclose the names of parties to a joint research agreement under 35 U.S.C. 103(c)(2)(C), the parties to the joint research agreement are considered to be the same person for purposes of § 1.78. The CREATE Act amended 35 U.S.C. 103(c) to provide that subject matter developed under a joint research agreement shall be treated as owned by the same person or subject to an obligation of assignment to the same person for purposes of determining obviousness if three conditions are met: (1) The claimed invention was made by or on behalf of parties to a joint research agreement that was in effect on or before the date the claimed invention was made; (2) the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and (3) the application for patent for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement. *See Changes to Implement the Cooperative Research and Technology Enhancement Act of 2004,* 70 FR 1818, 1818 (Jan. 11, 2005), 1291 *Off. Gaz. Pat. Office* 58, 58–59 (Feb. 8, 2005) (final rule). Section 1.78(h) also provides that if the application is amended to disclose the names of parties to a joint research agreement, the applicant must identify the one or more other nonprovisional applications as required by § 1.78(f)(1) with the amendment unless the applications have been identified within the four-month period specified in § 1.78(f)(1).

Section 1.78(i) provides that the time periods set forth in § 1.78 are not extendable.

The changes to § 1.78 (except §§ 1.78(a) and 1.78(d)(1)) are applicable to any nonprovisional application pending on or after November 1, 2007. The changes to §§ 1.78(a) and 1.78(d)(1) are applicable to any application filed on or after November 1, 2007, or any application entering the national stage after compliance with 35 U.S.C. 371 on or after November 1, 2007. Except as otherwise indicated in this final rule, any application filed under 35 U.S.C. 111(a) on or after November 1, 2007, or any application entering the national stage after compliance with 35 U.S.C. 371 on or after November 1, 2007, seeking to claim the benefit under 35 U.S.C. 120, 121, or 365(c) and § 1.78 of a prior-filed nonprovisional application or international application must either: (1) Meet the requirements specified in one of §§ 1.78(d)(1)(i) through (d)(1)(v); or (2) include a grantable petition under § 1.78(d)(1)(vi).

With respect to applications that claim the benefit under 35 U.S.C. 120, 121, or 365(c) only of nonprovisional applications or international applications filed before August 21, 2007: An application is not required to meet the requirements set forth in § 1.78(d)(1) if: (1) The application claims the benefit under 35 U.S.C. 120, 121, or 365(c) only of prior-filed nonprovisional applications filed before August 21, 2007 or prior-filed applications entering the national stage after compliance with 35 U.S.C. 371 before August 21, 2007; and (2) there is no other application filed on or after the publication date of this final rule in the **Federal Register** that also claims the benefit under 35 U.S.C. 120, 121, or 365(c) of such prior-filed nonprovisional applications or international applications. This provision will provide applicants with ''one more'' continuation application or continuation-in-part application of a second or subsequent continuing application (continuation application or continuation-in-part application) that was filed prior to the publication date of this final rule in the **Federal Register**

without a petition under § 1.78(d)(1)(vi). Thus, an applicant may file a single continuation application or continuation-in-part application on or after November 1, 2007, without meeting the requirements specified in § 1.78(d)(1)(i) through (d)(1)(v), or including a petition under § 1.78(d)(1)(vi), even if the prior-filed application was a second or subsequent continuation or continuation-in-part application. It should be noted that the purpose of this provision is to ensure that an applicant may file ''one more'' continuation application or continuation-in-part application of an application that was filed prior to the publication date of this final rule in the **Federal Register** without a petition and showing, and not to provide an ''extra'' continuation application or continuation-in-part application for applications filed prior to the publication date of this final rule in the **Federal Register**. If an application filed before the publication date of this final rule in the **Federal Register** is not a continuing application or is only the first continuing application, this provision will not entitle an applicant to file a third or subsequent continuation or continuation-in-part application without a petition under § 1.78(d)(1)(vi) showing that the amendment, argument, or evidence sought to be entered could not have been submitted during the prosecution of the prior-filed application.

Section 1.104 (nature of examination): The Office proposed a number of changes to § 1.104 to implement the ''representative claims'' examination approach. *See Changes to Practice for the Examination of Claims in Patent Applications*, 71 FR at 64, 68, 1302 *Off. Gaz. Pat. Office* at 1131, 1332. The Office is not proceeding with the changes to § 1.104 to implement the ''representative claims'' examination approach, but is revising § 1.104 for consistency with current examination practices.

Section 1.104(a)(1) is amended to add the phrase ''and other requirements'' to the phrase ''the examination shall be complete with respect both to compliance of the application or patent under reexamination with the applicable statutes and rules'' to address situations in which the requirement is based upon Office practice as set forth in the MPEP or in the case law. For example, the phrase ''other requirements'' would address the situation in which a claim did not comply with the requirement in MPEP § 608.01(m) that each claim be the object of a single sentence starting with ''I (or we) claim,'' ''The invention claimed is,'' or the equivalent. *See Fressola* v. *Manbeck*, 36 U.S.P.Q.2d 1211, 1212 (D.D.C. 1995). In addition, in the event that there is a requirement for restriction including election of species, or both, the provision in § 1.104(a)(1) for a ''thorough study [and] investigation of the available prior art relating to the subject matter of the claimed invention'' will continue to apply only with respect to the invention and species elected for examination on the merits. This provision of § 1.104 does not apply with respect to an invention or species that has been withdrawn from consideration as a result of a requirement for restriction, including an election of species.

Section 1.104(b) is also amended to delete the sentence ''[h]owever, matters of form need not be raised by the examiner until a claim is found allowable.'' The Office would prefer that all matters of form be resolved at the earliest time during the patent examination process. Nevertheless, an Office action would not be considered improper simply because the Office action did not raise every applicable issue of form present in the application.

Section 1.105 (requirements for information): Section 1.105(a)(1) is amended to provide that an applicant may be required to set forth where (by page and line or paragraph number) in the specification of the application, or any application the benefit of whose filing date is sought under title 35, United States Code, there is written description support for the invention as defined in the claims (whether in independent or dependent form), and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the invention, under 35 U.S.C. 112, ¶ 1. Therefore, in situations in which it is not readily apparent where the specification of the application, or an application for which a benefit is claimed, provides written description support and enablement under 35 U.S.C. 112, ¶ 1, for a claim or a limitation of a claim, the examiner may require the applicant to provide such information. The Office considers this authority to be inherent under the patent statute and existing rules (including § 1.105), but is revising § 1.105 to make the authority explicit.

Section 1.110 (inventorship and date of invention of the subject matter of individual claims): Section 1.110 is amended to refer to § 1.78, rather than a specific paragraph (paragraph (c)) of § 1.78. The first sentence of § 1.110 is also amended to relocate the phrase ''when necessary for purposes of an Office proceeding'' to the end of the sentence for clarity.

Section 1.114 (request for continued examination): Under § 1.114, an applicant is permitted to file a single request for continued examination without a petition and showing in a single application family. *See* § 1.114(f)(1). An application family includes the initial application and its continuation or continuation-in-part applications. An applicant is also permitted to file a single request for continued examination without a petition and showing in a divisional application family. *See* §§ 1.114(f)(2) and (f)(3). A divisional application family includes the divisional application and its continuation applications. An applicant may file a second or subsequent request for continued examination if the applicant files a petition and a showing that the amendment, argument, or evidence sought to be entered could not have been submitted earlier. *See* § 1.114(g).

Section 1.114(a) is amended to make clear that an applicant may not file an unrestricted number of requests for continued examination, that a request for continued examination must include a petition under § 1.114(g) unless the conditions set forth in § 1.114(f)(1), (f)(2), or (f)(3) are satisfied, and that a request for continued examination must be identified as a request for continued examination. Section 1.114(a) otherwise contains the provisions of former § 1.114(a).

Section 1.114(d) is revised to eliminate the sentence ''[i]f an applicant timely files a submission and fee set forth in § 1.17(e), the Office will withdraw the finality of any Office action and the submission will be entered and considered.'' This change is to avoid misleading applicants into believing that the Office will *pro forma* withdraw the finality of any Office action and the submission will be *pro forma* entered and considered upon timely filing of a submission and fee set forth in § 1.17(e). Under revised § 1.114, a second or subsequent request for continued examination must also include a petition accompanied by the fee set forth in § 1.17(f) except under the conditions set forth in § 1.114(f).

Section 1.114(f) provides the conditions under which an applicant may file a request for continued examination under § 1.114 without a petition under § 1.114(g).

Section 1.114(f)(1) permits an applicant to file a single request for continued examination in any one (but only one) of an initial application or its continuation applications or

continuation-in-part applications. Section 1.114(f)(1) provides that an applicant may file a request for continued examination under § 1.114 without a petition under § 1.114(g) if a request for continued examination has not been previously been filed in any of: (1) The application; (2) any application whose benefit is claimed in the application under 35 U.S.C. 120, 121, or 365(c); and (3) any application that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of the application, not including any nonprovisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii), 1.78(d)(1)(iii) or 1.78(d)(1)(vi). For example, if applicant filed one request for continued examination in an initial application, applicant is precluded from filing a second request for continued examination in the initial application and in any continuation applications or continuation-in-part applications that claim the benefit of the initial application (not including any nonprovisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii), 1.78(d)(1)(iii) or 1.78(d)(1)(vi)), without a petition under § 1.114(g).

Section 1.114(f)(2) permits an applicant to file a single request for continued examination under § 1.114 in a divisional application meeting the conditions set forth in § 1.78(d)(1)(ii) provided that no request for continued examination has been filed in any continuation application of the divisional application. Section 1.114(f)(2) provides that an applicant may file a request for continued examination under § 1.114 in a divisional application without a petition under § 1.114(g) if a request for continued examination has not previously been filed in any of: (1) The divisional application; and (2) any application that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of that divisional application, not including any nonprovisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii), (d)(1)(iii) or (d)(1)(vi).

Section 1.114(f)(3) permits an applicant to file a single request for continued examination in a continuation application of a divisional application meeting the conditions set forth in § 1.78(d)(1)(ii) provided that no request for continued examination has been filed in the divisional application or any other continuation application of the divisional application. Section 1.114(f)(3) provides that an applicant may file a request for continued examination under § 1.114 in a continuation application of a divisional application without a petition under § 1.114(g) if a request for continued examination has not previously been filed in any of: (1) The continuation application; (2) the divisional application; and (3) any other application that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of that divisional application, not including any nonprovisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii), (d)(1)(iii) or (d)(1)(vi).

The provisions of § 1.114(f) are illustrated with the following example (the example used to illustrate the provisions of §§ 1.78(d)(1)(i) through (d)(1)(iii)): (1) There is an initial application ''A'' that is subject to a restriction requirement under 35 U.S.C. 121 and § 1.141 *et seq.*; (2) a continuation application ''B'' of application ''A''; (3) a further continuation application ''C'' which claims the benefit of continuation application ''B'' and initial application ''A''; (4) a divisional application ''D'' (based upon the restriction requirement under 35 U.S.C. 121 and § 1.141 *et seq.* in application ''A''), which claims the benefit of continuation application ''C'', continuation application ''B'', and initial application ''A''; (5) a continuation application ''E'' of divisional application ''D'', which claims the benefit of divisional application ''D'', continuation application ''C'', continuation application ''B'', and initial application ''A''; and (6) a further continuation application ''F'' of continuation application ''E'', which claims the benefit of continuation application ''E'', divisional application ''D'', continuation application ''C'', continuation application ''B'', and initial application ''A''.

Section 1.114(f)(1) permits the filing of a single request for continued examination without a petition under § 1.114(g) in any one of applications ''A'', ''B'', or ''C''. Specifically, a request for continued examination may be filed in application ''A'', if a request for continued examination has not previously been filed in any of: (1) application ''A''; (2) any application (none) whose benefit is claimed in application ''A''; and (3) any application (applications ''B'' and ''C'') that claims the benefit of application ''A'', not including divisional application ''D'' and its continuation applications ''E'' and ''F''. In addition, a request for continued examination may be filed in application ''B'', if a request for continued examination has not previously been filed in any of: (1) Application ''B''; (2) any application (application ''A'') whose benefit is claimed in application ''B''; and (3) any application (application ''C'') that claims the benefit of application ''B'', not including divisional application ''D'' and its continuation applications ''E'' and ''F''. Finally, a request for continued examination may be filed in application ''C'', if a request for continued examination has not previously been filed in any of: (1) Application ''C''; (2) any application (applications ''A'' and ''B'') whose benefit is claimed in application ''C''; and (3) any application (none) that claims the benefit of application ''C'', not including divisional application ''D'' and its continuation applications ''E'' and ''F''.

Section 1.114(f)(2) permits the filing of a single request for continued examination without a petition under § 1.114(g) in application ''D'', if a request for continued examination has not previously been filed in application ''E'' or application ''F''. Specifically, a request for continued examination may be filed in application ''D'', if a request for continued examination has not previously been filed in any of: (1) Divisional application ''D''; and (2) any application (applications ''E'' and ''F'') that claims the benefit of divisional application ''D''.

Section 1.114(f)(3) permits the filing of a single request for continued examination without a petition under § 1.114(g) in any one of applications ''E'' or ''F'', if a request for continued examination has not previously been filed in application ''D''. Specifically, a request for continued examination may be filed in continuation application ''E'', if a request for continued examination has not previously been filed in any of: (1) Continuation application ''E''; (2) divisional application ''D''; and (3) any other application (application ''F'') that claims the benefit of divisional application ''D''. In addition, a request for continued examination may be filed in continuation application ''F'', if a request for continued examination has not previously been filed in any of: (1) continuation application ''F''; (2) divisional application ''D''; and (3) any other application (application ''E'') that claims the benefit of divisional application ''D''.

Section 1.114(g) provides that a request for continued examination must include a petition accompanied by the fee set forth in § 1.17(f) and a showing that the amendment, argument, or evidence sought to be entered could not have been submitted before the close of prosecution in the application. A petition under § 1.114(g) and the fee set forth in § 1.17(f) are not required if the

conditions set forth in § 1.114(f) are satisfied. Since a petition under § 1.114(g) requires a showing that there is an amendment, argument, or evidence that could not have been submitted prior to the close of prosecution in the application, a petition under § 1.114(g) for a request for continued examination including only an information disclosure statement as the submission required by § 1.114(c) (*i.e.*, not including an amendment, argument, or evidence) would not be granted.

Thus, an applicant may file a single request for continued examination without a petition under § 1.114(g) in any one (but only one) of an initial application or its continuation applications or continuation-in-part applications. An applicant may also file a single request for continued examination without a petition under § 1.114(g) in any one (but only one) of a divisional application (meeting the conditions set forth in § 1.78(d)(1)(ii)) or its continuation applications. Any second or subsequent request for continued examination in an application or application family must include a petition, accompanied by the fee set forth in § 1.17(f), and a showing that the amendment, argument, or evidence sought to be entered could not have been submitted prior to the close of prosecution in the application.

Section 1.114(h) provides that the filing of an improper request for continued examination, including a request for continued examination with a petition under § 1.114(g) that is not grantable, will not stay any period for reply or other proceedings. This is consistent with the current practice for requests for continued examination. *See* MPEP § 706.07(h), subsection V (the mere request for continued examination and fee will not operate to toll the running of any time period set in the previous Office action for reply to avoid abandonment of the application).

The Office proposed § 1.114(f) to include: ''[a]ny other proffer of a request for continued examination in an application not on appeal will be treated as a submission under § 1.116. Any other proffer of a request for continued examination in an application on appeal will be treated only as a request to withdraw the appeal.'' *See Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims*, 71 FR at 61, 1302 *Off. Gaz. Pat. Office* 1329. This final rule does not adopt that proposed change because it is unnecessary. Section 1.116 applies only to amendments, affidavits, and other evidence filed after the mailing of a final Office action but prior to an appeal. However, applicants are permitted to file a request for continued examination under § 1.114 after the mailing of a notice of allowance or an action that otherwise closes prosecution in the application (*e.g.*, an Office action under *Ex parte Quayle,* 1935 Dec. Comm'r Pat. 11 (1935)). *See* § 1.114(b). Furthermore, § 1.114(d) already provides for the situation in which a request for continued examination is filed in an application on appeal.

As discussed previously, applicants are permitted to file two continuation or continuation-in-part applications and a single request for continued examination without any justification. The provisions of § 1.78(d)(1) are independent of the provisions of § 1.114. Thus, filing a request for continued examination does not preclude an applicant from filing a first or second continuation application (or continuation-in-part application). In addition, an applicant may not agree to forgo a first or second continuation application (or continuation-in-part application) to obtain a second or third request for continued examination, nor can applicant forgo a request for continued examination to obtain a third continuation or continuation-in-part application. For example, an applicant cannot file two requests for continued examination without a petition and showing in an application instead of filing one of the two permitted continuation applications.

The Office is implementing an optional streamlined continuation application procedure under which an applicant may have a continuation application placed on an examiner's amended (Regular Amended) docket (see discussion of § 1.78(d)(1)(i)). Thus, an applicant may effectively obtain the docketing benefit (*i.e.*, being placed on an examiner's amended (Regular Amended) docket) of a second and third request for continued examination without a petition under § 1.114(g) by requesting that the two continuation applications permitted under § 1.78(d)(1)(i) be treated under the optional streamlined continuation application procedure.

The changes to § 1.114 apply to any application in which a request for continued examination is filed on or after November 1, 2007. Thus, a request for continued examination filed on or after November 1, 2007, in an application in which a request for continued examination has previously been filed, in a continuation or continuation-in-part application of an application in which a request for continued examination has previously been filed, or in an application whose benefit is claimed in any other nonprovisional application in which a request for continued examination has previously been filed, must include a petition under § 1.114(g). That is, an applicant may file a request for continued examination (and not ''one more'' request for continued examination) on or after November 1, 2007, without a petition under § 1.114(g) only if the conditions set forth in § 1.114(f)(1), (f)(2), or (f)(3) are met.

Section 1.117 (refund due to cancellation of claim): The Consolidated Appropriations Act provides that 35 U.S.C. 41(a), (b), and (d) shall be administered in a manner that revises patent application fees (35 U.S.C. 41(a)) and patent maintenance fees (35 U.S.C. 41(b)), and provides for a separate filing fee (35 U.S.C. 41(a)), search fee (35 U.S.C. 41(d)(1)), and examination fee (35 U.S.C. 41(a)(3)) during fiscal years 2005 and 2006. *See* Public Law 108–447, 118 Stat. 2809 (2004). The Consolidated Appropriations Act also provides that the Office may, by regulation, provide for a refund of any part of the excess claim fee specified in 35 U.S.C. 41(a)(2) for any claim that is canceled before an examination on the merits has been made of the application under 35 U.S.C. 131. *See* 35 U.S.C. 41(a)(2) (as administered during fiscal years 2005 and 2006 pursuant to the Consolidated Appropriations Act). The Revised Continuing Appropriations Resolution, 2007 (Pub. L. 110–5, 121 Stat. 8 (2007)), keeps the patent fee and fee structure provisions of the Consolidated Appropriations Act, 2005, in effect during fiscal year 2007 (until September 30, 2007).

Section 1.117 is added to implement this provision of the Consolidated Appropriations Act. Section 1.117(a) provides that if an amendment canceling a claim is filed before an examination on the merits has been made of the application, the applicant may request a refund of any fee under § 1.16(h), (i), or (j) or under § 1.492(d), (e), or (f) paid on or after December 8, 2004, for such claim. Thus, if an applicant decides to cancel the claims in excess of five independent claims and in excess of twenty-five total claims rather than provide an examination support document in compliance with § 1.265, the applicant may request a refund of any fee for such claim that is paid on or after December 8, 2004. Section 1.117(a) as adopted, however, does not require that the amendment have been filed in reply to a notice under § 1.75(b)(3). Section 1.117(a) requires only that the amendment have been filed before an examination on the

merits has been made of the application. The Consolidated Appropriations Act authorizes a refund only for a claim that has been canceled before an examination on the merits has been made of the application under 35 U.S.C. 131. The Office thus lacks authority to grant a refund either on the basis of: (1) The withdrawal from consideration of a claim directed to a non-elected invention or species; or (2) the cancellation of a claim after an examination on the merits has been made of the application under 35 U.S.C. 131. Section 1.117(a) also provides that if an amendment adding one or more claims is also filed before the application has been taken up for examination on the merits, the Office may apply any refund under § 1.117 to any excess claims fees due as a result of such an amendment. The date indicated on any certificate of mailing or transmission under § 1.8 will not be taken into account in determining whether an amendment canceling a claim was filed before an examination on the merits has been made of the application.

•''[A]n examination on the merits has been made of the application'' for purposes of § 1.117(a) once a first Office action on the merits, notice of allowability or allowance, or action under *Ex parte Quayle* is shown in the Patent Application Locating and Monitoring (PALM) system as having been counted. For purposes of § 1.117(a), ''before'' means at least one day before. If an amendment canceling a claim is filed and an Office action is counted on the same day, the amendment canceling a claim was not filed before an examination on the merits has been made of the application. The Patent Application Information Retrieval (PAIR) system is a system that provides public access to PALM for patents and applications that have been published. The PAIR system does not provide public access to information concerning applications that are maintained in confidence under 35 U.S.C. 122(a). Applicants, however, may use the private side of PAIR to access confidential information about their pending application. To access the private side of PAIR, a customer number must be associated with the correspondence address for the application, and the user of the system must have a digital certificate. For further information, contact the Customer Support Center of the Electronic Business Center at (571) 272–4100 or toll free at (866) 217–9197.

Section 1.117(b) (§ 1.117(c) as proposed) provides that if a request for refund under this section is not filed within two months from the date on which the claim was canceled, the Office may retain the excess claims fee paid in the application. This two-month period is not extendable. If an amendment canceling a claim is not filed before an examination on the merits, the Office will not refund any part of the excess claims fee paid in the application except as provided in § 1.26.

The provisions of § 1.117(b) as proposed are duplicative of the provisions of § 1.138(d) and have not been adopted as unnecessary.

The patent fee provisions of the Consolidated Appropriations Act expire (in the absence of additional legislation) on September 30, 2007 (at the end of fiscal year 2007). Therefore, in the absence of subsequent legislation, the refund provision in § 1.117 will likewise expire on September 30, 2007 (at the end of fiscal year 2007), regardless of the date on which the excess claims fee was paid.

Section 1.136 (extensions of time): Section 1.136(a)(1) is amended to add ''[t]he reply is to a notice requiring compliance with § 1.75(b) or § 1.265'' to the enumerated list of replies to which the extension of time provision of § 1.136(a) is not applicable. A notice under § 1.75(b)(3) is a ''notice requiring compliance with § 1.75(b).'' A ''notice requiring compliance with § 1.75(b)'' would include a notice mailed before the issuance of a first Office action on the merits setting a two-month time period within which the applicant must: (1) File an examination support document in compliance with § 1.265; or (2) amend the application such that it contains no more than five independent claims and no more than twenty-five total claims. A ''notice requiring compliance with § 1.75(b)'' would also include a notice issued after a first Office action on the merits in an application in which the applicant is given a time period within which the applicant must amend the application such that it contains no more than five independent claims and no more than twenty-five total claims. For example, if a reply to a non-final Office action on the merits seeks to amend an application such that it contains more than five independent claims and more than twenty-five total claims, the reply would be held non-responsive and (if the non-compliance with § 1.75(b) appears to have been inadvertent) the Office would give the applicant a two-month time period that was not extendable under § 1.136(a) within which to provide an amendment that does not result in the application containing more than five independent claims or more than twenty-five total claims. *See* § 1.135(c).

Section 1.142 (requirement for restriction): Section 1.142(a) is amended to state that an examiner ''may'' (rather than ''will'') require restriction if two or more independent and distinct inventions are claimed in a single application. The change is for consistency with current Office practice under which a requirement that an application containing claims to two or more independent and distinct inventions be restricted to a single invention is discretionary (*see* 35 U.S.C. 121 and MPEP § 803.01). An application containing claims to two or more independent and distinct inventions typically is not restricted to a single invention if the search and examination of all of the claims in the application can be made without serious burden (*see* MPEP section 803).

Section 1.142(c) is added to permit applicants to suggest requirements for restriction. Specifically, § 1.142(c) provides that if two or more independent and distinct inventions are claimed in a single application, the applicant may file a suggested requirement for restriction under § 1.142(c). Any suggested requirement for restriction must be filed before the earlier of the first Office action on the merits or an Office action that contains a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121 in the application. It must also be accompanied by an election without traverse of an invention to which there are no more than five independent claims and no more than twenty-five total claims, and must identify the claims to the elected invention. Claims to the non-elected invention, if not canceled, will be withdrawn from further consideration by the examiner. If the examiner accepts the suggested restriction, then the claims to the non-elected invention, if not canceled by the applicant, will be withdrawn from further consideration by the examiner. *See* the discussion of §§ 1.75(b)(5) and 1.78(d)(1)(ii).

Section 1.75(b)(3)(iii) as proposed would have permitted applicants to reply to a notice from the Office that an application contains more than ten representative claims (under certain conditions) by submitting a suggested requirement for restriction accompanied by an election without traverse of an invention to which there are no more than five independent claims and no more than twenty-five total claims. *See Changes to Practice for the Examination of Claims in Patent Applications*, 71 FR

at 64, 67–68, 1302 *Off. Gaz. Pat. Office* 1331, 1334. However, because the ''representative claims'' examination approach is not adopted in this final rule, this proposed provision of § 1.75(b)(3)(iii) is unnecessary. In this final rule, applicants may file a suggested requirement for restriction accompanied by an election without traverse (§ 1.142(c)) of an invention to which there are no more than five independent claims and no more than twenty-five total claims without first awaiting a notice from the Office under § 1.75(b)(3).

Section 1.142(c) further provides that if the applicant's suggested requirement for restriction is accepted, the restriction requirement will be set forth in a subsequent Office action. Any claim to the non-elected invention or inventions, if not canceled, is by the election withdrawn from further consideration.

If the suggested requirement for restriction is refused, the applicant will be notified in an Office action. That Office action may include, a notice under § 1.75(b)(3) requiring applicant to file an examination support document or amend the application to contain no more than five independent claims or no more than twenty-five total claims. If an applicant's suggested restriction requirement is refused, the examiner may make a different restriction requirement or make no restriction requirement. 35 U.S.C. 121 authorizes, but does not compel, the Director to require that an application containing two or more independent and distinct inventions be restricted to one of the inventions. A decision not to restrict an application to a single invention is not an action or requirement within the meaning of § 1.181(a). Thus, any review of an examiner's requirement for restriction that differs from a suggested restriction requirement will only concern the appropriateness of the examiner's restriction requirement and will not address the appropriateness of the applicant's suggested restriction requirement or compare the examiner's restriction requirement and the suggested restriction requirement.

Section 1.145 (subsequent presentation of claims for different invention): Section 1.145 is amended to state that an applicant ''may'' (rather than ''will'') be required to restrict the claims to the invention previously claimed if, after an Office action on an application, the applicant presents claims directed to an invention distinct from and independent of the invention previously claimed (*see* discussion of § 1.142(a)). Section 1.145 is amended to add ''on the merits'' to clarify that § 1.145 applies only after a first Office action on the merits.

Section 1.265 (examination support document): Section 1.265 is added to set forth what an ''examination support document'' entails. An examination support document is required under § 1.75(b)(1) when an applicant presents more than five independent claims or more than twenty-five total claims in an application. *See* § 1.75(b)(1) and the discussion of § 1.75(b)(1). Section 1.265(a) sets forth the requirements for an examination support document. Section 1.265(b) provides for the requirements of the preexamination search required under § 1.265(a)(1). Section 1.265(c) provides for the requirements of the listing of references required under § 1.265(a)(2). Section 1.265(d) provides for certain situations in which a supplemental examination support document is required when applicant files an information disclosure statement citing additional references. Section 1.265(e) provides for situations in which the examination support document is insufficient. Section 1.265(f) provides an exemption to applications filed by a small entity as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The exemption is for the requirement in § 1.265(a)(3) that an examination support document must include an identification of all of the claim limitations (whether in independent or dependent form) that are disclosed by the cited references.

Section 1.265 contains fewer requirements than an accelerated examination support document under the revised procedures for certain petitions to make special (*see Changes to Practice for Petitions in Patent Applications To Make Special and for Accelerated Examination*, 71 FR 36232 (June 26, 2006), 1308 *Off. Gaz. Pat. Office* 106 (July 18, 2006) (notice)). For example, § 1.265 does not require that the examination support document identify any cited references that may be disqualified as prior art under 35 U.S.C. 103(c) as amended by the Cooperative Research and Technology Act (although applicants are encouraged to identify any cited references that may be so disqualified). Thus, the Office's guidelines concerning the accelerated examination support document may be helpful to applicants who are preparing an examination support document under § 1.265. The guidelines under the revised accelerated examination procedure, search templates, and samples of a preexamination search document and an examination support document can be found on the Office's Internet Web site at *http://www.uspto.gov/web/patents/accelerated/*. The Office will provide similar guidelines for examination support document under § 1.265 and will post such guidelines on the Office's Internet Web site.

Section 1.265(a)(1) provides that an examination support document must include a statement that a preexamination search in compliance with § 1.265(b) was conducted. The examination support document must identify (in the manner set forth in MPEP § 719.05) the field of search by class and subclass and the date of the search, where applicable. For database searches, the examination support document must identify the search logic or chemical structure or sequence used as a query, the name of the file or files searched and the database service, and the date of the search.

Section 1.265(a)(2) provides that an examination support document must include a listing in compliance with § 1.265(c) of the reference or references deemed most closely related to the subject matter of each of the claims (whether in independent or dependent form). The references that would be most closely related to the subject matter of each of the claims include: (1) A reference that discloses the most number of limitations in an independent claim; (2) a reference that discloses a limitation of an independent claim that is not shown in any other reference in the listing of references required under § 1.265(a)(2); and (3) a reference that discloses a limitation of a dependent claim that is not shown in any other reference in the listing of references required under § 1.265(a)(2). References that are only relevant to the general subject matter of the claims would not be most closely related to the subject matter of each of the claims if there are other references that are deemed to be more closely related to the subject matter of the claims.

It is envisioned that the reference or references presented as being most closely related to the subject matter of the claims will generally be references that result from the preexamination search provided for in § 1.265(a)(1). The preexamination search provided for in § 1.265(a)(1) should result in the reference or references that are most closely related to the subject matter of the claims. However, an applicant may not exclude a reference from an examination support document simply because the reference was not the result of the preexamination search provided for in § 1.265(a)(1). The reference, for instance, may have been brought to applicant's attention via a foreign or PCT search report. References that have

been brought to the applicant's attention regardless of the source of those references must be considered in identifying the reference or references most closely related to the subject matter of each of the claims.

Section 1.265(a)(3) provides that an examination support document must, for each reference in the listing of references required under § 1.265(a)(2), identify all of the limitations of each of the claims (whether in independent or dependent form) that are disclosed by the reference. Applicant may satisfy this requirement either by mapping the limitations of each of the claims to the references or by mapping the references to the limitations of the claims. Applicants may map the limitations of each of the claims to the references by, for each claim, identifying where the cited references disclose features, showings, or teachings that are relevant to each limitation of such claim. Applicants may map the references to the limitations of the claims by, for each cited reference, identifying where the reference discloses features, showings, or teachings that are relevant to the limitations of each of the claims.

Section 1.265(a)(3) requires the applicant to identify at least one appearance in the reference (a representative portion) of a specific feature, showing, or teaching for which the reference is being cited. If the feature, showing, or teaching appears in more than one portion of the reference, applicant would not need to specifically point out more than one occurrence. Applicant, however, should do so where the additional appearance may not be apparent to the examiner and may have some additional significance over its first identified appearance. If an applicant recognizes that a document is relevant for more than one feature, showing, or teaching, the applicant would need to specifically identify each additional feature, showing, or teaching and the portion where the feature, showing, or teaching appears in the document. A mere statement indicating that the entire reference, or substantially the entire reference, is relevant would not comply with § 1.265(a)(3).

Section 1.265(a)(4) provides that an examination support document must include a detailed explanation particularly pointing out how each of the independent claims is patentable over the references cited in the listing of references required under § 1.265(a)(2). The explanation required by § 1.265(a)(4) may be set forth together with the identification required by § 1.265(a)(3) or may be provided separately. For example, the identification required by § 1.265(a)(3) and the explanation required by § 1.265(a)(4) may be set out in a single spreadsheet with two columns, or may be set out in two spreadsheets. A general statement that all of the claim limitations are not described in a single reference does not satisfy the requirements of § 1.265(a)(4). Section 1.265(a)(4) requires that the examination support document set out with particularity, by reference to one or more specific claim limitations, why the claimed subject matter is not described in the references, taken as a whole. The applicant must explain why a person of ordinary skill in the art would not have combined the features disclosed in one reference with features disclosed in another reference to arrive at the claimed subject matter. The applicant must also explain why the claim limitations referenced render the claimed subject matter novel and non-obvious over the cited prior art.

Section 1.265(a)(5) provides that an examination support document must include a showing of where each limitation of the claims (whether in independent or dependent form) finds support under 35 U.S.C. 112, ¶ 1, in the written description of the specification. If the application claims the benefit of one or more applications under title 35, United States Code, the showing must also include where each limitation of the claims finds support under 35 U.S.C. 112, ¶ 1, in each such application in which such support exists. For means- (or step-) plus-function claim elements under 35 U.S.C. 112, ¶ 6, this requires: (1) That the claim limitation be identified as means- (or step-) plus-function claim element under 35 U.S.C. 112, ¶ 6; and (2) that the structure, material, or acts in the specification that correspond to each means- (or step-) plus-function claim element under 35 U.S.C. 112, ¶ 6, be identified. *See Changes to Practice for Petitions in Patent Applications To Make Special and for Accelerated Examination*, 71 FR at 36325, 1308 *Off. Gaz. Pat. Office* at 107.

If the examiner, after considering the application and any examination support document, still has questions concerning the invention or how the claims define over the prior art or are patentable, the examiner may request an interview before the first Office action. If the applicant declines such a request for an interview or if the interview does not result in the examiner obtaining the necessary information, the examiner may issue a requirement for information under § 1.105 to obtain such information. Section 1.133(a)(2) was amended in November of 2005 to permit an interview before the first Office action if the examiner determines that such an interview would advance prosecution. *See Provisions for Claiming the Benefit of a Provisional Application With a Non-English Specification and Other Miscellaneous Matters*, 70 FR at 56121, 56128, 1299 *Off. Gaz. Pat. Office* at 144, 150. Applicant may request an interview before the first Office action. Such a request is ordinarily granted in a continuing application or if the examiner determines that the interview would advance prosecution. *See* § 1.133(a)(2) and MPEP § 713.02.

Section 1.265(b) provides that the preexamination search must involve U.S. patents and patent application publications, foreign patent documents, and non-patent literature, unless the applicant can justify with reasonable certainty that no references more pertinent than those already identified are likely to be found in the eliminated source. That justification must be included in the statement required by § 1.265(a)(1). Section 1.265(b) also provides that the preexamination search must encompass all of the limitations of the independent claims. It must also encompass all of the limitations of the dependent claims separately from the claim or claims from which they depend. The claims must be given the broadest reasonable interpretation. A search report from a foreign patent office will not automatically satisfy the requirement in § 1.265(a)(1) for a preexamination search unless it includes the information required by § 1.265.

Section 1.265(c) provides for the content requirements of the listing of references required under § 1.265(a)(2) as part of an examination support document. Section 1.265(c) provides the same content requirements as those that are currently provided in §§ 1.98(a) and (b). Specifically, § 1.265(c) provides that the listing of references required under § 1.265(a)(2) as part of an examination support document must include a list identifying each of the cited references (§§ 1.265(c)(1) and (c)(2)), a copy of each reference except for references that are U.S. patents or U.S. patent application publications (§ 1.265(c)(3)), and each English language translation if required by § 1.265(c)(4). Applicant may use the USPTO form, ''Examination Support Document Listing of References,'' to submit the listing of references. The form will be available on the Office's Internet Web site at *http://www.uspto.gov/web/forms/index.html#patent.*

Section 1.265(c)(1) provides that the list of cited references must group U.S. patents and U.S. patent application publications (including international

applications designating the United States) in a section separate from other references. Section 1.265(c)(1) also provides that each page of the list of the cited references must include: (1) The application number, if known, of the application in which the examination support document is being filed; (2) a column that provides a space next to each cited reference for the examiner's initials; and (3) a heading that clearly indicates that the list is part of an examination support document listing of references.

Section 1.265(c)(2) provides that the list of cited references must identify each cited reference as follows: (1) Each U.S. patent must be identified by first named patentee, patent number, and issue date; (2) each U.S. patent application publication must be identified by applicant, patent application publication number, and publication date; (3) each U.S. application must be identified by the applicant, application number, and filing date; (4) each foreign patent or published foreign patent application must be identified by the country or patent office which issued the patent or published the application, an appropriate document number, and the publication date indicated on the patent or published application; and (5) each publication must be identified by publisher (*e.g.*, name of journal), author (if any), title, relevant pages of the publication, publication date, and place of publication.

Section 1.265(c)(4) provides that if a non-English language document is being cited, any existing English language translation of the non-English language document must be submitted if the translation is within the possession, custody, or control of, or is readily available to any individual identified in § 1.56(c).

Section 1.265(d) provides for a supplemental examination support document. If an information disclosure statement is filed in an application in which an examination support document is required and has been filed, the applicant must also file a supplemental examination support document addressing the references cited in the information disclosure statement in the manner required under §§ 1.265(a)(3) and (a)(4), unless the information disclosure statement cites only references that are less closely related to the subject matter of one or more claims than the references cited in the examination support document listing of references required under § 1.265(a)(2).

Section 1.265(e) provides that the applicant will be notified if: (1) The examination support document or preexamination search is deemed to be insufficient; or (2) the claims have been amended such that the examination support document no longer covers each claim. The notice will give the applicant a two-month time period within which the applicant must either file a corrected or supplemental examination support document or amend the application such that it contains no more than five independent claims and no more than twenty-five total claims in order to avoid abandonment. Section 1.265(e) further provides that this two-month period is not extendable under § 1.136(a).

Section 1.265(f) provides an exemption from the requirement in § 1.265(a)(3) that an examination support document must, for each reference cited in the listing of references required under § 1.265(a)(2), include an identification of all of the limitations of each of the claims (whether in independent or dependent form) that are disclosed by the reference that applies to applications by a small entity as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Regulatory Flexibility Act defines a ''small entity'' as a ''small business'' as defined in 5 U.S.C. 601(3), a ''small organization'' as defined in 5 U.S.C. 601(4), and a ''small governmental jurisdiction'' as defined 5 U.S.C. 601(5). *See* 5 U.S.C. 601(6). Section 1.265(f) specifically provides that an examination support document, or a corrected or supplemental examination support document, is not required to comply with the requirements set forth in § 1.265(a)(3) if the examination support document is accompanied by a certification that any rights in the application have not been assigned, granted, conveyed, or licensed, and there is no obligation under contract or law to assign, grant, convey, or license any rights in the application, other than a security interest that has not been defaulted upon, to any entity other than a business or other concern as defined in § 1.265(f)(1), a not-for-profit enterprise as defined in § 1.265(f)(2), or a government as defined in § 1.265(f)(3). A business or other concern which meets the definition set forth in § 1.265(f)(1), a not-for-profit enterprise that meets the definition set forth in § 1.265(f)(2), or a government that meets the definition set forth in § 1.265(f)(3) may make the certification provided for in § 1.265(f) regardless of whether the business or other concern, not-for-profit enterprise, or government is located in or operates primarily in the United States.

With respect to the business or other concerns defined in § 1.265(f)(1), the Regulatory Flexibility Act provides that ''the term 'small business' has the same meaning as the term 'small business concern' under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.'' *See* 5 U.S.C. 601(3). The Office has established the standard set forth in 13 CFR 121.802 for paying reduced patent fees as the definition of ''small business'' for Regulatory Flexibility Act purposes with respect to patent-related regulations. Therefore, a ''small business'' for Regulatory Flexibility Act purposes with respect to patent-related regulations is a business or other concern: (1) Whose number of employees, including affiliates, does not exceed 500 persons; and (2) which has not assigned, granted, conveyed, or licensed (and is under no obligation to do so) any rights in the invention to any person who made it and could not be classified as an independent inventor, or to any concern which would not qualify as a non-profit organization or a small business concern under this definition.

With respect to the not-for-profit enterprises defined in § 1.265(f)(2), the Regulatory Flexibility Act provides that ''the term 'small organization' means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.'' *See* 5 U.S.C. 601(4). The Office has not established any definition of ''small organization'' for Regulatory Flexibility Act purposes with respect to patent-related regulations. Therefore, a ''small organization'' for Regulatory Flexibility Act purposes with respect to patent-related regulations is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

With respect to the governments defined in § 1.265(f)(3), the Regulatory Flexibility Act provides that ''the term 'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an

agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the **Federal Register**.'' *See* 5 U.S.C. 601(5). The Office has not established any definition of ''small governmental jurisdiction'' for Regulatory Flexibility Act purposes with respect to patent-related regulations. Therefore, a ''small governmental jurisdiction'' for Regulatory Flexibility Act purposes with respect to patent-related regulations is a government of a city, county, town, township, village, school district, or special district, with a population of less than fifty thousand.

An entity that meets the definition of a small entity set forth in § 1.27 for paying reduced patent fees may or may not meet one of the definitions under §§ 1.265(f)(1) through (f)(3) to make a certification under § 1.265(f). The Office will not give advisory opinions as to whether or not a specific individual or entity meets the definitions under §§ 1.265(f)(1) through (f)(3) to make a certification under § 1.265(f). Questions related to standards for small business concerns, not-for-profit enterprises, or governments may be directed to: Small Business Administration, Size Standards Staff, 409 Third Street, SW., Washington, DC 20416.

Section 1.495 (entering the national stage in the United States of America): Section 1.495(g) provides that if the documents and fees contain conflicting indications as to whether the submission is an application under 35 U.S.C. 111 or a submission to enter the national stage under 35 U.S.C. 371, the documents and fees will be treated as a submission to enter the national stage under 35 U.S.C. 371. It is Office experience that, in most cases, documents and fees that contain such conflicting indications were intended as submissions under 35 U.S.C. 371.

Section 1.704 (reduction of period of adjustment of patent term): Section 1.704(c) is amended to provide the patent term adjustment consequences of a failure to comply with § 1.75(b) (*e.g.*, a failure to file an examination support document in compliance with § 1.265 when necessary under § 1.75(b)). Such a failure will be considered a circumstance that constitutes a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application under 35 U.S.C. 154(b)(2)(C). The failure to comply with § 1.75(b) will delay processing or examination of an application because the Office must issue a notice and await the applicant's reply before examination of the application may begin. Therefore, § 1.704(c) provides for a reduction of any patent term adjustment when there is a failure to comply with § 1.75(b). Specifically, any patent term adjustment will be reduced by the number of days in the period between the following beginning and ending dates. The beginning date of the period is the day after the date that is the later of: (1) The filing date of the amendment resulting in the noncompliance with § 1.75(b); (2) four months from the filing date of the application in an application under 35 U.S.C. 111(a); or (3) four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in an application which entered the national stage from an international application after compliance with 35 U.S.C. 371. The ending date of the period is the filing date of: (1) An examination support document in compliance with § 1.265; (2) an election responsive to an Office-issued requirement for restriction including an election of species that places the application in compliance with § 1.75(b) (*e.g.*, the election of an invention that is drawn to five or fewer independent claims and twenty-five or fewer total claims that would obviate the need for an examination support document under § 1.265); (3) an amendment resulting in compliance with § 1.75(b) (*e.g.*, amending the application to contain five or fewer independent claims and twenty-five or fewer total claims); (4) a suggested requirement for restriction under § 1.142(c) accompanied by an election without traverse of an invention to which there are no more than five independent claims and no more than twenty-five total claims.

The examiner's acceptance of a suggested requirement for restriction accompanied by an election without traverse of an invention to which there are no more than five independent claims and no more than twenty-five total claims would be sufficient to obviate the need for an examination support document under § 1.265. If the suggested requirement for restriction is not accepted, the applicant will be notified and given a time period within which the applicant must either file an examination support document or amend the application such that it contains no more than five independent claims and no more than twenty-five total claims. Failure to timely reply to such a notice would result in the abandonment of the application. The abandonment of an application results in the period of adjustment set forth in § 1.703 (if any) being reduced under § 1.704(c)(3).

III. Response to Comments

As discussed previously, the Office published notices in January of 2006 proposing: (1) Changes to practice for continuing applications, requests for continued examination, and applications containing patentably indistinct claims; and (2) changes to the practice for the examination of claims in patent applications. *See Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims,* 71 FR at 48–61, 1302 *Off. Gaz. Pat. Office* 1318–29, and *Changes to Practice for the Examination of Claims in Patent Applications*, 71 FR 61–69, 1302 *Off. Gaz. Pat. Office* 1329–35. The Office received over five hundred written comments (from government agencies, universities, intellectual property organizations, industry, law firms, individual patent practitioners, and the general public) in response to this notice. The comments and the Office's responses to the comments follow:

A. Changes to Continuing Application Practice

Comment 1: A number of comments stated that the changes in the definitions of continuation, divisional, and continuation-in-part applications set forth in § 1.78(a) are likely to confuse the public and examiners and that the Office has not identified any value that would result from these changes. Several comments suggested that further guidance was needed to resolve ambiguities as to whether an application is a divisional or continuation application. One comment argued that the requirement to identify the relationship of the applications could create hardship when it is unclear whether the changes to the specification or claims make the application a continuation, divisional, or continuation-in-part application.

Response: The definitional changes are necessary in order to clearly define the conditions for claiming benefit of prior-filed applications under § 1.78(d)(1). This final rule further clarifies the definition of a divisional application set forth in § 1.78(a)(2). Under this final rule, an applicant may file a divisional application directed to a non-elected invention if the prior-filed application is subject to a requirement for restriction. The divisional application need not be filed during the

pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. Thus, applicant may file a divisional application claiming the benefit of the initial application that was subject to the requirement for restriction and any intermediate continuing applications.

Furthermore, the definitions of continuation, divisional, and continuation-in-part application set forth in § 1.78(a) are substantially the same as the previous definitions set forth in the MPEP, except that a divisional application is now defined more narrowly. *See* the discussion of § 1.78(a). The former practice permitted an applicant to file a continuing application and identify the application as a ''divisional'' application even when the prior-filed application was not subject to a requirement for restriction. Such a continuing application was called a ''voluntary'' divisional application. Under this final rule, a ''voluntary'' divisional application would instead fall under the definition of a continuation application. Therefore, a continuing application would be a continuation application and not a divisional (''voluntary'' divisional) application if the prior-filed application was not subject to a requirement for restriction. If the prior-filed application was subject to a requirement for restriction, a continuing application claiming only a non-elected invention or inventions would be a divisional application. It is noted that although the definition of continuation application set forth in § 1.78(a)(2) uses the phrase ''invention or inventions'' rather than ''subject matter'' (as used in the definition of continuation application set forth in MPEP § 201.07), no substantive difference between these terms is intended. The requirement to identify the relationship (*i.e.*, continuation, divisional, or continuation-in-part) between the prior-filed application and the continuing application is not a new requirement under this final rule. This requirement has been provided in the former § 1.78(a)(2)(i). Accordingly, the definitions of continuation, divisional, and continuation-in-part application set forth in § 1.78(a) are not likely to confuse the public or examiners for any extended period.

Comment 2: A number of comments observed the proposed requirement that a divisional application may claim the benefit of only a single application would require that all divisional applications filed as a result of a restriction requirement in a prior-filed application be filed before the patenting or abandonment of that application. A number of comments suggested that the rule changes limiting divisional applications to claim benefit to only a single prior-filed application would result in an overall increase in application filings and pendency, contrary to their intended purpose. The comments contended the changes being adopted in this final rule effectively force applicants to claim all patentably distinct inventions in the prior-filed application or file related applications in parallel in order to preserve potential patent rights in those inventions. The comments suggested that since a divisional application must be filed during the pendency of the prior-filed application, many more divisional applications would be filed than would be filed under the current system, as applicants will not have sufficient time and information to determine whether the invention is worth pursuing. The comments stated that, consequently, the Office will be forced to examine more inventions than it would under current practice, wasting both applicants' and the Office's resources. A number of comments also suggested that the inability to prosecute divisional applications sequentially, thus allowing applicants to spread filing and prosecution costs over time and to file only those divisional applications that are commercially valuable in view of subsequent market development, will have a particularly negative impact on the biotechnology and pharmaceutical industries and on small entities. The comments suggested that patent rights will be lost due to a lack of funding and that the increased costs will be particularly onerous in certain technologies, *e.g.*, biotechnology and chemical arts, where the Office routinely issues complex restriction requirements, sometimes alleging hundreds or thousands of independent and distinct inventions. Several comments also suggested that the rules should be modified to account for the economic impossibility, in many cases, of pursuing numerous divisional applications simultaneously. One comment also suggested that the need to file multiple stand alone applications or divisional applications at an early stage in prosecution to cover all embodiments of the invention will cause small companies to cut back funding on research in favor of patent prosecution, thus hindering innovation. One comment also suggested that the rules be revised, consistent with European Patent Office divisional practice, to permit the serial filing of divisional applications with the limitation that claims pursued in a continuation of any serial divisional application must be of the same scope as, or of a narrower scope than, the claims presented in that serial divisional application. One comment also suggested that prior to implementing the rule changes, the Office should conduct a study to assess the scope of potential divisional filing problems by studying the divisional filing habits of large and small entity applicants.

Response: The Office notes the concerns expressed in the public comment regarding the proposed requirement in § 1.78(d)(1)(ii) that a divisional application be filed during the pendency of the initial application. In response to those concerns and suggestions, § 1.78(d)(ii) as adopted in this final rule does not require that a divisional application be filed during the pendency of the initial application. This final rule permits applicants to file a divisional application for the claims to a non-elected invention if the initial application is subject to a requirement for restriction, the claims to the non-elected invention are cancelled in the initial application, and the divisional application meets the copendency requirement of 35 U.S.C. 120. That is, an applicant may file a divisional application during the pendency of the application that was subject to a restriction requirement or the pendency of any continuing application of such application. This final rule also permits applicant to file two continuation applications of a divisional application, plus a request for continued examination in the divisional application family, without any justification.

Comment 3: A number of comments suggested that the rule changes would encourage applicants to file more petitions challenging restriction requirements, thus further burdening the Office.

Response: The criteria for making a restriction requirement remain the same. Applicant may still seek review of any restriction requirements, if appropriate. The Office, however, does not anticipate any substantial increase in the number of petitions seeking review of restriction requirements. As discussed previously, § 1.78(d)(1)(ii) as adopted in this final rule does not require that a divisional application be filed during the pendency of a single prior-filed application. This final rule permits applicant to file a divisional application of an application if the application is subject to a requirement for restriction, claims to the non-elected invention are cancelled in the prior-filed application, and the divisional

application meets the copendency requirement of 35 U.S.C. 120. That is, applicant may file a divisional application during the pendency of the application that was subject to a requirement for restriction or the pendency of any continuing application of such application. Applicant will have sufficient time to determine whether to file a divisional application directed to a non-elected invention.

Comment 4: Several comments stated that the rule changes do not adequately address the situation where a restriction requirement is made by the examiner in a continuing application. The comments expressed concern that the rule changes appear to require applicant to forego all but one invention. One comment stated that the applicant's prior application, if published, may constitute prior art if benefit to the prior application is not permitted. Another comment suggested that concerns over prolonging patent term, abuse or bad faith are not raised where a divisional application is filed as a result of a restriction requirement made in the continuing application, and that such filings may actually improve quality, as the searches performed in the initial and first continuing application often provide significant information and guidance to the examiner in the second continuing application.

Response: As discussed previously, the Office has modified the proposed § 1.78(d)(1)(ii) in this final rule such that it does not require a divisional application to be filed during the pendency of a single prior-filed application. Instead, this final rule permits an applicant to file a divisional application for the claims to a non-elected invention that was not examined if the application was subject to a requirement for restriction, the claims to the non-elected invention are cancelled in the prior-filed application, and the divisional application meets the copending requirement of 35 U.S.C. 120. Therefore, applicant may file a divisional application of a continuing application for the claims to a non-elected invention that has not been examined if the continuing application was subject to a requirement for restriction. Such a divisional application may claim the benefit of the continuing application that was subject to a requirement for restriction and the initial application whose benefit is claimed in the continuing application.

Comment 5: One comment requested clarification as to whether a divisional application can be filed if a request for continued examination was filed in the initial application.

Response: The filing of a request for continued examination in the initial application does not preclude an applicant from filing a divisional application under the proposed rule as well as under this final rule. The condition that ''no request for continued examination under § 1.114 has been filed in the prior-filed application'' as proposed applied only to the filing of continuation and continuation-in-part applications under proposed § 1.78(d)(1)(i). Compare proposed §§ 1.78(d)(1)(i) and 1.78(d)(1)(ii). Furthermore, § 1.78(d)(1) as adopted in this final rule contains no conditions with respect to continuation applications, divisional applications, or continuation-in-part applications concerning whether a request for continued examination was filed in the initial application or a prior-filed continuing application. Therefore, the filing of a request for continued examination does not preclude an applicant from filing two continuation or continuation-in-part applications, and any divisional application directed to a non-elected invention that has not been examined if the prior-filed application was subject to a requirement for restriction.

Comment 6: A number of comments requested that the Office not limit ''voluntary'' divisional applications. In addition, several comments noted the importance of ''voluntary'' divisional applications in protecting important inventions the significance of which could not reasonably be anticipated when the application was filed. Another comment indicated the importance of ''voluntary'' divisional applications for obtaining quick patents to protect applicants' products from competitors while preserving the opportunity to obtain patent protection on other aspects of the invention. Several comments stated that the standard under § 1.78(d)(1) makes little sense when the objective of filing the continuing application is to obtain patents on distinct inventions. One of the comments expressed concern that each patent is, both by law and regulation, to be directed to a single invention and that patent applications directed to multiple inventions are subject to restriction under 35 U.S.C. 121.

Response: This final rule permits applicants to file a so-called ''voluntary'' divisional application as a continuation application in compliance with § 1.78(d)(1)(i) when the prior-filed application was not subject to a requirement for restriction. Under § 1.78(d)(1)(i), applicant may file two such continuation applications without a petition and showing of why the amendment, argument, or evidence sought to be entered could not have been previously submitted. Applicant likewise may file a third or subsequent continuation application with a petition and showing pursuant to § 1.78(d)(1)(vi).

Furthermore, applicant may suggest a requirement for restriction under § 1.142(c) if the applicant believes that two or more independent and distinct inventions are claimed in the application. *See* § 1.142(c) and the discussion of § 1.142(c). In such case, § 1.78(d)(1)(ii) provides that an applicant may file a divisional application directed to a non-elected invention that has not been examined if the prior-filed application is subject to a requirement for restriction. The divisional application is not required to be filed during the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. Section § 1.78(d)(1)(iii) also permits an applicant to file, without a petition and showing, two continuation applications of a divisional application plus a request for continued examination in the divisional application family. Therefore, applicants have sufficient opportunity to obtain patent protection on other aspects of the invention.

35 U.S.C. 121 provides that ''[i]f two or more independent and distinct inventions are claimed in one application, the Director may require the application to be restricted to one of the inventions.'' (Emphasis added.) Thus, 35 U.S.C. 121 authorizes, but does not compel, the Director to require that an application containing two or more independent and distinct inventions be restricted to one of the inventions. The Office typically decides whether to issue a restriction requirement when an application contains two or more independent and distinct inventions based upon, *inter alia,* the burden on the Office to search and examine more than one invention. *See MPEP § 803.*

Comment 7: Several comments suggested that the restriction on a so-called ''voluntary'' divisional application would be a major divergence from other countries and would not be favorable from the viewpoint of promoting global harmonization of patent practices. One comment noted that the Japan Patent Office (JPO) and the European Patent Office (EPO) have liberal ''voluntary'' divisional application rules and have not reported any evidence of abuse.

Response: Under this final rule, applicant still has the opportunity to file a so-called ''voluntary'' divisional application except that such an application is defined in this final rule

as a continuation application. That is, as discussed previously, applicant may file a ''voluntary'' divisional application as a continuation application in compliance with § 1.78(d)(1)(i) when the prior-filed application was not subject to a requirement for restriction. Specifically, under § 1.78(d)(1)(i), applicant may file two continuing applications of an initial application without a petition and showing and then may file a third or subsequent continuation with a petition and showing under § 1.78(d)(1)(vi). Accordingly, this final rule is not a major divergence from the ''voluntary'' divisional practice available in other countries.

Moreover, under the PCT and the Paris Convention, the determination of the conditions and effect of internal (domestic) priority claims is a matter for the authority concerned. *See, e.g.*, PCT Article 8(2)(b) and Article 4(G)(2) of the Paris Convention. Efforts in recent years to harmonize substantive patent law have not focused on achieving harmonization on domestic priority. (*See http://www.wipo.int/patent/law/en/harmonization.htm* for further information).

Comment 8: Several comments suggested that eliminating ''voluntary'' divisional applications violates Article 4G(2) of the Paris Convention.

Response: Section 1.78(d) as adopted in this final rule does not eliminate what has traditionally been referred to as a ''voluntary'' divisional application. The second sentence of Article 4G(2) of the Paris Convention provides that each country ''shall have the right to determine the conditions under which such division shall be authorized.'' As discussed previously, a ''voluntary'' divisional application would not meet the definition of divisional application set forth in § 1.78(a)(2), but would instead be a continuation application as defined in § 1.78(a)(3). If the prior-filed application is not subject to a requirement for restriction, the applicant may file a ''voluntary'' divisional application as a continuation application under the conditions set forth in § 1.78(d)(1)(i). Such a definition is consistent with 35 U.S.C. 121. Furthermore, if the prior-filed application is subject to a requirement for restriction, § 1.78(d)(1)(ii) provides that an applicant may file an ''involuntary'' divisional application directed to a non-elected invention that has not been examined. Therefore, § 1.78(d) is consistent with Article 4G(2) of the Paris Convention.

Comment 9: One comment suggested amending proposed § 1.78(d)(1)(ii) to define a divisional application as an application that only includes claims that were non-elected in the prior-filed application to prevent new claims from being filed in the divisional application, thus further increasing the numbers of claims that examiners have to examine.

Response: Such a requirement is unnecessary because applicant may amend the non-elected claims that have been filed in the divisional application during the course of prosecution of the divisional applications as the prior art is developed and/or to correct formal matters. Section § 1.78(d)(1)(ii) as adopted in this final rule permits an applicant to file a divisional application directed to a non-elected invention that has not been examined that was subject to a requirement for restriction in the prior-filed application. Therefore, applicant may present claims in the divisional application that are different than the claims in the prior-filed application if the claims in the divisional application are directed to the subject matter of the non-elected invention.

Comment 10: One comment expressed concern that the Office may pressure examiners to limit the issuance of restrictions in order to reduce the number of applications to be examined, thus artificially making it look like the pendency rate has gone down. The comment requested that the Office implement a policy mandating examiners to issue restrictions when requested by the applicant, except in cases where it is clear that such restrictions are not proper.

Response: Restriction practice is set forth in Chapter 800 of the MPEP. As discussed previously, the applicant may suggest a requirement for restriction under § 1.142(c) if the applicant believes that two or more independent and distinct inventions are claimed in the application. The examiner may accept or refuse the suggested restriction requirement. Alternatively, the examiner may issue a different restriction. *See* the discussion of § 1.142(c). Either way, it remains important from the standpoint of the public interest that no requirements for restriction are made that might result in the issuance of two patents for the same invention. *See* MPEP § 803.01.

Comment 11: One comment questioned the status of a divisional application if the restriction requirement is withdrawn after filing of the divisional application.

Response: If a restriction requirement is made and the applicant cancels the non-elected claims (and any generic claims or other types of linking claims if present) in the prior-filed application and files a divisional application, the restriction requirement will not be withdrawn. Also, as discussed previously, applicants cannot rely upon a requirement for restriction to avoid the requirement for an examination support document where: (1) The applicant traverses the requirement for restriction; (2) the requirement for restriction may be conditional, such as a requirement for election of species in an application that contains a claim that is generic to all of the claimed species (*see* MPEP § 809), or a requirement for restriction in an application that contains a linking claim (*e.g.*, a subcombination claim linking plural combinations); or (3) the applicant plans to request rejoinder of the claims to the non-elected invention (*see* MPEP § 821.04 *et seq.*). Under §§ 1.78(a)(2) and 1.78(d)(1)(ii), the prior-filed application to which a divisional application claims the benefit must be subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121 and the invention claimed in the divisional application must not have been elected for examination and must not have been examined in any prior-filed application. Thus, a divisional application will be improper when the claims to the non-elected invention have not been cancelled and the requirement for restriction is withdrawn in the prior-filed application (or when the invention claimed in the divisional application has been examined in the prior-filed application). Furthermore, since the claims of the prior-filed application and the divisional application would be drawn to the same invention, both applications may be subject to a double patenting rejection (*see* MPEP § 821.04) and the provisions of 1.75(b)(4) (determining number of claims for purposes of examination support document threshold when multiple applications contain patentably indistinct claims).

For example, where claims directed to a product and to a process of making and/or using the product are presented in the same application and subject to a requirement for restriction, the applicant may request rejoinder of the non-elected process claims that depend from or otherwise require all the limitations of an allowable product claim. *See* MPEP § 821.04(b). Upon rejoinder of claims to a non-elected process invention, the requirement for restriction between the elected product and non-elected process invention is withdrawn. Thus, the rejoinder of non-elected process claims after allowance of the elected product claims may result in a prior or subsequently filed

''divisional'' application not being a proper divisional application under §§ 1.78(a)(2) and 1.78(d)(1)(ii) because the prior-filed application is no longer subject to a requirement for restriction. Applicant may avoid this problem by canceling the non-elected process claims and claiming them in a divisional application before rejoinder occurs. In such a situation, because the non-elected claims have been cancelled, the restriction requirement cannot be withdrawn. This will preserve applicant's rights under 35 U.S.C. 121 and § 1.78(d)(1)(ii).

If the applicant chooses to retain the non-elected claims and files a divisional application claiming the non-elected invention and then the restriction requirement is withdrawn in the prior-filed application, the benefit claim under § 1.78(d)(1)(ii) in the later-filed divisional application would no longer be proper. Thus, the later-filed application would not be entitled to the benefit of the prior-filed application. If applicant still desires to maintain the later-filed application, applicant must delete or correct the benefit claim to indicate that the application is a continuation application if the requirements set forth in § 1.78(d)(1)(i) can be met. If applicant no longer wants to maintain the later-filed application, applicant may abandon the application before the examination has been made of the application and may request a refund of any previously paid search and excess claims fees.

Comment 12: A number of comments suggested that limiting continuation-in-part applications was unnecessary. The comments explained that concerns associated with continually reopening prosecution do not apply to continuation-in-part applications, which are usually filed as a result of the inventor having developed a significant improvement in the invention. One comment stated that limiting continuation-in-part applications will not reduce application filings, but rather will simply cause applicants to file the application as a new application without a benefit claim because the claims of the continuation-in-part application are usually directed to the new subject matter and thus not entitled to benefit of the parent filing date. Several comments suggested that continuation-in-part applications are necessary for adequate protection of improvements to the invention and that these improvements often become the key feature of an invention that leads to its success. One comment, however, suggested that continuation-in-part practice be terminated, because with the twenty-year patent term, there is no benefit to applicant or to the Office associated with continuing this practice.

Response: Inconsistent rules for continuation applications and continuation-in-part applications would likely lead to confusion and create the potential for abuse. First, there is no reason to treat continuation applications different from continuation-in-part applications where both fall under § 1.78 and are contemplated by 35 U.S.C. 120. Second, there is no reason why the Office should maintain the ability to file an unlimited string of continuation-in-part applications without justification while proceeding with a change to § 1.78 to require a justification for any third or subsequent continuation application. Third, if applicants could file continuation-in-part applications without restriction, then they could be used as a tool to circumvent this final rule. Thus, the Office considers it appropriate to require a justification for any third or subsequent continuing application that is a continuation application or a continuation-in-part application.

The changes in this final rule do not impact applicants' ability to protect improvements to the invention disclosed in a prior-filed application. Section 1.78(d)(1)(i) allows an applicant to file two continuation-in-part applications of a prior-filed application without a petition and showing. Applicant may also file any third or subsequent continuation-in-part application with a petition and showing. Hence, applicants have ample opportunity to seek protection for improvements.

Furthermore, for the continuation-in-part application to actually receive the benefit of the filing date of the prior-filed application, 35 U.S.C. 120 requires that the subject matter of at least one claim of the continuation-in-part application must be disclosed in the prior-filed application in the manner provided by 35 U.S.C. 112, ¶ 1. *See Studiengesellschaft Kohle m.b.H*, 112 F.3d at 1564–65, 42 U.S.P.Q.2d at 1677–78. The term of any patent resulting from the continuation-in-part application will be measured under 35 U.S.C. 154(a)(2) from the filing date of the prior-filed application, even if the continuation-in-part application never receives any benefit from the prior-filed application. *See Abbott Labs.*, 104 F.3d at 1309, 41 U.S.P.Q.2d at 1537. To maximize the term of any resulting patent, applicant should file the application containing only claims directed to the improvements without claiming the benefit of the prior-filed application rather than a continuation-in-part application.

Comment 13: Several comments suggested that, if the prior-filed application is abandoned in favor of a continuation-in-part application before examination of the prior-filed application, or is filed within a short time of the prior-filed application, the limits on continuing applications should not include such continuation-in-part applications. Several comments explained that in rapidly advancing sciences, continuation-in-part applications are often filed while abandoning the prior application in the chain before an examination of the merits. Thus, a continuation-in-part application is often the first in a series to be examined as an initial application. At a minimum, the rules should be modified to exclude from counting prior-filed applications that are abandoned before issuance of a first action on the merits.

Response: Section 1.78(d)(1)(v) as adopted in this final rule addresses the situation in which an applicant files a continuation (or continuation-in-part) application to correct informalities rather than completing an application for examination under § 1.53. Under § 1.78(d)(1)(v), if the prior-filed application is abandoned due to the failure to timely reply to an Office notice issued under § 1.53(f)), the applicant may file ''one more'' continuation application (or continuation-in-part application) without there being a requirement for a petition and showing under § 1.78(d)(1)(vi). Specifically, § 1.78(d)(1)(v) provides that a continuation application or continuation-in-part application is permitted if the following conditions are met: (1) The application claims benefit under 35 U.S.C. 120 or 365(c) of a prior-filed nonprovisional application filed under 35 U.S.C. 111(a), and the prior-filed nonprovisional application became abandoned due to the failure to timely reply to an Office notice issued under § 1.53(f) and does not claim the benefit of any other nonprovisional application or international application designating the United States of America; (2) the application is a continuation application as defined in § 1.78(a)(3) or a continuation-in-part application as defined in § 1.78(a)(4) that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of no more than three prior-filed applications; and (3) any application whose benefit is claimed under 35 U.S.C. 120, 121, or 365(c) in such nonprovisional application has its benefit claimed in no more than two other nonprovisional applications. This does not include any divisional

application that satisfies the conditions set forth in § 1.78(d)(1)(ii) or continuation application that claims the benefit of such divisional application and satisfies the conditions set forth in § 1.78(d)(1)(iii).

For example, applicant may file a third continuation (or continuation-in-part) application claiming the benefit of an intervening (second) continuation (or continuation-in-part) application, a first continuation (or continuation-in-part) application, and a prior-filed application without a petition under § 1.78(d)(1)(vi), if the prior-filed application became abandoned due to the failure to timely reply to a Notice to File Missing Parts mailed by the Office of Initial Patent Examination and does not claim the benefit of any other application. The prior-filed application, however, must be entitled to a filing date and have paid therein the basic filing fee within the pendency of the application. *See* § 1.78(d)(2).

Comment 14: One comment suggested that the rule changes encourage applicants to file two applications, *i.e.*, a continuation-in-part application and a divisional application, rather than a single continuation-in-part application, where the non-elected invention is further developed. The comment stated that this is inefficient for both the Office and applicants.

Response: The Office appreciates that the changes being adopted in this final rule do provide some incentive for applicants who seek only to maximize the number of continuing applications and requests for continued examination permitted without any justification to file both a continuation-in-part application and a divisional application in this situation. However, applicants seeking to maximize the number of continued examination filings are not likely to file only a single continuation-in-part application in this situation under either the former practice or the change to continuing application practice being adopted in this final rule. Furthermore, this final rule permits applicant to file two continuation or continuation-in-part applications plus one request for continued examination in an application family, without any justification. And, this final rule permits applicant to file two continuation applications plus one request for continued examination in the divisional application family, without any justification.

Comment 15: One comment suggested that continuation-in-part applications are an important tool for correcting errors in the initial application (*e.g.*, correction of test data) and this should be encouraged, rather than discouraged.

Response: The Office is neither encouraging nor discouraging the filing of continuation-in-part applications. Rather, this final rule treats continuation-in-part applications roughly the same as continuation applications. That is, applicant is permitted to file two continuation or continuation-in-part applications of an initial application without a petition and showing. Applicant is also permitted to file a third or subsequent continuation or continuation-in-part application with a petition and showing. *See* § 1.78(d)(1)(i). The only notable difference between the two, apart from their definitions, is that an applicant may file only a continuation application of a divisional application and not a continuation-in-part application of a divisional application. *See* § 1.78(d)(1)(iii). Nevertheless, applicants may use continuation-in-part applications to correct initial applications under this final rule to the extent they were used for this purpose before this final rule. Furthermore, as previously discussed, § 1.78(d)(1)(v) as adopted in this final rule provides that if an applicant files a continuation (or continuation-in-part) application to correct informalities rather than completing an application for examination under § 1.53, the applicant may file ''one more'' continuation application (or continuation-in-part application) without there being a requirement for a petition and showing under § 1.78(d)(1)(vi). *See* § 1.78(d)(1)(v).

Comment 16: One comment suggested that the Office should require applicants to certify that no 35 U.S.C. 102(b) bar applies for continuation-in-part applications filed more than twelve months from the earliest claimed date.

Response: Under § 1.56, applicant has a duty to disclose to the Office all information known to applicant to be material to patentability including any prior art under 35 U.S.C. 102(b). This includes a reference with a publication date more than one year prior to the filing date of the continuation-in-part application if at least one claim in the continuation-in-part application is drawn to the subject matter not disclosed in the prior-filed application. Applicant is required to file a newly executed oath or declaration under § 1.63 upon the filing of a continuation-in-part application. *See* § 1.63(e). The oath or declaration under § 1.63 must include a statement that the person making the oath or declaration acknowledges the duty to disclose to the Office all information known to the person to be material to patentability as defined in § 1.56. *See* § 1.63(b)(3).

Comment 17: One comment argued that requiring applicant to identify whether the claims are supported by the specification before the examination is unfair and unreasonable because it is a legal issue that should be determined during the prosecution. Another comment suggested that the Office should, at most, require applicant to identify the differences between the continuation-in-part application and the prior-filed application. Another comment suggested that when a continuation-in-part application is filed, the Office should require the applicant to discuss whether the new matter added to the specification is inventive or based on ordinary skill. One comment, however, supported the requirement for a continuation-in-part applicant to identify which claims are disclosed in the prior-filed application and thus are entitled to the earlier filing date.

Response: Applicants are in the best position to identify the effective filing date of their claims. Thus, § 1.78(d)(3) provides that if an application is identified as a continuation-in-part application, the applicant must identify the claim or claims for which the subject matter is disclosed in the manner provided by 35 U.S.C. 112, ¶ 1, in the prior-filed application. Any claim that is not so identified will be treated as only being entitled to the actual filing date of the continuation-in-part application, and subjected to prior art based on the actual filing date of the continuation-in-part application.

Whether any ''new matter'' is inventive or based on ordinary skill is not determinative of whether the claims of the continuation-in-part application are entitled to the filing date of the prior-filed application. The test is whether the original disclosure of the prior-filed application provides adequate support and enablement for the claimed subject matter of the continuation-in-part application in compliance with the requirement of 35 U.S.C. 112, ¶ 1. *See* MPEP § 201.11, I, Disclosure Requirement.

Comment 18: A number of comments suggested that the rule changes effectively eliminate the use of ''bypass'' continuing applications (*i.e.*, an application filed under 35 U.S.C. 111(a) that claims benefit under 35 U.S.C. 120 or 365(c) of the filing date of an earlier international application that did not enter the national stage under 35 U.S.C. 371). The comments argued that a bypass continuing application would be counted as a continuing application whereas a national stage submission under 35 U.S.C. 371 would not. The comments indicated that there are

important reasons for filing bypass applications and suggested that it is unfair to treat bypass applications differently than national stage applications because in both applications the examiner will be examining the claims for compliance with U.S. national law for the first time. Consequently, a number of comments recommended that the international application should not be counted toward the threshold for filing continuing applications unless the international application enters the U.S. national stage, while other comments recommended that the bypass application should not be counted.

Response: The Office notes the concerns expressed in the public comment regarding the proposed changes to § 1.78(d)(1). The Office has modified proposed § 1.78(d)(1) in this final rule to provide for certain ''bypass'' continuing applications. Under § 1.78(d)(1)(iv), if a Demand has not been filed and the basic national fee has not been paid in the international application, and the international application does not claim the benefit of any other nonprovisional application or international application designating the United States of America, the applicant may file ''one more'' continuation application (or continuation-in-part application) of such international application without there being a requirement for a petition and showing under § 1.78(d)(1)(vi). Specifically, § 1.78(d)(1)(iv) provides that a continuation application or continuation-in-part application is permitted if the following conditions are met: (1) The application claims benefit under 35 U.S.C. 120 or 365(c) of a prior-filed international application designating the United States of America, and a Demand has not been filed and the basic national fee (§ 1.492(a)) has not been paid in the prior-filed international application and the prior-filed international application does not claim the benefit of any other nonprovisional application or international application designating the United States of America; (2) the application is either a continuation application as defined in § 1.78(a)(3) or a continuation-in-part application as defined in § 1.78(a)(4) that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of no more than three (rather than two) prior-filed applications; and (3) any application whose benefit is claimed under 35 U.S.C. 120, 121, or 365(c) in such nonprovisional application has its benefit claimed in no more than two (rather than one) other nonprovisional applications. This does not include any divisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii) or continuation application that claims the benefit of such divisional application and satisfies the conditions set forth in § 1.78(d)(1)(iii).

For example, applicant may file a third continuation application claiming the benefit of an intervening (second) continuation (or continuation-in-part) application, the first ''bypass'' continuation (or continuation-in-part) application, and the prior-filed international application without a petition under § 1.78(d)(1)(vi), if a Demand has not been filed and the basic national fee has not been paid in the international application, and the international application does not claim the benefit of any other nonprovisional application or international application designating the United States of America.

Comment 19: Several comments questioned whether an international application that designates the United States of America and claims benefit to a prior nonprovisional application would be treated as a second continuation application upon entry into the U.S. national stage if a request for continued examination is filed in the nonprovisional application prior to entering the national stage. Another comment questioned whether a request for continued examination could be filed in a nonprovisional application if a U.S. national stage application claims benefit under 35 U.S.C. 120 or 365(c) to the nonprovisional application. Several comments suggested that if an international application designating the United States of America claims benefit to a prior-filed nonprovisional application, and a request for continued examination is filed in the nonprovisional application, then a petition under § 1.78(d)(1)(vi) would be required, in violation of PCT Rule 51*bis,* in order to perfect entry of the international application into the U.S. national stage. The comments also suggested that any refusal to grant such a petition would violate the PCT because there is no basis in the treaty for refusing national stage perfection on such grounds.

Response: The Office notes the concerns expressed in the public comment regarding the proposed changes to §§ 1.78(d)(1) and 1.114 that would permit an applicant to file only one of the following: A continuation application, a continuation-in-part application, or a request for continued examination, without any justification. The Office has made modifications to these proposed changes such that this final rule permits an applicant to file two continuation applications or continuation-in-part applications, plus a single request for continued examination in an application family, without any justification. Therefore, under this final rule, applicant is permitted to have the national stage of an international application designating the United States of America claim the benefit of a prior-filed nonprovisional application in which a request for continued examination has been filed without a petition and showing. The provisions of § 1.78(d)(1) are independent of the provisions of § 1.114. The filing of a request for continued examination in a nonprovisional application does not preclude a U.S. national stage application from claiming the benefit of the nonprovisional application. Likewise, a U.S. national stage application claiming the benefit under 35 U.S.C. 120 or 365(c) of a nonprovisional application will not preclude an applicant from filing a request for continued examination in the nonprovisional application.

Applicant may also file any additional continuation or continuation-in-part application or request for continued examination with a petition and showing. If an international application that enters the U.S. national stage contains or is amended to contain a specific reference to a prior-filed application that is not permitted by at least one of §§ 1.78(d)(1)(i) through (d)(1)(vi), the Office will refuse to enter, or will delete if present, the specific reference to the prior-filed application. *See* § 1.78(d)(1). Furthermore, the national stage application will be treated as entitled only to the actual international filing date of the national stage application, and will be subject to prior art based on the actual international filing date.

Refusal to grant a petition under § 1.78(d)(1)(vi) (assuming such a petition is necessary) would not prevent an applicant from completing the requirements for entry into the national phase under 35 U.S.C. 371. The requirements for entry of an international application into the national phase under 35 U.S.C. 371 are set forth in 35 U.S.C. 371(c) and § 1.495. The effect of a refusal to grant any such petition would only be that the national stage application would not be entitled to the benefit of the filing date of the nonprovisional application under 35 U.S.C. 120 and 365(c). Furthermore, the necessity to file a petition under § 1.78(d)(1)(vi) in the national stage application to obtain benefit to the nonprovisional application would not

violate PCT Rule 51*bis*. PCT Rule 51*bis* does not govern the requirements that a designated Office may impose for recognition of domestic benefit claims. Rather, the ability of a designated Office to establish conditions for, and the effect of, domestic benefit claims is expressly provided for in PCT Article 8(2). PCT Article 8(2) states, in pertinent part, that ''[w]here, in the international application, the priority of one or more national applications filed in or for a designated State is claimed, or where the priority of an international application having designated only one State is claimed, the conditions for, and the effect of, the priority claim in that State shall be governed by the national law of that State.''

Comment 20: Several comments suggested that the rules create an anomaly. The comments argued that if an application is first filed as a nonprovisional application followed by an international application claiming benefit to the nonprovisional application, and a request for continued examination is subsequently filed in the nonprovisional application, then a petition under § 1.78(d)(1)(vi) would be needed when the international application enters the U.S. national phase. The comments, however, further argued that if the application is first filed as a provisional application followed by, one year later, concurrently filed international and nonprovisional applications both claiming benefit to the provisional application, then a petition under § 1.78(d)(1)(vi) would not be needed when the international application enters the U.S. national phase even if a request for continued examination was filed in the nonprovisional application.

Response: The Office has made modifications to the proposed changes to §§ 1.78(d)(1) and 1.114 such that this final rule permits an applicant to file two continuation applications or continuation-in-part applications, plus a single request for continued examination in an application family, without any justification. Therefore, under this final rule, applicant may enter the U.S. national stage in an international application designating the United States of America claiming the benefit of a prior-filed nonprovisional application in which a request for continued examination has been filed without a petition and showing. As discussed previously, the provisions of § 1.78(d)(1) are independent of the provisions of § 1.114. The filing of a request for continued examination in a nonprovisional application does not preclude a U.S. national stage application from claiming the benefit of the nonprovisional application.

Note that, in the first described application chain, the international application claims benefit to a nonprovisional application under 35 U.S.C. 120 or 365(c) and therefore is a ''continuing application'' as defined in § 1.78(a). In the second described application chain, the international application is not a continuing application as it only claims benefit to the provisional application. In any event, § 1.78(d)(1) as adopted in this final rule would not require a petition and showing for the national stage application to claim the benefit of a prior-filed application in which a request for continued examination has been filed.

Comment 21: One comment argued that applicants who first file a nonprovisional application followed by a continuation-in-part application would not be able to designate the United States in any subsequently filed international application without a showing as to why the international application could not have been filed earlier. The comment argued that this violates the PCT.

Response: The Office has made modifications to the proposed changes to § 1.78(d)(1) such that this final rule permits an applicant to file two continuation applications or continuation-in-part applications, plus a single request for continued examination in an application family, without any justification. Therefore, under this final rule, applicant may file an international application designating the United States of America claiming the benefit of two prior-filed nonprovisional applications without a petition and showing. Applicant may also file any additional continuation or continuation-in-part application or request for continued examination with a petition and showing. The petition procedure under § 1.78(d)(1)(vi) applies only to international applications that have entered the U.S. national stage after compliance with 35 U.S.C. 371. Thus, the rule neither requires nor provides for the submission of such petitions in international applications during the international phase. It is also noted that under PCT Rule 4.9, the designation of all states, including the United States of America, in international applications is automatic upon filing of the PCT request.

Comment 22: Several comments questioned whether the limitation on the examination of claims in nonprovisional applications under § 1.75(b) could be circumvented by first filing an international application with as many claims as desired and then entering the U.S. national phase after the claims have been searched in the international phase. The comments suggested that the Office should examine all claims in a national stage application that were the subject of a search and written opinion in the international phase, particularly if the United States Patent and Trademark Office was the international searching authority.

Response: The requirements of § 1.75(b) apply to national stage applications under 35 U.S.C. 371 as well as to applications filed under 35 U.S.C. 111(a). Thus, the rule cannot be circumvented by utilizing the PCT route. The fact that more than five independent claims or more than twenty-five total claims may have been searched and even subjected to international preliminary examination in the international phase will not entitle applicants to more than five independent claims or more than twenty-five total claims in the U.S. national phase application without the submission of an examination support document. This is analogous to existing practice under § 1.499, which permits restriction of claims in a national stage application for lack of unity notwithstanding that such claims may have been searched and subject to international preliminary examination in the international phase. Applying § 1.75(b) to national stage applications is appropriate because prior art uncovered during the international search often necessitates the need to make substantial amendments to the claims in the national phase. Additionally, the claims would need to be examined for compliance with all substantive requirements of U.S. national law.

Comment 23: One comment suggested that the rules limiting continuing applications would result in more applicants filing international applications and entering the U.S. national stage in order to avoid onerous restriction requirements. Another comment suggested that the rules limiting the examination of claims might trigger increased usage of the PCT and national stage entry into the U.S.

Response: Applicants are free to choose whichever route they believe is more advantageous for obtaining patent protection in the United States, whether through the PCT or through a direct national filing under 35 U.S.C. 111(a).

Comment 24: A number of comments requested that the Office should notify the applicant in an Office action when a continuing application is not available under any one of the first three conditions in § 1.78(d)(1). A number of

comments stated that the refusal to enter or to delete any references to prior-filed applications that are not permitted under § 1.78(d)(1) would place a heavy burden on the Office.

Response: The changes to §§ 1.78 and 1.114 in this final rule are clearly set forth in this final rule. Applicant and his or her representative have the duty to know the rules of practice when prosecuting an application for patent before the Office. Applicant should not file a continuing application without knowing whether it is proper. The refusal to enter or to delete any references to prior-filed applications that are not permitted under § 1.78(d)(1) would not place any additional burden on the Office.

Comment 25: A number of comments argued that the rule changes would protract the examination process and divert resources from examining functions to administrative tasks. In particular, the comments predicted that the rule changes would increase the number of petitions, including petitions for filing additional continuing applications and requests for continued examination and petitions for supervisory review of Office actions and restriction requirements. Several other comments argued that the delay in prosecution of an application would increase while decisions on petitions under §§ 1.78(d)(1)(vi) and 1.114(g) were debated and reviewed. Several comments questioned whether the Office would be adequately staffed with enough personnel to handle the onslaught of petitions, as well as further review of decisions dismissing the petitions. Several comments also argued that any reduction in backlog would be insignificant given that the Office would grant some of the petitions for additional continuing applications and requests for continued examination. Several comments suggested that the proposed changes to the continued examination practice will force applicants to petition every improper procedural requirement by examiners, including restriction requirements, finality and non-entry of after-final amendments, in order to preserve applicant's rights. One comment stated that applicants are likely to file petitions, such as petitions addressing the prematureness of a final rejection under § 1.181, to save their one ''as-matter-of-right'' continuation or continuation-in-part application or request for continued examination. Several comments stated that applicants would petition almost all restriction requirements, resulting in an increase in the number of petitions filed. Another comment stated petitions seeking review of restriction requirements would be filed in order to determine early in the prosecution cycle the number of divisional applications that must be filed to preserve patent rights.

Response: One of the Office's goals is to focus its limited patent examining resources on the examination of new applications, and thereby increase the effectiveness of Office resources while also reducing the backlog of unexamined patent applications. The requirements for seeking third and subsequent continuing applications will not have an effect on the vast majority of patent applications. The changes being adopted in this final rule, however, will reduce the strain on the Office's patent examining resources, which will allow for a better, more timely examination of new applications.

The Office recognizes the amount and type of resources needed to implement the changes to §§ 1.78 and 1.114 being adopted in this final rule. The authority to decide petitions under §§ 1.78(d)(1)(vi) and 1.114(g) has been delegated to the Deputy Commissioner for Patent Examination Policy (who may further delegate this authority to officials under the Deputy Commissioner for Patent Examination Policy). The Office is planning to provide sufficient staff to handle the projected number of petitions.

The Office provides the procedure under § 1.181 for applicants to seek review of requirements and objections made by the examiner. If applicant finds that a requirement or an objection made in an Office action is procedurally wrong, applicant should request reconsideration or file a petition under § 1.181 to review the requirement or objection. As an example, when applicant challenges the finality of an Office action as being premature, the applicant should focus on whether the Office action met the appropriate standard for finality. The Office will make every effort to decide the petitions in a timely manner. Applicant, however, should not file a continuing application or a request for continued examination in an effort to address improper procedural requirements. Petitions for supervisory review of Office actions and restriction requirements will continue to be decided by supervisory patent examiners or other managers. Therefore, examiners will not be diverted from the examination process by these petitions. Finally, it should be noted that complaints about an Office action that relate to the merits of patentability of the claims must be addressed in an appeal to the BPAI, and not in a petition under § 1.181 for supervisory review, even if the issues may be phrased in procedural terms. *See Boundy* v. *U.S. Pat. & Trademark Office,* 73 U.S.P.Q. 2d 1468, 1472 (E.D. Va. 2004).

Comment 26: Several comments stated that any resources saved via implementation of these final rules would be used for other filings necessitated by the changes. Thus the rule changes, according to the comments, would increase the backlog and pendency and add to the administrative cost and burdens of the Office. In particular, a number of comments predicted that the number of applications would increase because applicants would file more of the following: (1) Provisional applications; (2) continuation applications rather than requests for continued examination; (3) reissue applications to perfect or broaden claims; (4) reexamination proceedings to have prior art considered; (5) divisional applications (because applicants are required to file all divisional applications during the pendency of the first application); (6) multiple parallel applications that have similar or the same disclosures; and (7) continuing applications before the effective date.

Response: The Office notes the concerns expressed in the public comment and has attempted to avoid the possibility of increased filings necessitated by modifying the proposed changes. The Office has made modifications to the proposed changes to §§ 1.78(d)(1) and 1.114 such that this final rule permits an applicant to file two continuation applications or continuation-in-part applications, plus a single request for continued examination in an application family, without any justification. Also, under this final rule, a divisional application need not be filed during the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. This final rule also permits applicant to file two continuation applications of a divisional application plus a request for continued examination in the divisional application family, without any justification. Therefore, the Office does not expect any significant increase in filings of applications. Specifically, the Office does not expect that the number of divisional applications would increase in response to the changes being adopted in this final rule because applicants should have sufficient time to determine whether to file a divisional application for a non-elected invention following a restriction requirement. Furthermore, an increase in filings of provisional applications will not place additional burden on the Office's patent

examining resources because no examination is provided in provisional applications. The Office does not expect its examining resources to be impacted when applicants file continuation applications rather than requests for continued examination, or when applicants file reissue applications and reexamination proceedings rather than continuing applications.

The changes being adopted in this final rule do not encourage applicants to file multiple applications with patentably indistinct claims. Pursuant to § 1.78(f)(3), the Office may require elimination of the patentably indistinct claims from all but one of the nonprovisional applications. If the patentably indistinct claims are not eliminated from all but one of the applications, the Office will treat each application as having the total of all of the claims (whether in independent or dependent form) for purposes of determining whether an examination support document is required by § 1.75(b). *See* § 1.75(b)(4). Moreover, when an applicant (or assignee) files multiple applications with the same claimed filing or priority date, a common inventor, and substantial overlapping disclosures, the Office will presume that the applications contain patentably indistinct claims. *See* § 1.78(f)(2). The applicant must either rebut this presumption or submit the appropriate terminal disclaimers and explain why two or more pending applications containing patentably indistinct claims should be maintained. Once applicant recognizes that having multiple applications that contain patentably indistinct claims is not needed, applicant would abandon the applications or stop filing multiple applications that have patentably indistinct claims.

Comment 27: One comment stated that a requirement for Director's approval to file a second or subsequent continuing application or request for continued examination would create a disincentive for examiners to provide a thorough examination, leaving the burden on the applicant to prosecute the application.

Response: The Office modified the proposed provision that would have limited applicant to one continuation or continuation-in-part application or to one request for continued examination, without any justification. This final rule allows applicant to file two continuation or continuation-in-part applications plus a request for continued examination in an application family, without any justification. What is more, the Office expects that limiting the number of continuing applications and requests for continued examination that may be filed without justification will encourage both applicants and examiners to engage in a more thorough prosecution and examination earlier in the application process. Examiners are professionals who perform their duties in compliance with patent laws, rules of practice, and patent examining procedures set forth in the MPEP. They are responsible for the quality of their work product. There is no reason why examiners would provide lower quality examination in response to the changes in this final rule. In fact, this final rule is intended to improve the quality of examination by facilitating the examination of applications that contain more than five independent claims or twenty-five total claims via the examination support document.

Comment 28: A number of comments stated that the Office should treat continuing applications the same as new applications and should not limit the available protection because applicants who file continuing applications pay the same filing fees as those who file a new application. One comment argued that continuing applications should not be limited because they claim ''new inventions'' in that they pursue broader claims, a different invention, or an improvement, and the purpose of patents is to protect inventions, not to facilitate examination. One comment argued that continuation and continuation-in-part applications are legitimate because the statutes that create and authorize ''continuation practice'' do not distinguish such applications from ''new'' applications in terms of their importance, nor do they limit the resources that are committed to them.

Response: The former unrestricted continued examination practice was impairing the Office's ability to examine new applications. As a result, the Office is modifying continued examination practice in this final rule to address the backlog of unexamined new applications. Under this final rule, therefore, if the amendments, arguments, or evidence sought to be entered could have been previously submitted in the initial application, two continuing applications, and a request for continued examination, applicants are encouraged to make such submissions early rather than wait to do so in another continuing application or request for continued examination. That way, the examiner would have the information earlier to make the patentability determination. If applicant could not have submitted them earlier, applicant may file a third continuing application with a petition and showing under § 1.78(d)(1)(vi) or a second request for continued examination with a petition and showing under § 1.114(g).

Comment 29: A number of comments stated that the rule changes would not permit applicants to file even a single continuation or continuation-in-part application, when the applicant filed a request for continued examination in the initial application.

Response: The Office has made modifications to the proposed changes to §§ 1.78(d)(1) and 1.114 such that this final rule permits an applicant to file two continuation applications or continuation-in-part applications, plus a single request for continued examination in an application family, without any justification. Applicant may also file any additional continuation or continuation-in-part application or request for continued examination with a petition and showing as to why the amendment, argument, or evidence sought to be entered could not have been submitted earlier. The provisions of § 1.78(d)(1) are independent of the provisions of § 1.114. The filing of a request for continued examination in the initial application does not preclude applicant from filing a continuing application of the initial application.

Comment 30: Several comments objected to the Office's proposal that a petition under § 1.78 to accept an unintentionally delayed claim under 35 U.S.C. 120, 121, or 365(c) will not be granted in an application in which a request for continued examination has been filed. One comment argued that applicant would lose substantial rights if the Office dismisses a petition to accept an unintentionally delayed claim filed after a request for continued examination has been filed in the prior-filed application.

Response: The Office has made modifications to the proposed changes to §§ 1.78 and 1.114 such that the provisions of § 1.78(d) as adopted in this final rule are independent of the provisions of § 1.114. Thus, § 1.78(e) as adopted in this final rule does not provide that a petition to accept an unintentionally delayed claim under 35 U.S.C. 120, 121, or 365(c) will not be granted in an application in which a request for continued examination has been filed.

Comment 31: A number of comments stated that the rule changes would not permit applicants to consolidate two applications into a single continuation-in-part application, which is contrary to the goal of reducing the number of applications.

Response: The Office has made modifications to the proposed changes such that this final rule permits an applicant to file two continuation applications or continuation-in-part applications, plus a single request for continued examination in an application family, without any justification. Therefore, applicant is permitted to file a continuation-in-part application that claims the benefit of two prior-filed applications without a petition and showing under § 1.78(d)(1)(vi). If applicant thinks that a third or subsequent continuation-in-part application is necessary for consolidation purposes, then such applicant may file a petition and showing under § 1.78(d)(1)(vi) to obtain the additional filing.

Comment 32: Several comments argued that applicants need continuing applications and requests for continued examination because the reissue procedure does not give applicants the same flexibility.

Response: Continuing applications and requests for continued examination are not, by statute, available for the same purposes as reissue applications. Continuing applications and requests for continued examination are available to an applicant during the prosecution of an initial application to enable an applicant to secure protection on the full scope of an invention with the correct benefit claim. *See* 35 U.S.C. 120, 121, and 365(c). By contrast, the reissue procedure is available to an applicant after a patent has issued to permit an applicant to correct errors made during the prosecution of the original application without any deceptive intention and to enlarge the scope of the claims of the original patent if the reissue application is filed within two years from the grant of the original patent. *See* 35 U.S.C. 252. Furthermore, this final rule permits applicant to file two continuation or continuation-in-part applications plus one request for continued examination in an application family, without any justification. These available filings provide sufficient flexibility.

Comment 33: One comment suggested that the rule changes would be contrary to patent harmonization goals. One comment argued that the rule changes would hurt foreign applicants because they would be required to assess the degree of protection much earlier than they normally would, resulting in retaliatory challenges abroad for U.S. applicants.

Response: The Office did not receive any comments from any foreign patent office or authority. The Office does not expect any retaliation from other countries or any adverse impact. Many countries do not have flexible practices for filing continuation applications, continuation-in-part applications, and requests for continued examination.

Comment 34: A number of comments argued that the rule changes would increase the cost to applicants for prosecuting each application, and for filing more multiple parallel applications, divisional applications, appeals, and petitions under §§ 1.78 and 1.114. Several comments argued that the rule changes would cause applicants to incur excessive expenses before determining whether the invention is commercially viable. One comment argued that the Office would cause applicants to perform patent searches in order to have a good working knowledge of the prior art to draft claims for full coverage. One comment argued that the rule changes would increase practitioner fees because applicants must submit more carefully drafted claims and replies (estimated five additional hours per case for drafting all possible claims, at an average of 150 dollars per hour, the additional cost would be 750 dollars per application or 200 million dollars for 317,000 applications). One comment estimated that the attorney cost in preparing an application would at least double if not increase by a factor of ten, which would place new applications out of reach of small businesses. Several comments argued that it would be practically impossible or at least much more difficult, expensive and time-consuming to obtain patent protection for the full scope of inventions, especially for large, complex inventions. One comment argued that the rule changes are extremely burdensome for patent applicants and practitioners to maintain and develop a cohesive patent strategy. One comment stated that the rule changes were very complex and fraught with ambiguity and would create difficulties and misunderstandings for applicants and practitioners in the implementation, possibly resulting in the loss of inventors' rights and an increase in practitioners' exposure to malpractice.

Response: The Office encourages applicants to diligently prosecute the initial application, two continuation or continuation-in-part applications, and one request for continued examination, without a petition and showing, so that applicants do not need to file a petition and showing to secure a third or subsequent continuation or continuation-in-part application or a second or subsequent request for continued examination and incur the costs associated with these filings. The patent system best serves the interests of all parties, including the public, when applicants and their representatives are diligent in drafting the claims and replies. Applicant would get a quality patent with desirable claim coverage. The Office would not waste patent examining resources to examine applications that are not diligently prepared. Even prior to the changes being adopted in this final rule, applicants and their representatives had certain duties when prosecuting applications in front of the Office. Applicant is required to submit fully responsive replies to Office actions (*see* § 1.111) and to particularly point out and distinctly claim what the applicant regards as his or her invention (*see* 35 U.S.C. 112, ¶ 2). Furthermore, if applicant's lack of knowledge of the prior art (or lack of diligence) causes unnecessary delay or needless increase in the cost of prosecution before the Office, applicant would be violating § 10.18(b)(2)(i).

If applicants need more time to determine the aspect of the invention for which patent protection should be sought, applicant may file a request for deferred examination under § 1.103(d) upon filing the initial application. Applicant should have sufficient time to determine whether to file a divisional application for a non-elected invention because a divisional application is not required under this final rule to be filed during the pendency of the initial application, as long as the copendency requirement of 35 U.S.C. 120 is met. If applicant disagrees with the examiner's rejections, it would be more effective to appeal the rejections than to file a continuing application or a request for continued examination. It should not be burdensome for applicants and their representatives to prosecute diligently by drafting claims that particularly point out and distinctly claim the subject matter which the applicant regards as his or her invention, as well as replies that are fully responsive to the Office actions.

The requirements for seeking third and subsequent continuing applications in this final rule will not have an effect on the vast majority of patent applicants. Approximately 342,600 nonprovisional patent applications (excluding plant and design applications) were filed in the Office in fiscal year 2006. Of those applications, approximately 32,700 were identified as continuation applications, approximately 15,700 were identified as continuation-in-part applications, and approximately 20,600 were identified as divisional applications. In addition, approximately 74,700 requests for

continued examination were filed in the Office in fiscal year 2006. The requirements for seeking a third or subsequent continuation or continuation-in-part application or a second or subsequent request for continued examination would only have affected 2.7 percent of these filings (applications or requests for continued examination). As discussed previously, the changes being adopted in this final rule do not give any advantage to those applicants who file multiple parallel applications containing patentably indistinct claims. *See* §§ 1.75(b)(4) and 1.78(f).

Comment 35: One comment argued that the rule changes would encourage the courts to have a more liberal view on the doctrine of equivalents. Another comment argued that the rule changes limiting continuation practice takes away the right of the patentee to use continuing applications to secure patent protection for equivalents of the invention claimed in the prior-filed application, citing *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, 344 F.3d 1359, 68 U.S.P.Q.2d 1321 (Fed. Cir. 2003) (*Festo X*).

Response: The doctrine of equivalents is a patent law concept relating to infringement which protects patentees against efforts of copyists to evade liability for infringement by making only insubstantial changes to a patented invention. *See Festo Corp.* v. *Shoketsu Kinzodu Kogyo Kabushiki Co.*, 535 U.S. 722, 726–27, 62 U.S.P.Q.2d 1705, 1709 (2002) (*Festo VIII*). The case law on the doctrine of equivalents has been well established since *Warner-Jenkinson Co.* v. *Hilton Davis Chem. Co.*, 520 U.S. 17, 41 U.S.P.Q.2d 1865 (1997) and *Festo VIII*. A concurrence in *Festo X* noted that the demise of the flexible doctrine of equivalents ''rule'' may encourage applicants to (*inter alia*) use continuation strategies to avoid the lack of flexibility that now exists in the doctrine of equivalents. *See Festo X*, 344 F.3d at 1375, 68 U.S.P.Q.2d 1332. This concurrence in *Festo X*, however, was not espousing some ''right'' of the patentee to use continuing applications to maintain the doctrine of equivalents, but was simply noting that applicants now use continuing application practice as a substitute for a flexible doctrine of equivalents.

The Office is concerned that practitioners and applicants may indeed be increasingly using continuing applications not to advance prosecution but to compensate for changes in the law of the doctrine of equivalents. Such practices would appear to be likely to contravene § 10.18(b)(2)(i), under which a party presenting a paper to the Office is certifying that the paper is not being presented to cause unnecessary delay or needless increase in the cost of prosecution before the Office. Under *Festo X*, a narrowing amendment gives rise to a presumption that equivalents not covered by the literal language of the claims have been foregone. Permitting two continuing applications plus a request for continued examination in any one of the initial application or two continuing applications as of right should in general assure that applicants have an adequate chance to advocate to the examiners that an amendment is unneeded. Beyond that, the Office is concerned that applications may be continued, rather than disputes on the need for amendment being appealed, for the purpose of delay. A requirement that an applicant at that stage be prepared to justify his or her need for an additional continuing application is reasonable in these circumstances.

Comment 36: A number of comments suggested that the rule changes are arbitrary and capricious, premature, imprudent and ill-advised. A number of comments argued that the Office has no rational basis for the rule change, and has not provided sufficient explanations, data or evidence to justify the rule changes and to show that the rule changes will actually improve the backlog of applications, the quality of examinations, overall examination efficiency, quality of patents, and pendency. In addition, the comments asserted patents would be harder to enforce and litigate because all relevant prior art may not have been considered.

One comment stated that the Office does not have a pendency problem because the average pendency is within zero to three years. One comment argued that the Office provides no studies to show that businesses are being harmed due to delayed prosecution. One comment argued that reducing the backlog is not an appropriate reason for limiting the number of continuing applications and requests for continued examination as a matter of right. Several comments argued that the Office has not identified continuation applications as a major source of the backlog, and therefore, the rule changes would have limited impact on the backlog. One comment pointed out that second and subsequent continued examination filings make up only a small percentage of the total number of continued examination filings. Several comments alleged that the Office's statistics are misleading and the rule changes would only eliminate at most five to ten percent of the continuation applications because the Office should not have included ''involuntary'' divisional applications and requests for continued examination. One comment argued that the Office provided no statistical data showing the percentage of applicants that ''misuse'' the continued examination practice as alleged. One comment also suggested that although the Continuing Applications Proposed Rule cites to data regarding the total number of continuations and the consequential burdens imposed on examiners, no analysis is provided as to the grounds for filing these applications and whether those grounds constituted ''abuse.''

Several comments argued that there is no indication that the Office has conducted any serious analysis of how or why requests for continued examination and continuation applications are used by applicants. The comments suggested the following: A suitable analysis would involve review of prosecution histories of patents that were issued from a continuation application or a request for continued examination and determination of whether such patents could have issued if the rule changes were in place; and if such patents would not have issued, the Office should explain how such a loss of rights is consistent with the goals of the patent system. A number of comments asserted that the rule changes should be narrowly tailored to only those few applicants who intentionally delay the conclusion of examination rather than adversely impacting all applicants. A number of comments suggested that the Office should conduct a pilot program on the changes and report the results to the public prior to implementing the rule changes.

Several comments further argued that the Office has not identified any study showing that restricting applicants to a single continued examination opportunity would satisfactorily address its problems without causing substantial harm to the protection of innovation or the patent examining process. Several comments alleged that the Office has not sufficiently considered the effect of the rule changes on U.S. applicants and the U.S. economy and suggested that further study is needed because the ability to file multiple continuing applications helps U.S. applicants to protect their inventions against foreign competitors and the rule changes would cause further outsourcing of American manufacturing and loss of American jobs.

Several comments, however, supported the rule changes. The comments provided the following reasons why the rule changes would be appropriate: (1) They would improve

the Office's productivity, enhance patent quality, and eliminate growing abuses in the patent prosecution process, which would accelerate innovation, especially in the software and hardware technologies that have fast technology evolution and short product life cycle; (2) the rule changes would help the Office reduce backlog and pendency because they would reduce the ancillary loads on the examination process so that examiners can focus on important core issues, and the Office could focus its limited examining resources on faster examination of new applications; (3) the rule changes appropriately address those few applicants who disproportionately contribute to the backlog and provide applicants with the ability to file appropriate continued examination filings and multiple opportunities to present claims and arguments; (4) applicant may correct appropriate mistakes (including by broadening claims) through the reissue process; (5) by eliminating long chains of continued examination filings, the rule changes would provide earlier and greater legal certainty as to the scope of patent rights, reduce wasteful litigation, and encourage negotiations between patent holders and others; (6) the rule changes would likely promote confidence in U.S. patents, stimulate innovation, enhance competition, and increase consumer welfare; and (7) the rule changes would help to deter applicants from strategically using the continued examination practice to disadvantage competitors and their licensees, and would prevent applicants from keeping continuation applications pending for extended periods of time so that they can monitor the development of the market and modify their claims to cover their competitors' products.

Response: In fiscal year 2006, the average pendency to first Office action was 22.6 months for the entire Patent Examining Corps. The average was much higher in certain areas (*e.g.*, in Technology Center 2100 (computer architecture, software and information security) the average pendency to first Office action was 30.8 months, and in Technology Centers 3620 and 3690 (electronic commerce) the average pendency to first Office action was 43.9 months). As several comments noted, long pendency of patent applications is problematic in some industries (*e.g.*, computer software and hardware technologies) where product life cycles are short and new improvements can quickly make the technology obsolete. The Office has the authority and responsibility to establish regulations that shall govern the conduct of proceedings in the Office and facilitate and expedite the processing of patent applications. *See* 35 U.S.C. 2(b)(2). The Office has the responsibility to take appropriate action to improve efficiency, patent quality and pendency. The Office does not expect that the changes being adopted in this final rule alone will be sufficient to address the growing backlog of unexamined patent applications. The Office is implementing many initiatives to improve efficiency in the examination process and quality of patents.

Continued examination filings divert the Office's limited examining resources from the examination of new applications. One of the Office's goals is to focus the limited examining resources on the examination of new applications. The rules do not place an absolute limit on the number of continued examination filings. The Office recognizes there are appropriate reasons for applicant to file a continuing application or request for continued examination. Under this final rule, applicant is permitted to file the initial application, two continuing applications, and a request for continued examination in an application family, without any justification. Thus, applicant has sufficient opportunities to present claims, amendments, arguments, evidence, and prior art during the prosecution of the initial application, two continuing applications, and a request for continued examination. An applicant who considers this to be insufficient may file a third or subsequent continuing application or second or subsequent request for continued examination with a petition and showing as to why the amendment, argument, or evidence sought to be entered could not have been previously submitted. If the amendment, argument, or evidence can be submitted earlier in the prosecution process, applicant is required to do so, rather than delay the prosecution and waste the Office's patent examining resources on a prosecution that is not focused. The examination process is more efficient when the applicant diligently prosecutes the application so that the examiner has all of the relevant information, including amendments, evidence, arguments, and prior art as early as possible. Most applicants who prosecute diligently will not need to file a third or subsequent continuing application. Reviewing the prosecution histories of patents, conducting pilot programs, publishing green papers, *etc.*, would not show all of the reasons why applicants would file multiple continued examination filings. Applicants could have different reasons for filing continuation applications, continuation-in-part applications and requests for continued examination. The rules appropriately provide applicant the opportunity to show why a third or subsequent continuing application or second or subsequent request for continued examination is needed. The comments do not provide any persuasive data or evidence that shows how the rule changes, or any restrictions on the continued examination filing practice, would have a negative impact on the quality of patents, the U.S. economy, or innovation.

As discussed previously, approximately 342,600 nonprovisional patent applications (excluding plant and design applications) and approximately 74,700 requests for continued examination were filed in the Office in fiscal year 2006. The requirements for seeking a third or subsequent continuation or continuation-in-part application or a second or subsequent request for continued examination would only have affected 2.7 percent of these filings (applications or requests for continued examination). The Office did not include divisional applications in this analysis. The Office included requests for continued examination because when an applicant files a request for continued examination, the examiner reopens the prosecution of the application and conducts another substantive examination similar to a continuation application.

Comment 37: Several comments argued that the amount of resources spent on additional continuing applications or requests for continued examination is not as high as asserted because continuation applications and requests for continued examination take less of the examiner's time than new applications since the examiner is already familiar with the prior art, issues, and subject matter of the application.

Response: The Office expects that limiting the number of continuing applications and requests for continued examination that may be filed without justification will encourage both applicants and examiners to focus on ''getting it right the first time.'' In any event, examiners are given the same amount of time to examine a continuing application or request for continued examination as a new application. Certain continuing applications and requests for continued examination could have more complex issues than a new application, such as evaluating new evidence in a biotechnology application.

Any reduction in the number of continuing applications and requests for continued examination would increase the Office's ability to focus its patent examining resources on the examination of new applications.

Comment 38: Several comments asserted that the premise that expedited examination is more important than protection of inventor's rights is faulty.

Response: The Office did not state such a premise. Applicants may seek full protection of their inventions under this final rule, which does not place any absolute limits on the number of continuing applications and requests for continued examination. Limiting the number of continuing applications and requests for continued examination that may be submitted without justification is not counter to the protection of an inventor's rights.

Comment 39: Several comments predicted that the rule changes would decrease the Office's revenue due to the decrease in continuing applications and requests for continued examination.

Response: The Office's goal is to utilize its patent examining resources more efficiently to reduce backlog and improve pendency. In exchange for greater efficiency, the Office expects there would be some decrease in revenue as the number of continued examination filings declines, as the comment indicates. But, this final rule is not being implemented with a view toward revenue; instead, it is being implemented to improve the patent examination process.

Comment 40: A number of comments argued that there is no public notice problem. The comments argued that most applications (ninety percent) are published, the prosecution of the published applications is open to the public, and competitors are already able to analyze a file history to determine the broadest range of claim protection that may be granted in a patent of a continuing application. Several comments suggested that members of the public could prevent infringement by identifying the novel inventions in the disclosure and avoiding those inventions in their practices. Several comments, however, noted that publication of applications is not sufficient to provide public notice of what the patentee will ultimately claim because a patent may eventually issue with broader or significantly different claims than those published and any delays at the Office will perpetuate uncertainty as to the scope of the eventual patent.

Response: The Office agrees that the publication of an application is not sufficient notice of the scope of protection afforded by an eventual patent because the claims have not been determined to be patentable at the time of publication. Asking the public to determine the broadest range of claim protection and to prevent infringement based on the publication of an application would defeat the purposes of patent examination and 35 U.S.C. 112, ¶ 2. The patent claims provide the public with notice of the patent protection, not the disclosure of an application.

Comment 41: A number of comments stated that the current patent law already contains its own solution to the problem of long chains of continuing applications. The comments argued that filing and maintenance fees and the twenty-year patent term provision discourage applicants from filing continuing applications. Several comments argued that the Office is acting prematurely because the recent changes (*e.g.*, the Office electronic filing system, the increase in hiring and fees, court decisions on doctrine of equivalents, the twenty-year patent term provisions, and publication of applications) should be sufficient to reduce the backlog and improve public notice. A number of comments alleged that the doctrine of prosecution laches is sufficient to address abuses. One comment argued that the Office should not be concerned with enforcement issues and the problem with public notice should not be a reason for the rule changes. Several comments argued that the Office's concern over public notice is misplaced because the notice function of claims is limited to published or patented claims and it does not extend to any future claims that might arise. Several comments, however, noted that even with the twenty-year patent term provisions, unrestricted continued examination practice still gives applicants incentives to keep continuing applications pending after the issuance of a patent so that the applicants can monitor the industry development and capture other companies' products by changing the scope of the claims in the continuing applications.

Response: The percentage of continued examination filings did not decrease after the implementation of the twenty-year patent term provision of the Uruguay Round Agreement Act (Pub. L. 103–465, 108 Stat. 4809 (1994)). Thus, the twenty-year patent term provisions do not discourage applicants from filing continued examination filings. As discussed previously, this final rule is not intended to address extreme cases of prosecution laches or to codify *Bogese II.* Examiners already have the authority (with a Technology Center Director's approval) to make a rejection on the grounds of prosecution history laches. *See* MPEP section 2190. Some of the reasons cited by the comments as to why an indefinite number of continuing applications is needed suggest that continuing applications may be used for purposes of delay more commonly than could be effectively addressed by the Office's application of its equitable prosecution history laches authority. Moreover, even where strategies of delay are not deliberately pursued, the lack of reasonable requirements on the use of continued examination practice may act as a disincentive to the examiner and applicant taking the most effective steps to reach conclusion.

The Office did not place a *per se* limit on the number of continuing applications and requests for continued examination. The rules require applicant to show why a third or subsequent continuing application or second or subsequent request for continued examination is necessary to advance prosecution. The Office recognizes both the adverse effects of unrestricted continued examination practice, and the appropriate uses of continued examination filings. The Office has sought to draw a reasonable balance in order not to discourage appropriate uses of continued examination filings while providing a regulatory setting in which unnecessary prolongation of proceedings can be avoided. The changes being adopted in this final rule are appropriately tailored to permit applicants to file the initial application, two continuation or continuation-in-part applications, and a request for continued examination in any one of these three applications without any justification. An applicant who considers this to be insufficient may file any additional continuation or continuation-in-part application or request for continued examination with a petition and showing as to why the amendment, argument, or evidence sought to be entered could not have been submitted earlier. The changes in this final rule will also permit the Office to focus its limited resources on examination of new applications in order to reduce the backlog of unexamined applications.

Comment 42: One comment argued that the Office's assertion that multiple patents tend to defeat the public notice function of patent claims does not justify the rule changes because the restriction practice tends to increase the number of patents. One comment argued that the Office is making unsupported assumptions that: (1) The possible issuance of multiple patents

arising from continuing applications tends to defeat the public notice function of patent claims; and (2) the public is left uncertain as to what a set of patents resulting from the initial application will cover when multiple applications with patentably indistinct claims are filed.

Response: Restriction practice encourages applicant to file a single application for each patentably distinct invention. The public notice function of patent claims is undermined, however, when multiple patents together claim only one patentable invention (*i.e.*, the patents contain patentably indistinct claims). In such case, applicant should file a single application claiming one patentable invention rather than multiple applications claiming the same patentable invention. The Office is not making unsupported assumptions that the possible issuance of multiple patents arising from continuing applications tends to defeat the public notice function of patent claims, and that the public is left uncertain as to what a set of patents resulting from the initial application will cover when multiple applications with patentably indistinct claims are filed. *See, e.g.*, *To Promote Innovation: The Proper Balance of Competition and Intellectual Property Law and Policy,* Ch. 4 at 26–31 (Federal Trade Commission 2003); Lemley and Moore, *Ending Abuse of Patent Continuations,* 84 B.U. L. Rev. at 100 (eliminating continuing application practice would be consistent with the policy goal of giving adequate notice about what is and is not covered by a patent).

Comment 43: Several comments predicted that the rule changes would discourage public disclosure of technology, thereby hurting industrial growth and innovation. Several comments argued that by limiting an applicant's ability to claim everything that is disclosed in the application, the rule changes would cause the applicant to submit more narrow disclosures to avoid inadvertent dedication of the subject matter to the public (citing *Johnson & Johnston Associates, Inc.* v. *R.E. Service Co.,* 304 F.2d 1235, 62 U.S.P.Q.2d 1225 (Fed. Cir. 2002) (en banc)). Several comments noted that the rule changes would force applicants to delay filing until all foreseeable information has been obtained or forego continuation-in-part filings that contain additional information. Several comments stated that small entities that have limited resources would not disclose alternative embodiments or would file applications with narrow disclosures to avoid restriction requirements. Several comments averred that inventors would delay the filing of applications until after clinical or market testing is concluded, a potentially commercially viable product is identified, or other refining of the invention is completed. The comments also predicted that some inventors would keep the invention secret from the public and/or limit the scope of the disclosure to avoid dedicating potentially commercial embodiments to the public. One comment argued that the Office is making an unsupported assumption that continuing applications and multiple applications containing patentably indistinct claims impose a burden on innovation. One comment argued that applicants would file multiple applications having divergent subject matter rather than a single application and applicants would omit certain concepts from the applications. One comment stated that the prior art complications caused by the inability to claim priority of an earlier filed application through intermediate applications would severely curb disclosure because applicants would avoid creating their own prior art under 35 U.S.C. 102(b) on a possible important commercial embodiment. One comment stated that the current continued examination practice encourages early disclosure of multiple embodiments of inventions developed through the iterative design process. One comment stated that large applications that disclose everything are good and advance the Office's mission. One comment argued that the proposed rule changes to the examination of claims will force applicants to file applications that incorporate secondary features into their own separately filed application. One comment argued that the new rules would result in omnibus filings on anything and everything.

Response: The Office has made modifications to the proposed rules concerning both continuing applications and examination of claims practices. First, this final rule permits an applicant to file two continuation applications or continuation-in-part applications, plus a single request for continued examination in an application family, without any justification. Second, this final rule permits applicants to present more than five independent claims or more than twenty-five total claims in an application if applicant files an examination support document before the first Office action on the merits of the application. Taken together, the changes to continuing application and examination of claims practices adopted in this final rule permit applicant to file as many claims as desired in one application and give applicant sufficient opportunity to seek appropriate protection for the disclosed invention. Accordingly, the changes being adopted in this final rule do not place a *per se* limit on the number of claims presented in an application, nor do they place a *per se* limit on the number of continuing applications and requests for continued examination available in an application family. The changes being adopted in this final rule likewise do not give any advantage to those applicants who file multiple applications that contain patentably indistinct claims because such applicants would be required to identify the multiple applications that contain patentably indistinct claims. *See* §§ 1.75(b) and 1.78(f).

The changes adopted in this final rule will not discourage applicants from filing patent applications because the substantive criteria for entitlement to a patent and the basic incentives for a patent (exclusive rights) have not changed. Whether applicants file narrow or broad disclosures, the changes in this final rule will reduce uncertainty with respect to what the applicant is claiming as the invention. The Office also does not expect applicants to delay the filing of an application because any commercial activities and public disclosures that occurred more than one year prior to the filing of an application would still be considered prior art under 35 U.S.C. 102(b). The changes being adopted in this final rule simply require applicants to prosecute their applications diligently and submit amendments, argument, and evidence early in the prosecution of the initial application, two continuing applications and a request for continued examination. As previously discussed, applicant has sufficient time to determine whether to file a divisional application. If applicant needs more time to determine which aspect of the invention to seek protection for, applicant may file a request for deferral of examination under § 1.103(d).

Comment 44: Several comments alleged that the rule changes would have a significant adverse impact on applicants if the first-to-file system is adopted because applicants would need to file more continuing applications to protect their inventions because applicants would need to file as soon as possible with broadly conceptualized disclosures and subsequently file continuing applications (*e.g.*, continuation-in-part applications) on the improvement or detailed embodiments.

Response: The United States currently does not have a ''first inventor-to-file''

standard. Other countries that have a ''first inventor-to-file'' standard have less flexible continued examination practice than the United States. For example, the Japan Patent Office does not permit continuation-in-part applications. Under the JPO practice, applicant may only submit an application on an improvement as a new application. The Office will continue to consider the issues related to the ''first-to-invent'' standard and the ''first inventor-to-file'' standard in determining the rights to a patent in the context of international harmonization efforts.

Comment 45: A number of comments argued that the rule changes would disproportionately impact small entities including universities, start-up companies, biotechnology companies, and public health industry because they are more likely to file continuing applications and requests for continued examination and have less resources. The comments provided the following reasons: (1) The proposed rule would require significant expenses early in the prosecution of the application that would cause small entities and independent inventors economic hardship; (2) the rule changes would encourage large companies that have more financial resources to ''steal'' inventions from the small entities because the increased cost of obtaining patent protection would prevent small entities from obtaining full protection of their inventions and cause many small entities not to seek patent protection; (3) small entities need the flexibility to respond to changing conditions by refining claims and they cannot afford up-front parallel filings as large companies can; (4) independent inventors and small entities need the ability to file multiple continued examination filings to spread the costs; (5) the rule changes could stifle the building of patent portfolios for small companies and cause a reduction of capital investment in these companies and in new technologies; (6) applicants should be permitted to get a patent on the allowed claims and then continue to prosecute the broader or rejected claims or to claim subject matter not previously claimed in a continuing application, in order to bring technologies to the market sooner, which would permit small entities to attract investors and obtain financing for further product development and patent prosecutions; (7) continued examination filings are more likely needed in complex fields like biotechnology because examiners are less likely to comprehend the invention fully in the limited time allotted for the initial search and examination and more likely to make restriction requirements, and applicants need additional opportunities to address technical issues arising during prosecution and submit evidence and clinical testing data; (8) companies in the life sciences need continued examination filings to obtain multiple patents that protect innovations and improvements that arise over the long time period of research and development, clinical testing, and the Food and Drug Administration (FDA) approval process; (9) in biotechnology, applicants may not know at the time of filing which embodiments of the invention have commercial value or how a competitor may attempt to copy the invention or circumvent the patent. One comment that supports the rule changes noted that large entities also operate within limited filing budgets, and the effects of the rules will apply across the board because any applicant must decide what level of filing activity it can reasonably afford, and make filing decisions accordingly. The comment further stated that small entities already receive a fifty percent discount on fees and can take advantage of inexpensive provisional applications to delay paying filing fees. Several comments argued that the rule changes will disproportionately impact small entities and that the Office obscures this fact by including requests for continued examination into the analysis. The comments stated that: 32 percent of patents to the top nineteen universities are continuation or continuation-in-part applications; 35.2 percent of first continuations and continuation-in-part applications are filed by small entities; and 37.9 percent of second continuations and continuation-in-part applications are filed by small entities.

Response: The Office notes the concerns expressed in the public comment particularly by small entities regarding the proposed changes to §§ 1.78(d)(1) and 1.114 that would have permitted an applicant to file only one of the following: A continuation application, a continuation-in-part application, or a request for continued examination, without any justification. The Office has made modifications to these proposed changes such that this final rule will permit an applicant to file two continuation applications or continuation-in-part applications, plus a single request for continued examination in an application family, without any justification. Under this final rule, an applicant may file a divisional application directed to a non-elected invention if the prior-filed application is subject to a requirement for restriction. The divisional application need not be filed during the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. This final rule also permits applicant to file two continuation applications of a divisional application plus a request for continuation examination in the divisional application family, without any justification. Applicant may also file any third or subsequent continuation or continuation-in-part application, or any second or subsequent request for continued examination in an application family, with a petition and showing. Therefore, applicants should have sufficient time to determine whether to seek protection for a particular aspect of an invention and should have sufficient opportunities to present claims, amendments and evidence for that aspect. For example, applicant is permitted to obtain a patent on the allowed claims from the initial application, and then continue to prosecute the broader or rejected claims in two continuation or continuation-in-part applications, and one request for continued examination without justification. Beyond those filings, applicant may seek a third or subsequent continuation or continuation-in-part application and a second or subsequent request for continued examination with a petition and showing. As previously discussed, the changes being adopted in this final rule do not give any advantage to those applicants who file multiple parallel applications containing patentably indistinct claims. *See* §§ 1.75(b)(4) and 1.78(f).

Applicant should also have sufficient opportunities to spread the cost of prosecution. Applicant has a one-year grace period under 35 U.S.C. 102(b) before filing a patent application to test the market or obtain capital resources. Before the end of the one-year grace period, applicant may file a provisional application to obtain a U.S. filing date and wait up to twelve additional months to file an initial nonprovisional application. During this two-year time period, applicants may determine the commercial value of each aspect of the invention before filing the initial nonprovisional application. Applicant may also request a deferral of examination under § 1.103(d) and defer the examination up to three years from the earliest filing date claimed (*e.g.*, the filing date of the provisional application). *See* § 1.103(d). By

requesting a deferral of examination, applicant would have even more time to determine the commercial value of the invention or obtain capital resources and would avoid the cost of filing and prosecuting multiple continued examination filings. Furthermore, divisional applications need not be filed during the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met.

The changes being adopted in this final rule do not disproportionately impact small entities. The Office estimates that the change would have required such a petition and showing in only 2.9 percent of the 112,210 small entity applications and requests for continued examination filed in fiscal year 2006. The Office included the number of requests for continued examination into the analysis because requests for continued examination divert the Office's patent examining resources from the examination of new applications and contribute to the increasing backlog of unexamined applications, just like continuation and continuation-in-part applications.

The Office notes that, during fiscal year 2006, it appears that the percentage of small entity continued examination filings that would have required a petition is slightly higher than the percentage of total continued examination filings that would have required a petition (2.9 percent small entity as opposed to 2.7 percent for all applicants). The Office also notes that, during fiscal year 2006, it appears that the percentage of small entity applications that exceeded the five independent claims and twenty-five total claim threshold is also slightly higher than the percentage of total applications that exceeded the five independent claim and twenty-five total claim threshold (24.4 as opposed to 23.7). These percentages are based upon data that is available in the Office's PALM system for applications filed during the most recent fiscal year. The Office does not think these slight differences establish that the changes in this final rule will have a disproportionate economic impact on small entities since these differences are within the margin of error. In addition, the comments provide no reason, and there is no apparent one for why small entity applicants would inherently require more continued examination filings to prosecute the applications to completion or more claims to adequately cover their inventions. Thus, even higher differences in these percentages could easily be explained by the fact that small entity applicants pay only one-half of the fees that other applicants pay for continuing applications, requests for continued examination, and excess claims.

Comment 46: A number of comments predicted the rule changes would limit applicants' opportunities to present claims, which would reduce the scope of the patent claims because applicants would be pressured to pursue and accept narrower claims. The comments argued that inventors would not be able to adequately protect their inventions and would in turn lose patent protection to certain aspects of their inventions, which would have an adverse impact on the value of patents, patent quality, innovations, research and development, the competitiveness of U.S. companies, and the U.S. economy and would eliminate U.S. jobs. The comments provided the following reasons: (1) The Office has not appropriately addressed applicants' interests in maximizing patent protection and receiving a fair consideration of all claims submitted; (2) the rule changes would require applicants to claim all aspects of the disclosed invention initially, even though applicants often file applications without knowing the value of their inventions in order to determine which embodiment will have value and be worthy of the investment in patent protection; (3) applicants would not be able to identify and address all claim permutations in the initial application and one continuation application, and complex inventions often need more claims and more than one continuation application to protect the invention; (4) the Office should provide applicants the flexibility to prosecute different embodiments at a later time; (5) the applicant should be permitted to present claims (or change the scope of the claims) in continuing applications to cover an embodiment of the invention disclosed in the initial application when the applicant later determines the commercial value of the embodiment, develops the actual product, or discovers a potential infringer's product; (6) competitors could easily circumvent the patent claims because applicant would not have the ability to change the scope of the claims to cover the competitor's product in a continuing application; (7) in view of the courts' restrictive claim interpretation, the required showing under §§ 1.78(d)(1) and 1.114 would eliminate a vast number of legitimate continuing applications and requests for continued examination needed to provide coverage of alternate aspects of an invention.

Response: This final rule does not place any *per se* limits on the number of continued examination filings that may be filed or on the number of claims an applicant may present in an application. Applicant is permitted to submit all of the claims that applicant desires during the prosecution of the initial application, two continuation or continuation-in-part applications, and a request for continued examination. An applicant who considers this to be insufficient may file a third or subsequent continuing application or second or subsequent request for continued examination with a petition showing why the amendment, argument, or evidence sought to be entered could not have been submitted earlier. For most applicants who prosecute their applications diligently, additional continued examination filings would not be needed. Applicant may also file a reissue application under 35 U.S.C. 251, if appropriate, to submit claims with different scope. Further, the use of continuation practice to circumvent statutory requirements for reissue and reexamination proceedings is not appropriate. In addition, the rules require an applicant to advance prosecution and not waste the Office's resources examining an application when the applicant is not ready to particularly point out and distinctly claim the subject matter which the applicant regards as his or her invention. *See also* § 10.18(b)(2)(i) and *Hyatt* v. *Dudas,* 2007 U.S. App. LEXIS 15350 (Fed. Cir. Jun. 28, 2007). Applicant should not use continued examination practice to delay the prosecution of the application because this adversely impacts the Office's ability to examine new applications and reduce the backlog of unexamined applications.

Comment 47: One comment predicted that the rule changes would discourage first action allowances because some applicants would intentionally file applications with at least one defect in order to receive a rejection to drag out pendency so that they can have more time to determine whether to file continuing applications.

Response: There is no reason why the new changes being adopted in this final rule will encourage an applicant to intentionally file an application with at least one defect to delay prosecution. Additionally, such an action by an applicant would violate § 10.18(b)(2)(i). By presenting to the Office any paper (including an application), the applicant is certifying that to the best of the applicant's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that the paper is not being presented to cause unnecessary delay or needless

increase in the cost of prosecution before the Office.

Comment 48: One comment sought clarification as to whether an applicant is permitted to amend the claims and/or file a continuation application to claim allowable subject matter presented in dependent claims.

Response: Applicant may amend the claims of an initial application to claim allowable subject matter presented in dependent claims if the amendment complies with the rules of practice (*e.g.*, § 1.116). For example, applicant may submit such an amendment in the initial application in response to a non-final Office action in the initial application. Such an amendment, however, will not be entered in the initial application as a matter of right after a final Office action. Under this final rule, applicant alternatively may file two continuation or continuation-in-part applications plus one request for continued examination in an application family, without any justification and pursue the amendment in one of those two applications or in the request for continued examination.

Comment 49: Several comments argued that the combined effect of the limit on the number of representative claims and the limit on the number of continuing applications and requests for continued examination as a matter of right would increase the number of multiple parallel applications and divisional applications because applicants would file more multiple parallel applications with small numbers of claims or present claim sets that would provoke restriction requirements. Either way, the comments contended that the backlog will increase. One comment further alleged that applicants would file more continued examination filings and appeals because by limiting the number of claims examined, two Office actions would be insufficient, thus resulting in an increase in pendency and cost. One comment argued that the rule changes would disproportionately impact inventions that require more claims, continuing applications, or examiner time. One comment stated that the limitations on continued examination filings and claims would cause more litigation because they would create more uncertainty in infringement and validity.

Response: As discussed previously, the Office is not adopting the ''representative claims'' examination approach or restricting the number of continued examination filings to one without any justification. Rather, this final rule permits applicant to present more than five independent claims or more than twenty total claims in an application if applicant files an examination support document. Applicant is also permitted to file two continuation or continuation-in-part applications, plus a request for continued examination in an application family, without any justification. The changes being adopted in this final rule do not place *per se* limits on the number of claims which applicant may present in an application or on the number of continued examination filings. The changes being adopted in this final rule do not encourage applicant to file multiple parallel applications that contain patentably indistinct claims. *See* §§ 1.75(b)(4) and 1.78(f). Applicants would obtain little benefit from filing multiple applications that contain patentably indistinct claims because the Office would treat each application as having the total of all of the claims (whether in independent or dependent form) in all such applications for purposes of determining whether an examination support document is required by § 1.75(b)(1) (but not for purposes of calculating the excess claims fee due in each application). Likewise, this final rule will not cause the number of divisional applications to increase because this final rule permits divisional applications to be filed serially. Therefore, applicant should have sufficient time to determine whether to file a divisional application to claim a non-elected invention.

Comment 50: A few comments suggested that the limits set in §§ 1.75(b)(4) and 1.78(d)(1) are inconsistent with interference practice under 35 U.S.C. 135 of copying claims for purposes of preserving the right to provoke an interference. One comment suggested that the changes to § 1.78 eliminates an applicant's right to add claims to an application to cover a similar or parallel technology, provided that the added claims find support in the specification, citing *PIN/NIP, Inc.,* v. *Platt Chemical Co.,* 304 F.3d 1235, 1247, 64 U.S.P.Q.2d 1344, 1352 (Fed. Cir. 2002). One comment stated that subjecting patentably indistinct claims in multiple commonly owned applications to elimination under § 1.78(f)(3) violates case law, for example *Kingsdown Med. Consultants, Ltd.* v. *Hollister Inc.,* 863 F.2d 867, 874, 9 U.S.P.Q.2d 1384, 1390 (Fed. Cir. 1988).

Response: The Office has modified proposed § 1.75(b)(4) and § 1.78(d)(1). This final rule permits an applicant to file two continuation or continuation-in-part applications plus one request for continued examination in an application family, without any justification. Applicant may also file a third or subsequent continuation or continuation-in-part application or a second or subsequent request for continued examination with a petition and showing. This final rule permits applicant to present up to five independent claims or twenty-five total claims in each application, without an explanation. Applicant may also present more than five independent claims and more than twenty-five total claims if applicant files an examination support document before the first Office action on the merits of the application. Applicant may file as many claims as necessary to claim the full scope of his or her invention. This final rule provides sufficient opportunities for applicant to present claims to provoke an interference during the prosecution of these applications. Therefore, the changes to §§ 1.75(b)(4) and 1.78(d)(1) being adopted in this final rule are not inconsistent with 35 U.S.C. 135. Furthermore, applicant may also file a reissue application under 35 U.S.C. 251, if appropriate, to submit claims for provoking an interference. In other situations, however, applicant is not permitted to maintain an application in pending status, without advancing prosecution, for the sole purpose of awaiting developments in similar or parallel technology. As previously discussed, such practice does not advance prosecution before the Office and impairs the ability of the Office to examine new and existing applications.

In other situations, however, applicant is not permitted to maintain an application in pending status, without advancing prosecution, for the sole purpose of awaiting developments in similar or parallel technology. As previously discussed, such practice does not advance prosecution before the Office and impairs the ability of the Office to examine new and existing applications.

The Federal Circuit noted in *PIN/NIP* that one may amend an application for the purpose of encompassing devices or processes of others, subject to compliance with the requirements of the patent statute and regulations (the claim at issue was determined to be invalid under 35 U.S.C. 112, ¶ 1, for lack of written description support). *See PIN/NIP,* 304 F.3d at 1247, 64 U.S.P.Q.2d at 1352. As such, *PIN/NIP* cannot be relied upon to support a ''wait and see'' concept under which an applicant files an initial application followed by a stream of continuation applications just to wait for any competitor to develop and market an invention not claimed in the initial application. *PIN/NIP,* 304

F.3d at 1247, 64 U.S.P.Q.2d at 1352. Further, in *Kingsdown,* the Federal Circuit opined: ''Nor is it in any manner improper to amend or insert claims intended to cover a competitor's product the applicant's attorney has learned about during the prosecution of a patent application. Any such amendment or insertion must comply with all statutes and regulations, of course, but, if it does, its genesis in the marketplace is simply irrelevant.'' *Kingsdown,* 863 F.2d at 874, 9 U.S.P.Q.2d at 130. This statement does not equate to a pronouncement that an applicant has a ''right'' under the patent statutes to file a continuous stream of continuing applications to ensure that there is always a pending application in which to present claims encompassing devices or processes of others.

Further continuation practice is not intended to supplant or permit circumvention of reissue practice. The patent statute at 35 U.S.C. chapter 25 provides for the correction of patents, and specifically provides for the reissue of a patent in those situations in which a ''patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of * * * the patentee claiming more or less than he had a right to claim in the patent.'' *See* 35 U.S.C. 251. *See also Toro Co.* v. *White Consol. Indus.,* 383 F.3d 1326, 1333, 72 U.S.P.Q.2d 1449, 1454 (Fed. Cir. 2004) (citing *Johnson & Johnston,* 304 F.2d at 1055, 62 U.S.P.Q.2d at 1231). Nothing, however, suggests that an applicant has a ''right'' under the patent statutes to file a continuing application to avoid the requirements of the reissue statute when seeking to correct or enlarge the scope of a patent. There is a difference between adding claims to an application that are otherwise pending, and deliberately prolonging prosecution in order to be able to do so. Deliberately prolonging a proceeding before the Office would not be consistent with the requirements of § 10.18.

Applicant may copy claims from another application or patent that is not commonly owned for the purposes of provoking an interference, without triggering § 1.78(f)(3). Section 1.78(f)(3) applies only to multiple commonly owned applications that contain patentably indistinct claims. Section 1.78(f)(3) is a restatement of former § 1.78(b), which previously gave the Office the same discretion to require elimination of patentably indistinct claims in all but one of the pending nonprovisional applications. The Office is not preventing applicants from providing such patentably indistinct claims in a single application, or in multiple applications if applicant submits a terminal disclaimer in accordance with § 1.321(c) and explains why submitting patentably indistinct claims in separate applications is necessary.

Comment 51: Several comments suggested that if the Office implements the limits on continued examination filings, the limits on the number of claims would be unnecessary.

Response: The comment provides no explanation as to how or why implementation of the continued examination filing changes would make the claims provisions unnecessary. The Office determined that the implementation of the changes to the continued examination practice and practice for examination of claims in patent applications are necessary to achieve quality and efficiency in the patent examination process.

Comment 52: A number of comments argued that applicants should be permitted to file more than one continuation or continuation-in-part application or request for continued examination as a matter of right because there are many legitimate reasons for the filings. The comments provided the following examples: (1) The process of developing the best prior art and obtaining the broadest possible protection is a complex process and may extend the prosecution process; (2) applicants may use strategies that would avoid prosecution history estoppel and preserve doctrine of equivalents protection; (3) applicants may maintain a continuing application so that they could respond to any adverse court decisions and associated uncertainties; (4) the quality of the examination process may cause delays; (5) examiners would allow broader claims in a continuation application after becoming more familiar with the subject matter and have more time to improve the search and analysis; (6) applicants may maintain a continuing application pending to prevent competitors from copying the invention or circumventing the initial patent claims because the courts are less inclined to interpret the scope of invention beyond the literal meaning of the claims, precluding claim scope that once was captured under the doctrine of equivalents; (7) applicants may file continuation applications as an ''insurance policy'' so that applicants can correct any defects found in the first patent or adjust the claim coverage without surrendering the patent (as in the reissue and reexamination practices); (8) applicants may file continuing applications to build large patent portfolios and attract capital investments; (9) applicants want time to conduct testing and to reevaluate the claim scope in light of new prior art, market experience, and technology development; (10) for complex technologies, it may take several prosecutions to determine the bounds of patentable subject matter; (11) applicants may want many patents on an invention to strengthen the protection; (12) applicants may file continuing applications to correct errors in the initial prosecution including those made by inexperienced representatives or applicants; and (13) applicants who are in a crowded or highly valuable field need to keep a continuing application pending for the purposes of provoking interference.

Response: The Office recognizes that there are some appropriate reasons for filing multiple continuing applications and requests for continued examination. There are, however, a number of reasons given for multiple continuing applications and requests for continued examination that are not considered appropriate. The changes being adopted in this final rule are tailored to permit applicants to file the initial application, two continuation or continuation-in-part applications, and a request for continued examination in an application family, without any justification. Any applicant who considers this to be insufficient may file an additional continuation or continuation-in-part application or a request for continued examination with a petition showing why the amendment, argument, or evidence sought to be entered could not have been submitted during the prosecution of the prior filings. Applicants are required to prosecute diligently and to particularly point out and distinctly claim the subject matter which the applicant regards as his or her invention, upon filing the application. If applicant's lack of knowledge of prior art, or lack of diligence during the prosecution of the application, causes unnecessary delay or needless increase in the cost of prosecution before the Office, applicant would be violating his or her duty under § 10.18. *See* § 10.18(b)(2)(i).

Comment 53: A number of comments argued that many continuing applications and requests for continued examination are caused by inadequate examinations, the final Office action practice, and the examiner production system. The comments provided the following examples: (1) It may take several exchanges between the examiner and applicant before the examiner appears to understand the invention; (2) examiners' lack of experience in the art and patent law; (3) some examiners have difficulty using the English

language in oral and written communications; (4) the Office has large turnover in examining personnel; (5) examiners make too many restriction requirements; (6) examiners want to obtain additional ''counts''; (7) examiners make improper rejections; (8) examiners refuse to enter any after-final replies; (9) examiners are not given sufficient time to conduct a proper search and examination in the initial application; (10) examiners did not read the specification and claims; (11) examiners do not adequately consider arguments made by the applicants; (12) examiners make premature final rejections; (13) examiners conduct piecemeal examination; (14) examiners are being overturned by supervisors or quality control; (15) examiners do not indicate allowable claims; (16) examiners do not set forth the rejections clearly in the Office actions; (17) examiners do not apply legal standards consistently; and (18) examiners make new grounds of rejection or cite new art in final Office actions.

Response: The Office provides applicant with procedures to address inadequate examination issues. Applicant should not use the continued examination practice as a substitute for the petition or appeal process. The practice of permitting an unlimited number of continuing applications and requests for continued examination appears to have created lax practices. Applicants should raise any issue of inadequate examination before the examiner and/or the examiner's supervisor. For example, applicants should raise any question as to prematureness of a final rejection before the primary examiner. Applicant may seek review of the examiner's decision on the finality of the Office action by petition under § 1.181, if appropriate. *See* MPEP §§ 706.07(c) and 1002.02(c). Restriction requirements are also reviewable by petition under § 1.181. Applicants may request an interview with the examiner to ensure that the examiner understands the invention or claims correctly, or to seek clarification of the rejections or Office action. *See* § 1.133(a)(2). If applicant disagrees with the examiner's rejections, applicant may appeal the rejections to the BPAI and/or request a pre-appeal brief conference, if appropriate.

Comment 54: A number of comments argued that filing continuing applications and requests for continued examination is more efficient and cost-effective in dealing with deficiencies of the examination process (even before a ''stubborn examiner'') because the factual record is fixed on appeal and the appeal process takes a longer time and is expensive, especially for independent inventors and small entities. The comments predicted that the rule changes would increase the number of pre-appeal brief conferences, examiner's answers and appeals, and force applicants to appeal applications that are not in condition for appeal (*e.g.*, the record has not been fully developed and unamended claims may be appealed). Several comments pointed out that continuing applications and requests for continued examination help applicants to place the application in better condition for appeal because most examiners refuse to enter the after-final amendments. One comment stated that some applicants might file the appeal simply to preserve pendency. Some of the comments suggested that the Office should wait and see what effect a quicker appeal process would have on the backlog before implementing the rule changes. The comments stated that once applicants appreciate the appeal process changes, more applicants would file appeals rather than continuing applications and requests for continued examination. Furthermore, the comments noted that a study conducted by a firm shows that out of 121 appeal briefs (appeals from January 1, 2004 to March 23, 2006), examiners issued only nine answers, which represents an enormous waste of applicants' time and money. One comment predicted that the BPAI would be quickly overwhelmed and a broken appeal process would create more damage to the examination process than the current problems.

Response: If applicant disagrees with the examiner's rejections, applicants should file an appeal rather than filing a continuation application or a request for continued examination. The appeal process offers a more effective resolution than the filing of a continuation application or a request for continued examination. The pre-appeal brief conference program provides applicant a relatively expeditious and low cost review of rejections by a panel of examiners. If, after the conference, the prosecution is reopened, the applicant will have a further opportunity to prosecute in front of the examiner. Applicant would not need to file an appeal brief. If the Office decides that the application should remain under appeal, it would be more efficient to appeal the rejection to the BPAI by filing an appeal brief rather than delay the appeal by filing a continuation application or a request for continued examination. Furthermore, the pendency of an appeal is relatively short. The current (as of the end of the second quarter of fiscal year 2007) pendency of a decided appeal was 5.6 months. The pendency of an appeal is the period between the assignment of an appeal number and the mailing date of the decision. In addition, the BPAI has reduced the inventory of pending appeals from 9,201 at the close of fiscal year 1997 to 1,357 at the close of fiscal year 2006. Nevertheless, continuing applications and requests for continued examination as a percentage of total filings have increased as BPAI appeal pendency and inventory of pending appeals has decreased. Applicants should have sufficient opportunity to place the application in condition for appeal during the prosecution of the initial application, two continuing applications, and one request for continued examination in an application family. An applicant who considers this to be insufficient may file any third or subsequent continuation or continuation-in-part applications or second or subsequent requests for continued examination with a petition showing why the amendment, argument, or evidence sought to be entered could not have been previously submitted.

Comment 55: Several comments alleged that the Office has provided no evidence for the assertion that the exchange between applicants and examiners becomes less beneficial and suffers from diminished returns after the initial application. A number of comments also argued that the Office did not provide any investigation or analysis of the frequency with which the value of exchanges between the examiner and applicant decrease after the first continuing application or request for continued examination. A number of comments suggested that continuing applications and requests for continued examination permit additional mutually beneficial interaction between the examiner and applicant because: (1) The examiner and applicant already are familiar with the issues in the prosecution; (2) they give the examiner more time to examine the same subject matter and gain better understanding of the prior art; and (3) they permit applicants multiple opportunities to refine the claims and present additional data or evidence which would result in better quality patents with valid claims and clearly defined subject matter. Several comments argued that the rule changes would not improve public notice and the exchanges between the examiner and applicant because applicants would file multiple parallel applications rather than one single application and the applications would be assigned to

different examiners. Several comments argued that the exchanges between the examiner and applicant would be less efficient and more contentious because applicants would present broader claims and argue rejections more aggressively resulting in higher pendency. Several comments also predicted that applicant would request more interviews which would be more work for both the examiner and applicant. Several comments argued that it is unclear how the exchange between examiners and applicants will be more efficient because there is nothing in the proposal to encourage examiners to be more reasonable and appeals are not more efficient. One comment also argued that the Office is making unexplained assumptions that: (1) The value of a continuing application or a request for continued examination is less than the value of a new application; (2) the changes to continuing applications practice being adopted in this final rule should improve the quality of issued patents, making them easier to evaluate, enforce, and litigate; (3) this small minority of applicants prejudices the public permitting applicants to keep applications in pending status while awaiting developments in similar or parallel technology and then later amending the pending application to cover the developments; and (4) the changes being adopted in this final rule will result in claims issuing faster.

Response: Under this final rule, applicant is permitted to file two continuation or continuation-in-part applications plus one request for continued examination in an application family. These filings will provide sufficient opportunities for applicants to submit amendments, arguments, and evidence. Furthermore, the exchange between applicant and the examiner will be more efficient because applicant can no longer delay the submissions of amendments, argument, and evidence and the examiner will have the information earlier to determine the patentability of the claims. In addition, even if one could argue that additional continuing applications and requests for continued examination are beneficial in the particular application, the marginal value of a third or subsequent continuing application or a second or subsequent request for continued examination vis-á-vis the patent examination process decreases due to the Office resources occupied by the additional continued examination filings for amendments, argument, and evidence that could have been presented earlier. Nevertheless, an applicant can show on petition that an additional filing is necessary. Finally, the changes being adopted in this final rule require applicant to submit all of the claims that are patentably indistinct in one single application and to identify multiple applications that contain patentably indistinct claims. *See* §§ 1.75(b) and 1.78(f).

Comment 56: One comment argued that the Office should not impose a limit on the number of continuing applications an applicant may file when the Office can issue any number of rejections and improper final rejections.

Response: In this final rule, the Office has not placed an absolute limit on the number of continued examination filings. Rather, applicant is permitted to file the initial application, two continuing applications, and a request for continued examination in an application family, without any justification, and any third or subsequent continuing application or second or subsequent request for continued examination with a petition and a showing as why the amendment, argument, or evidence sought to be entered could not have been submitted earlier. Applicant may seek review of any improper finality of a rejection by filing a petition under § 1.181, or of any improper rejection by filing a notice of appeal, a request for pre-appeal brief conference, and an appeal brief.

Comment 57: Several comments argued that examiners will have to review larger submissions because applicants will be forced to front-load responses to every Office action with interviews, declarations and other evidence when the attorney's argument alone otherwise might have been sufficient. The comments argued that this would increase pendency. One comment predicted that the rule changes would decrease examiners' production because there would be ''more hard cases'' and ''less easy counts.'' Several comments stated that the rule changes would require applicant to respond to a first Office action by preparing what would be a *de facto* appeal brief with all of the arguments and evidence because applicant would only file the one permissible continuation or continuation-in-part application or request for continued examination as a last resort after appeal.

Response: Section 1.78 as adopted in this final rule permits an applicant to file two continuing applications plus one request for continued examination in an application family, without any justification. Thus, the changes adopted in this final rule do not require applicant to respond to a first Office action by preparing what would be a *de facto* appeal brief with all of the arguments and evidence. Nevertheless, the examination will be more efficient when applicant submits a fully responsive reply to each Office action so that the examiner will have the information, including amendments, arguments, and evidence, to determine the patentability sooner rather than later. Even prior to the changes being adopted in this final rule, applicants have been required to file a fully responsive reply to an Office action. *See* §§ 1.111(b) and (c). A change to the rules of practice that encourages applicants to submit complete, rather than piecemeal, replies will advance prosecution to final disposition with a minimum number of Office actions, continuing applications, and requests for continued examination. Such change streamlines the examination process, thereby benefiting both applicants and the Office.

Comment 58: A number of comments argued that continuation or continuation-in-part applications and requests for continued examination are needed so that applicants can submit prior art that is discovered after the prosecution is closed (*e.g.*, through international search reports or foreign search reports), and amend the claims in view of late newly-discovered art. Several comments suggested that the Office should permit applicants to file a request for continued examination without a petition and showing to submit newly discovered prior art, and art cited by the U.S. International Searching Authority similar to art cited by a foreign patent office, because otherwise applicants would be penalized due to PCT administrative backlogs. One comment sought clarification in the situation where an applicant wishes to withdraw an application from issue to submit new art for consideration and a continuation application has been filed.

Response: Applicant is not required to file a continuation or continuation-in-part application or a request for continued examination in order to submit prior art discovered after the prosecution is closed or an amendment in view of the late discovered art. The Office recently proposed changes to information disclosure statement (IDS) requirements. *See Changes To Information Disclosure Statement Requirements and Other Related Matters,* 71 FR 38808 (July 10, 2006), 1309 *Off. Gaz. Pat. Office* 25 (Aug. 1, 2006) (proposed rule) (hereinafter ''Information Disclosure Statement Proposed Rule''). The proposed changes

(if adopted) would permit applicant to submit an IDS after a first Office action on the merits, but before the mailing date of a notice of allowability or a notice of allowance under § 1.311, if applicant files the IDS with the certification under § 1.97(e)(1) and a copy of the foreign search report, or an explanation under proposed § 1.98(a)(3)(iv) and a non-cumulative description under proposed § 1.98(a)(3)(v). Applicant would also be permitted to submit an IDS after allowance, but before the payment of the issue fee, if applicant files the IDS with a patentability justification under proposed § 1.98(a)(3)(vi), including any appropriate amendments to the claims. Applicant would be permitted to submit an IDS after the payment of the issue fee if applicant files a petition to withdraw from issue pursuant to § 1.313(c)(1), the patentability justification under proposed § 1.98(a)(3)(vi)(B), and an amendment to the claims. Prior to the effective date of any final rule based upon the Information Disclosure Statement Proposed Rule, applicant may submit an IDS after the close of prosecution with a petition under § 1.183 if the IDS complies with the applicable requirements set forth in the Information Disclosure Statement Proposed Rule for such an IDS.

B. Treatment of Third and Subsequent Continuation or Continuation-In-Part Applications

Comment 59: Several comments supported the rule changes that permit one continued examination filing without any justification. A number of comments, however, suggested that the Office should permit more than one continued examination filing without requiring a petition and showing. The comments suggested the following without a petition and showing: (1) At least two continuation or continuation-in-part applications; (2) at least three continuation or continuation-in-part applications; (3) three to six continued examination filings; (4) three to five applications per application family; (5) only one patent to be issued from a chain of continuation applications; (6) unlimited number of continuation applications coupled with a requirement for a patentability report in the third or subsequent continuation application or a prior art search and compliance with the requirements under 35 U.S.C. 112; (7) two requests for continued examination, but only one continuation or continuation-in-part application; (8) at least one request for continued examination per application; (9) more than one request for continued examination per application; and (10) two or three requests for continued examination per application. Several comments suggested that the Office should permit more than one continuation or continuation-in-part application if the applications are filed within a reasonable time period (*e.g.*, one to eight years from the earliest filing date claimed). One comment suggested that the Office should permit requests for continued examination filed within three years of the filing date if applicant has filed a petition to make special for accelerated examination. One comment suggested that the Office should permit applicant to file a request for continued examination, but allow the examiner to refuse the request for continued examination if the first action can be made final. One comment suggested that the Office should eliminate all continuing applications except for divisional applications. One comment proposed that the Office should eliminate all continuing applications, but permit requests for continued examination. One comment suggested that the limitation on the number of continued examination filings should not apply to divisional applications and requests for continued examination.

Response: The Office has modified the proposed provisions that permit applicant to file one continuation or continuation-in-part application or request for continued examination without any justification. Under this final rule, applicant may file two continuation or continuation-in-part applications plus one request for continued examination in an application family, without any justification. Applicant may also file any third or subsequent continuation or continuation-in-part application or second or subsequent request for continued examination with a petition and showing. The changes being adopted in this final rule will permit the Office to focus its patent examining resources on examining new applications, and thus reduce the backlog of unexamined applications and improve pendency for all applications. Permitting more than two continuation or continuation-in-part applications and more than one request for continued examination in an application family without any justification would significantly decrease the effectiveness of the changes being adopted in this final rule. These final rule requirements for seeking a third or subsequent continuation or continuation-in-part application will not impact the vast majority of the applications.

A time limit requirement for filing continuing applications and requests for continued examination would not be desirable because it would encourage applicants to file an unlimited number of continued examination filings before the time period expires. Furthermore, a time limit would preclude an applicant from filing appropriate continued examination filings after the time period expires. Additionally, this suggested strategy would also disproportionately impact applications in certain technologies (*e.g.*, biotechnology) that have long prosecutions.

Requiring a patentability report or a prior art search in a continuation application would not increase efficiency in the examination of the initial application. If applicant submits the information earlier in the initial application, applicant most likely would not need to file a third or subsequent continuing application because the examiner would have all of the relevant information to make the patentability determination in the initial application.

The Office recognizes there are appropriate reasons for filing continued examination filings. As a result, the Office did not place an absolute limit on the number of continued examination filings. If the prior-filed application was subject to a requirement for restriction, applicant may file a divisional application directed to a non-elected invention that has not been examined. The divisional application need not be filed during the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. *See* § 1.78(d)(1)(ii). Therefore, the changes being adopted in this final rule appropriately balance the need to reduce the large and growing backlog of unexamined patent applications and make the patent examination process more effective.

Comment 60: Several comments expressed concerns that there would be an added economic burden on applicants, particularly small entities, to pursue additional continued examination filings due to the new petition process, and that the economic burden will effectively be a bar to many applicants. The comments stated that even when an additional continued examination filing is completely justified, applicants will suffer undue hardship and will likely be deterred from even attempting to request any additional continued examination filing because of the expense and time involved to review and prepare the petition. One comment suggested that the petition process under §§ 1.78(d)(1)(vi) and 1.114(g) will have a disparate effect on small entities. Several comments suggested that the

Office should provide an exception for filing additional continued examination filings to applicants who are small entities and those that qualify for financial hardship. One comment further suggested that the Office should provide the exception for five years.

Response: The Office notes the concerns expressed in the public comment regarding the proposed changes to §§ 1.78(d) and 1.114(g) that would permit an applicant to file one continuation application, continuation-in-part application, or request for continued examination, without any justification. The Office has made modifications to the proposed provisions such that this final rule permits an applicant to file two continuation applications or continuation-in-part applications, plus a single request for continued examination in an application family, without any justification. Under this final rule, an applicant may also file a divisional application of a prior-filed application for the claims to a non-elected invention that was not examined if the application was subject to a requirement for restriction. The divisional application need not be filed during the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. This final rule also permits applicant to file two continuation applications of a divisional application plus a request for continued examination in the divisional application family, without any justification. Applicant may file any additional continuation application or request for continued examination with a petition and showing.

The changes to §§ 1.78(d) and 1.114(g) adopted in this final rule apply to all applicants, regardless of whether they are individuals, small businesses or large multinational corporations. These changes do not disproportionately affect individuals and small businesses. Applicants who seek to file a third or subsequent continuation or continuation-in-part application or a second or subsequent request for continued examination are required to file a petition under § 1.78(d)(1)(vi) or 1.114(g) regardless of their status. The requirements for seeking a third or subsequent continuation or continuation-in-part application or a second or subsequent request for continued examination would only have affected 2.9 percent of the applications or requests for continued examination filed by a small entity in fiscal year 2006. The Office notes that a vast majority of applicants do not file more than two continuation or continuation-in-part applications and more than one request for continued examination in an application family. Therefore, the $400 petition fee and the showing requirement will impact only a small minority of applicants.

C. Treatment of Second and Subsequent Requests for Continued Examination

Comment 61: Several comments supported the changes to § 1.114. A number of comments, however, objected to the changes and suggested that the Office should permit applicants to file requests for continued examination without a petition and showing. The comments provided the following reasons: (1) Requests for continued examination are different from continuing applications because requests for continued examination require applicant to advance prosecution and would not cause the Office to issue multiple patents to the same invention; (2) requests for continued examination are not continuation applications, but rather are the same application; (3) requests for continued examination help applicants to deal with deficiencies in the examination process and provide a more efficient, effective and cheaper procedure to advance prosecution and have art considered than the appeal, petition or reissue process; (4) limiting applicants to one request for continued examination without a petition would lead to more filings of continuation applications and petitions; (5) due to the changes in § 1.75, the Office would issue more final Office actions with new grounds of rejection, which would necessitate the filing of more requests for continued examination; and (6) applicants would file more appeals, and thus the pendency of applications would increase.

Response: The Office has modified the proposed provisions to provide that an applicant may file a request for continued examination in an application family, without a petition and showing. An application family includes the initial application and its continuation or continuation-in-part applications. Under this final rule, applicant may also file a request for continued examination in a divisional application family, without a petition and showing. A divisional application family includes the divisional application and its continuation applications. The provisions of § 1.78(d)(1) are independent of the provisions of § 1.114. Therefore, the filing of a request for continued examination does not preclude an applicant from filing two continuation or continuation-in-part applications. Similarly, the filing of a continuation or continuation-in-part application does not preclude an applicant from filing a request for continued examination.

When applicant files a request for continued examination, the prosecution of the application is reopened and the examiner conducts another substantive examination on the claims present in the application. Consequently, similar to continuation or continuation-in-part applications, requests for continued examination divert the Office's patent examining resources from the examination of new applications and contribute to the backlog of unexamined applications. The request for continued examination practice should not be used as a substitute for the appeal, petition or reissue process. If the applicant disagrees with the examiner's rejections, then the applicant should pursue the appeal process as a means to more efficiently resolve the disagreement.

In addition, under the Office's new optional streamlined continuation procedure, an applicant may request that a continuation application be placed on an examiner's amended (Regular Amended) docket (see discussions of §§ 1.78(d)(1)(i) and 1.114) which would be picked up for action faster than an application placed on the examiner's new continuing application (New Special) docket. By requesting that the two continuation applications permitted under § 1.78(d)(1)(i) be treated under the optional streamlined continuation application procedure, an applicant may obtain the benefits of faster processing similar to having a second and third request for continued examination without a petition under § 1.114(g).

Comment 62: One comment sought clarification on whether the changes to §§ 1.78 and 1.114 being adopted in this final rule apply to reissue applications.

Response: The changes to §§ 1.78 and 1.114 being adopted in this final rule apply to reissue applications. Under this final rule, applicant may file two reissue continuation applications plus a request for continued examination in the reissue application family, without any justification. Benefit claims under 35 U.S.C. 120, 121, or 365(c) in the application for patent that is being reissued will not be taken into account in determining whether a continuing reissue application claiming the benefit under 35 U.S.C. 120, 121, or 365(c) of the reissue application satisfies one or more of the conditions set forth in §§ 1.78(d)(1)(i) through 1.78(d)(1)(vi). For example, even if the application for the original patent was a second continuation application, applicant may still file two reissue continuation

applications. However, an applicant may not use the reissue process to add to the original patent benefit claims under 35 U.S.C. 120, 121, or 365(c) that do not satisfy one or more of the conditions set forth in §§ 1.78(d)(1)(i) through 1.78(d)(1)(vi) to the original patent, if the application for the original patent was filed on or after November 1, 2007.

Comment 63: One comment suggested that the examiner should not make any new rejections in a request for continued examination, unless the amendment to the claims raises new issues.

Response: When applicant files a request for continued examination in compliance with § 1.114, the prosecution of the application is reopened and the examiner will consider the amendment, argument, or evidence submitted by the applicant. The examiner will conduct another substantive examination, consistent with providing ''for the continued examination of application'' under 35 U.S.C. 132(b). Limiting the examiner's ability to conduct a patentability determination after the filing of a request for continued examination would not result in efficiency in the examination process.

Comment 64: One comment argued that it would be inconsistent to permit the filing of a request for continued examination in a prior-filed application after a continuation application is filed, but to not permit the filing of a continuation application of an application that has a request for continued examination filed therein. Another comment suggested that the Office should permit an applicant to file a continuation application even though a request for continued examination had been filed in the prior-filed application.

Response: The Office has modified the proposed provisions to provide that an applicant may file a request for continued examination in an application family, without a petition and showing. The provisions of § 1.78(d)(1) are independent of the provisions of § 1.114. Therefore, the filing of a request for continued examination does not preclude an applicant from first filing two continuation or continuation-in-part applications. Likewise, the filing of a continuation or continuation-in-part application does not preclude an applicant from first filing a request for continued examination. Put differently, under this final rule, applicant may file a continuation application of an application in which a request for continued examination has already been filed. Applicant may also file a request for continued examination in a prior-filed application after a continuation application has been filed.

D. Petitions Related to Additional Continuation Applications, Continuation-In-Part Applications, and Requests for Continued Examination

Comment 65: A number of comments were critical of the showing requirement set forth in §§ 1.78(d)(1) and 1.114. One comment argued that the required showing is a *per se* limit on the number of continuation or continuation-in-part applications and requests for continued examination. Several comments stated that the standard under §§ 1.78(d)(1) and 1.114 is a hindsight standard. The comments argued that except for rare instances when evidence was not in existence prior to filing the additional continuing examination filing, the Office could almost always conclude, in hindsight, that the amendment, argument, or evidence sought to be entered could have been previously submitted. One comment argued that the showing under §§ 1.78(d)(1) and 1.114(g) is too stringent and unrealistic given the practicalities of conventional and reasonable patent prosecution practice and the interests of patent applicants. Several other comments described the showing as exceptionally high, onerous, impossible to meet, restrictive, and ambiguous. Furthermore, several comments asserted that the rule changes required applicants to be aware of all possible prior art. Several other comments stated that the required showing set forth in §§ 1.78(d)(1) and 1.114 appears difficult to meet for any amendment submitted with an application that is not a continuation-in-part application, indicating that it is hard to imagine how one would prove that an amendment or argument ''could not have been submitted'' in the absence of new matter. One comment objected to the required showing under §§ 1.78(d)(1) and 1.114 because the purpose of filing an additional continuation or continuation-in-part application or a request for continued examination may be to do something other than present a new argument, evidence or amendment, such as protect a different aspect of the invention revealed by research and development subsequent to an initial application filing. One comment stated that given enough time and effort an applicant will almost always be able to come up with some reason why the amendment, argument, or evidence could not have been previously submitted as required by §§ 1.78(d)(1) and 1.114 and that this requirement merely adds a layer of bureaucracy. One comment in support of the showing under §§ 1.78(d)(1) and 1.114 stated that it is a sensible compromise that does not ban additional continued examination filings, but requires applicants in essence to show good cause for additional continued examination filings. Several comments in support of the showing stated that the proposed rules accommodate the legitimate uses of continuations, limit abuses that can harm the competitive process, and promote the patent system's ability to provide incentives to innovate by reducing pendency.

Response: The Office notes the concerns expressed in the public comment regarding the proposed provisions that would require a petition and showing if an applicant files more than one continued examination filing (a continuation application, a continuation-in-part application, or a request for continued examination). The Office has made modifications to these proposed changes such that this final rule permits an applicant to file two continuation applications or continuation-in-part applications, plus a single request for continued examination in an application family, without any justification. Under this final rule, an applicant may also file a divisional application of an application for the claims to a non-elected invention that was not examined if the application was subject to a requirement for restriction. The divisional application need not be filed during the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. This final rule also permits applicant to file two continuation applications of a divisional application plus a request for continued examination in the divisional application family, without any justification. Applicant may file any additional continuation application or request for continued examination with a petition and showing. Therefore, given the multiple opportunities for applicant to submit amendments, arguments, or evidence, it is appropriate to require an applicant to justify why an amendment, argument, or evidence sought to be entered could not have been submitted earlier when filing any third or subsequent continuation application, continuation-in-part application, or second or subsequent request for continued examination. The Office considers the standard set forth in §§ 1.78(d)(1)(vi) and 1.114(g) to be an appropriate balance of the interests of applicants and the need for a better

focused and effective examination process to reduce the large and growing backlog of unexamined applications.

Applicants and practitioners have a duty to refrain from submitting an application or other filing to cause unnecessary delay or needless increase in the cost of prosecution before the Office. *See* § 10.18(b)(2). Applicants also have a duty throughout the prosecution of an application to make a *bona fide* attempt to advance the application to final agency action. *See Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims*, 71 FR at 49, 1302 *Off. Gaz. Pat. Office* at 1319. Applicant should be prepared to particularly point out and distinctly claim what the applicant regards as his or her invention. Furthermore, the examination process is more efficient and the quality of the patentability determination will improve when applicant presents the desired claims, amendments, arguments and evidence as early as possible in the prosecution. The changes to §§ 1.78 and 1.114 in this final rule do not require an applicant to be aware of all possible prior art to meet the showing under §§ 1.78(d)(1)(vi) and 1.114(g), but applicant is required to conduct a prior art search for filing an examination support document under § 1.265. Nor do these changes add to applicant's existing duties under § 1.56(a) to disclose to the Office all information known to the applicant to be material to patentability, and under 37 CFR Part 10.

Comment 66: One comment asserted that the Office will not achieve its goal of reducing the number of filings of continuation applications because an applicant could easily show why the amendment, argument, or evidence could not have been previously submitted when the subject matter of the claims in the continuation application is different from the subject matter of the claims of the initial application.

Response: The submission of an amendment to the claims or new claims to different subject matter alone will not be sufficient to meet the showing requirement under § 1.78(d)(1)(vi). Applicant must provide a satisfactory showing that the amendment, argument, or evidence sought to be entered could not have been previously submitted during the prosecution of the initial application, two continuation applications, and the request for continued examination.

Comment 67: One comment stated that the required showing under §§ 1.78(d) and 1.114 might have far-reaching implications that extend outside the patent process. Several comments expressed concerns that the showing may require applicants to disclose highly sensitive business information such as business strategies, and to alert their competitors as to how the applicants plan to gain a competitive edge. The comments further expressed concerns that the petition procedure may also invoke attorney-client privilege.

Response: Applicants or patent owners often present sensitive business information to the Office, such as a showing of unavoidable delay in a petition to revive under § 1.137(a) or a petition to accept late payment of a maintenance fee under § 1.378(b). The Office has procedures in place for applicants and patent owners to submit trade secrets, proprietary material, and protective order material and to prevent unnecessary public disclosure of the material. *See* MPEP §§ 724–724.06. If it is necessary for an applicant to disclose sensitive business information to the Office to meet the showing under § 1.78(d)(1)(vi) or 1.114(g), applicant may submit the information in compliance with the procedures set forth in MPEP §§ 724–724.06 (*e.g.*, the information must be clearly labeled as such and be filed in a sealed, clearly labeled, envelope or container).

Comment 68: One comment stated that the petitions under §§ 1.78(d)(1) and 1.114 would be scrutinized in court, creating a substantial increase in time and resources devoted to litigating and enforcing otherwise valid patent rights. One comment expressed concern that the petitions under §§ 1.78(d)(1) and 1.114 are unlikely to be granted and are likely to be the subject of an attack in litigation. A number of comments asserted that applicants would be subject to a higher potential for allegations of inequitable conduct. Additionally, one comment argued that the proposed rule changes would increase the frequency of malpractice litigation.

Response: The rules adopted in this final rule require applicants to prosecute their applications with reasonable diligence and foresight. The submission of a showing as to why an amendment, argument or evidence sought to be entered could not have been submitted earlier does not expose an applicant to a greater risk of inequitable conduct or litigation. The failure to disclose material information, or an affirmative misrepresentation of a material fact or submission of false material information or statements, coupled with an intent to deceive or mislead the Office, constitutes inequitable conduct. The simple submission of a showing as to why an amendment, argument or evidence sought to be entered could not have been submitted earlier does not by itself raise such intent. If an applicant acts with candor and good faith in dealing with the Office, there should be no increased risk that the applicant will be accused of inequitable conduct. Similarly, if patent practitioners abide by the standards of professional conduct expected of practitioners in their relationships with their clients, and comply with the requirements of the patent statutes and rules, there should be no reason for increased exposure to malpractice suits.

Comment 69: Several comments suggested that the Office should adopt an alternate standard for additional continued examination filings in place of the standard set forth in §§ 1.78(d)(1) and 1.114. Some of the comments suggested the following alternatives: (1) A reasonable diligence standard; (2) a certification by a practitioner that it is necessary for the inventor to be adequately protected; (3) the ''unduly interferes'' standard as set forth in the former § 1.111(b); (4) a requirement that the submission be a *bona fide* attempt to advance prosecution; (5) an explanation of the need for the continued examination filing; (6) a reasonable justification standard; (7) a reasonable under the circumstances standard; or (8) a good cause standard. One of the comments stated that a good cause standard would not place an undue burden on the Office or prejudice the public. Additionally, the comment requested that an application filed for good cause should not count toward the single continued examination filing as a matter of right.

Response: The Office considers the standard that the amendment, argument or evidence sought to be entered could not have been previously submitted set forth in §§ 1.78(d)(1)(vi) and 1.114(g) appropriate for an additional continued examination filing. The standard set forth in §§ 1.78(d)(1)(vi) and 1.114(g) as adopted in this final rule (''a showing that the amendment, argument, or evidence sought to be entered could not have been submitted [earlier]'') is more definite than the alternatives suggested in the comments (*e.g.*, ''good cause'' and ''reasonable under the circumstances'') and other standards set forth in the patent statutes (*see e.g., Smith* v. *Mossinghoff*, 671 F.2d 533, 538, 213 U.S.P.Q. 977, 982 (DC Cir. 1982) (noting the absence of guidance concerning the meaning of the term ''unavoidable'' in 35 U.S.C. 133)). The comments do not provide an explanation as to why any of

these alternatives would be a more effective standard or more definite. Furthermore, §§ 1.78(d)(1) and 1.114(g) as adopted in this final rule do not set an absolute limit on the number of continued examination filings. Applicants are permitted to file two continuation or continuation-in-part applications and one request for continued examination without any justification. Applicants are also permitted to file any third or subsequent continuation or continuation-in-part application or second or subsequent request for continued examination with a petition and showing. If an amendment, argument, or evidence could have been submitted during the prosecution of the initial application, two continuing applications, or a request for continued examination, applicant must present such submission earlier rather than wait to submit it later in a third or subsequent continuation or continuation-in-part application or in a request for continued examination. Thus, the required showing is an appropriate standard.

Finally, as discussed further in this final rule, the Office may grant relief ''in an extraordinary situation'' in which ''justice requires'' even if the situation does not technically meet the standard that the amendment, argument or evidence sought to be entered could not have been previously submitted. *See* § 1.183. The Office, however, does not anticipate granting petitions under § 1.78(d)(1)(vi) on a basis other than a showing that the amendment, argument or evidence sought to be entered could not have been previously submitted.

Comment 70: Several comments suggested that the changes to § 1.78 should only be temporary so that the Office may assess the impact of the changes before adopting the rule. One comment also suggested that if the Office adopts the rule changes, the Office should eliminate the changes once the backlog decreases.

Response: Unrestricted continued examination filings and duplicative applications that contain patentably indistinct claims are significantly hindering the Office's ability to examine new applications to such an extent that it is necessary for the Office to adopt and implement the changes to these practices. After the implementation of the changes being adopted in this final rule, the Office will re-evaluate the rules of practice to determine what, if any, additional changes are necessary.

Comment 71: Several comments suggested that §§ 1.78(d)(1) and 1.114 should be revised from ''a showing as to why the amendment, argument, or evidence presented could not have been previously submitted'' to ''a showing as to why the new claim, amendment, argument, or evidence presented could not have been previously submitted'' to resolve any potential ambiguity in the rules.

Response: The Office notes the comments' concern for ambiguity in the language of the rules. The phrase, ''a showing * * * that **the amendment**, argument, or evidence sought to be entered could not have been submitted'' (emphasis added) inherently encompasses a showing as to why a new claim could not have been previously submitted. A new claim presented in a continuing application is considered to be an amendment to the claims of the prior-filed application. Thus, by using the word ''amendment'' in the standard of §§ 1.78(d)(1)(vi) and 1.114(g), the Office intended to capture new claims sought to be introduced in a third or subsequent continuation or continuation-in-part application or second or subsequent request for continued examination.

Comment 72: One comment recommended that the Office should only require a petition and showing if the claims are presented more than two years after the earliest filing date claimed.

Response: Sections 1.78(d)(1) and 1.114 as adopted in this final rule provide applicant sufficient opportunities to present claims during the prosecution of the initial application, two continuing applications, and a request for continued examination in an application family without a petition under § 1.78(d)(1)(vi) or 1.114(g). The prosecution of these applications and the request for continued examination, most likely, would extend more than two years from the earliest claimed filing date. Therefore, the suggestion, if adopted, would likely increase the number of applicants who would be required to file a petition and showing.

Comment 73: Several comments proposed an exception to the rule changes to permit applicant to file a continuing application or a request for continued examination as a matter of right, without requiring a petition and showing, if the prior application is abandoned prior to examination.

Response: As suggested, the Office has made modifications to the proposed provisions to provide that an applicant may file a continuation or continuation-in-part application without any justification in certain situations in which the prior-filed application was abandoned prior to examination. Section 1.78(d)(1)(v) as adopted in this final rule provides that if an applicant files a continuation or continuation-in-part application to correct informalities rather than completing an application for examination under § 1.53 (*i.e.*, the prior-filed application became abandoned due to the failure to timely reply to an Office notice issued under § 1.53(f)), the applicant may file ''one more'' continuation or continuation-in-part application without a petition and showing under § 1.78(d)(1)(vi). Thus, applicant may file a continuation or continuation-in-part application to correct informalities rather than completing an application for examination under § 1.53. The prior-filed nonprovisional application, however, must be entitled to a filing date and have paid therein the basic filing fee within the pendency of the application. *See* § 1.78(d)(2).

Comment 74: Several comments suggested the Office should include exceptions to the petition requirement of §§ 1.78(d)(1) and 1.114 to permit applicant to file a continuing application or a request for continued examination as a matter of right, without requiring a petition and showing, in the following situations: (1) Some of the claims in the prior-filed application have been allowed and the continuation application contains only claims that were rejected in the prior-filed application; (2) the continuation application contains claims to an unclaimed invention disclosed in the prior-filed application; (3) the continuing application is claiming an independent and distinct invention; (4) the continuing application claims species or subgenus that falls within a generic claim that has been allowed or issued in one of the prior-filed applications; (5) the continued examination filing is filed for the purposes of submitting newly discovered prior art or amendments or evidence in view of the newly discovered prior art; (6) the continued examination filing is filed after an unsuccessful appeal; (7) a divisional application of an application that was subject to a restriction requirement is filed for the purposes of claiming the non-elected inventions; (8) the continuation application includes claims that were canceled in the prior-filed application; (9) the applicant certifies that the filing is done in good faith to advance prosecution and without deceptive intent; (10) the continued examination filing is filed for submitting evidence or an amendment to overcome a final rejection; (11) a continuation or continuation-in-part is filed to overcome a lack of utility rejection; (12) the continued

examination filing is filed to submit a declaration under § 1.131 or 1.132; (13) the continued examination filing is filed to submit data or other evidence not available for submission in the parent application to obviate a rejection under 35 U.S.C. 101 or 112, ¶ 1 (*e.g.*, for lack of utility or enablement); (14) the continued examination filing is filed to respond to an examiner's request for additional information; (15) the continued examination filing is filed to respond to a new ground of rejection; (16) the prior-filed application was abandoned in favor of a continuing application that is filed using the Office electronic filing system; and (17) a request for continued examination is filed via the Office electronic filing system. One comment stated that if Congress does not eliminate 35 U.S.C. 135(b)(2), the need to copy claims from published applications should be exempt from the limit of continued examination filings in an application as a matter of right.

Response: The Office notes the concerns expressed in the public comment regarding the proposed changes to §§ 1.78(d)(1) and 1.114 that would have required applicant to file a petition and showing for a second or subsequent continuation or continuation-in-part application or request for continued examination. The Office has modified these proposed changes such that this final rule permits an applicant to file two continuation applications or continuation-in-part applications, plus a single request for continued examination in an application family, without any justification.

Other than the situations provided in §§ 1.78(d)(1)(iv) and (d)(1)(v), this final rule permits that a third or subsequent continuing application or any second or subsequent request for continued examination to be filed with a petition and a showing as to why the amendment, argument, or evidence sought to be entered could not have been previously submitted. Sections 1.78(d)(1)(iv) and (d)(1)(v) provide that applicant may file ''one more'' continuation or continuation-in-part application without a petition and showing in certain situations. Specifically, § 1.78(d)(1)(iv) pertains to the situation where an applicant files a bypass continuation or continuation-in-part application rather than paying the basic national fee (entering the national stage) in an international application in which a Demand for international preliminary examination (PCT Article 31) has not been filed, and the international application does not claim the benefit of any other nonprovisional application or international application designating the United States of America. See the discussion of § 1.78(d)(1)(iv). Section 1.78(d)(1)(v) pertains to the situation where an applicant files a continuation or continuation-in-part application to correct informalities rather than completing an application for examination under § 1.53. *See* the discussion of § 1.78(d)(1)(v).

The Office will decide petitions under §§ 1.78(d)(1)(vi) and 1.114(g) based on their substantive argument and the facts in the record and apply the standard in a consistent manner. There are no situations that will result in a *per se* or *pro forma* grant of a petition under § 1.78(d)(1)(vi) or 1.114(g). Whether specific situations would be a sufficient showing under § 1.78(d)(1)(vi) or 1.114(g) is discussed in the responses to subsequent comments.

Comment 75: Several comments opposed the $400 fee for filing a petition under §§ 1.78(d)(1) and 1.114. The comments indicated that the proposed petition fee of $400 is unnecessarily high, especially in view of the filing fees. Furthermore, the comments argued that it is unfair to require the submission of a costly fee and a time-consuming petition regardless of the reason for filing the continuing application or request for continued examination. One other comment stated that the proposed petition fee does not cover the amount of work required to determine if applicant's showing is sufficient to meet the requirements in §§ 1.78(d)(1) and 1.114. Another comment questioned why an applicant must pay a petition fee of $400 when filing an additional continuation-in-part application simply to add new matter.

Response: The Office considers $400 to be an appropriate fee for filing a petition under § 1.78(d)(1)(vi) or 1.114(g). 35 U.S.C. 41(d) authorizes the Director to establish fees to recover the estimated average cost to the Office for handling, reviewing and deciding petitions. The Office has determined that the average cost to the Office for handling, reviewing and deciding the petitions under §§ 1.78(d)(1)(vi) and 1.114(g) will be at least $400. As previously discussed, applicants most likely will be able to avoid the requirements for filing a petition and the required fee if applicants diligently prosecute applications (including the continuing applications and a request for continued examination permitted under §§ 1.78(d)(1) and 1.114(f) without any petition). If an applicant desires to file an application simply to claim new subject matter, the applicant may file a new application (rather than a continuation-in-part application) without claiming the benefit of the prior-filed applications and avoid paying the $400 petition fee. As discussed previously, claims to new subject matter will not be entitled to any benefit of the prior-filed application that does not provide support under 35 U.S.C. 112, ¶ 1, for the claimed subject matter and the patent term of any resulting patent of the continuation-in-part application would be measured from the filing date of the prior-filed application.

Comment 76: One comment requested that the Office waive the requirement for a petition fee if applicant submits new art from a foreign search report or related application or files an amendment in response to new arguments made by the examiner.

Response: A petition, the appropriate showing, and the fee set forth in § 1.17(f) are required under § 1.78(d)(1)(vi) or 1.114(g) when applicant files a third or subsequent continuing application or a second or subsequent request for continued examination regardless of the reason for such a filing. In addition, a request to submit new art from a foreign search report or related application is not likely to be a sufficient showing under § 1.78(d)(1)(vi) or 1.114(g) (see discussion relating to the filing of continuing applications and requests for continued examination to obtain consideration of an information disclosure statement). Likewise, the mere fact that the examiner made new arguments or a new ground of rejection in a final Office action would not be considered a sufficient showing. The Office will decide each petition on a case-by-case basis focusing on whether the new ground of rejection in the final Office action could have been anticipated by the applicant.

Comment 77: Several comments stated that there is no public notice of the criteria the Director will apply to meet the required showing under § 1.78(d)(1) or 1.114. A number of comments sought clarification on what type of showing under § 1.78(d)(1) or 1.114 would be necessary to permit the filing of an additional continuing application or request for continued examination. A number of comments specifically sought clarification of the phrase, ''could not have been previously submitted,'' in §§ 1.78(d)(1) and 1.114 regarding the satisfactory showing needed to be permitted to file an additional continuing application or request for continued examination. A number of other comments suggested that prior to the implementation of the final rule, the Office should publish

more specific guidelines such as a non-exclusive set of examples that would constitute a sufficient showing under §§ 1.78(d)(1) and 1.114. In addition, several comments requested that the Office provide an opportunity for public comment on the suggested guidelines.

Response: As discussed previously, the standard set forth in §§ 1.78(d)(1)(vi) and 1.114(g) as adopted in this final rule (''a showing that the amendment, argument, or evidence sought to be entered could not have been submitted [earlier]'') is more definite than the alternatives suggested in the comments (*e.g.*, ''good cause'' and ''reasonable under the circumstances'') and other standards set forth in the patent statutes (*see e.g.*, *Smith* v. *Mossinghoff*, 671 F.2d 533, 538, 213 U.S.P.Q. 977, 982 (D.C. Cir. 1982) (noting the absence of guidance concerning the meaning of the term ''unavoidable'' in 35 U.S.C. 133)). If an amendment, argument or evidence could be submitted during the prosecution of the initial application, two continuing applications, and a request for continued examination in an application family, applicant must present such an amendment, argument or evidence earlier rather than wait to submit it later in an additional continuing application or request for continued examination. Applicants should not rely upon the availability of additional continuing applications or requests for continued examination in prosecuting an application. The Office will determine on a case-by-case basis whether the applicant's showing as to why the amendment, argument or evidence sought to be entered could not have been submitted earlier is satisfactory. In addition to the showing submitted by the applicant, the Office may review the prosecution history of the initial application and the prior continuing applications or require additional information from the applicant in deciding a petition. The following are some factors that the Office may consider when deciding whether to grant a petition under § 1.78(d)(1)(vi) or 1.114(g): (1) Whether applicant should file an appeal or a petition under § 1.181 (*e.g.*, to withdraw the finality of an Office action) rather than a continuing application or request for continued examination; (2) the number of applications filed in parallel or serially with substantially identical disclosures; and (3) whether the evidence, amendments, or arguments are being submitted with reasonable diligence.

With respect to the first factor (whether applicant should be filing an appeal or a petition under § 1.181 rather than a continuing application or request for continued examination), if the showing under § 1.78(d)(1)(vi) or 1.114(g) relates to an issue that should be petitioned or appealed, the Office will likely not grant the petition for an additional continuing application or request for continued examination. Applicant should address any issues pertaining to inadequate examination by seeking review via a petition under § 1.181 or an appeal, rather than by filing a continuing application or request for continued examination.

If the disagreement between the examiner and applicant is procedural in nature (*e.g.*, an objection), then applicant should file a petition under § 1.181. For example, an applicant should file a petition under § 1.181 to request the withdrawal of the finality of an Office action when the finality was premature, or to review the examiner's refusal to enter an after-final amendment. The Office will likely not grant a petition under § 1.78(d)(1)(vi) or 1.114(g) if applicant argues only that an amendment after final rejection should have been entered in the prior-filed application because the final was premature. Applicant should have addressed the non-entry in the prior-filed application and not later in a petition under § 1.78(d)(1)(vi) or 1.114(g) for a continuing application or request for continued examination. If the issue goes to the merits of a rejection, applicant should file an appeal to the BPAI under 35 U.S.C. 134 and § 41.31.

With respect to the second factor (the number of applications filed in parallel or serially with substantially identical disclosures), the higher the number of applications with identical or substantially identical disclosures or the higher the number of applications in the chain of prior-filed copending applications, the more opportunities applicant had to present the amendment, argument or evidence. Accordingly, a petition under § 1.78(d)(1)(vi) or 1.114(g) is less likely to be granted.

With respect to the third factor (whether the evidence, amendments, or arguments are being submitted with reasonable diligence), the Office will focus on whether the evidence or data submitted with the petition to meet the showing under § 1.78(d)(1)(vi) or 1.114(g) was presented in a reasonably diligent manner. This will take into account the condition of the application at the time of examination (*e.g.*, whether the initial application was in proper form for examination by the time of the first Office action in the initial application or whether it was necessary to first issue Office actions containing rejections under 35 U.S.C. 112 or objections to have the application placed in proper form for examination), the consistency of the Office's position during prosecution (*e.g.*, whether applicant received wholly new prior art rejections versus prior art rejections slightly modified to address the amendments), and the earnestness of the applicant's efforts to overcome outstanding rejections (*e.g.*, whether replies fully addressed all of the grounds of rejection or objection in the Office actions, or whether amendments or evidence were submitted only when arguments were failing to persuade the examiner).

Comment 78: One comment sought clarification as to whether a petition under § 1.78(d)(1) would be available for ''involuntary'' divisional applications. Another comment suggested an applicant should be permitted to file any divisional application in response to a restriction requirement.

Response: The Office notes the concerns expressed in the public comment regarding the proposed changes to § 1.78(d)(1)(ii). The Office has modified this provision relative to the proposed changes such that § 1.78(d)(1)(ii) as adopted in this final rule does not require a divisional application to be filed during the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. Under this final rule, applicant may file, without any justification, a divisional application containing only claims directed to a non-elected invention that has not been examined if the prior-filed application was subject to a requirement for restriction (an ''involuntary'' divisional application''). Applicant may also file two continuation applications and a request for continued examination in the divisional application family, without any justification. Furthermore, applicant may file a third or subsequent continuation application or a second or subsequent request for continued examination with a petition and showing.

Comment 79: Several comments sought clarification on whether the Office will grant a petition under § 1.78(d)(1) for filing a divisional application of an application that was subject to a restriction requirement for the purposes of claiming the non-elected inventions.

Response: As previously discussed, the Office has modified the provisions of § 1.78(d)(1)(ii) relative to the proposed changes. In this final rule, § 1.78(d)(1)(ii) does not require a divisional application to be filed during

the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. This final rule provides that an applicant may file a divisional application directed to each non-elected invention that has not been examined if the prior-filed application is subject to a requirement for restriction. Section § 1.78(d)(1)(iii) as adopted in this final rule also permits applicant to file two continuation applications of a divisional application, plus a request for continued examination in the divisional application family, without any justification. Furthermore, applicant may file an additional continuation application or request for continuation examination with a petition and showing. Under this final rule, applicant should have sufficient time to file a divisional application for claiming a non-elected invention. Therefore, the Office will most likely not grant a petition under § 1.78(d)(1)(vi) to permit an applicant to file a divisional application directed to a non-elected invention.

Comment 80: One comment suggested a petition under § 1.78(d)(1) should be granted when an applicant needs an additional continuing application to partition the claims in the prior-filed application, such that a terminal disclaimer applies only to some but not all claims in the prior-filed application. The comment alternatively suggested changing the regulations to allow the filing of a terminal disclaimer for selected claims.

Response: This final rule permits applicant to file two continuation or continuation-in-part applications plus a request for continued examination in an application family, without justification. Therefore, applicant may use one of the two permitted continuation or continuation-in-part applications to partition the claims such that a terminal disclaimer applies to the prior-filed application but does not apply to the continuation application. Notably, applicant may avoid this situation by presenting all of the patentably indistinct claims in a single application. As discussed previously, multiple applications with patentably indistinct claims divert the Office's patent examining resources from the examination of new applications. Applicant should submit all patentably indistinct claims in a single application. *See* §§ 1.75(b)(4) and 1.78(f). Under this final rule, applicant must identify such multiple applications with patentably indistinct claims to the Office and assist the Office in resolving double patenting issues early in the prosecution. In the situation in which an application contains at least one claim that is patentably indistinct from at least one claim in another application, the Office will treat the claims in both applications as being present in each of the applications for the purposes of determining whether each application exceeds the five independent claim and twenty-five total claim threshold under § 1.75(b). *See* the discussion of § 1.75(b)(4). Accordingly, the Office is not likely to grant a petition for the sole purpose of partitioning claims to avoid a terminal disclaimer.

Additionally, a disclaimer of a terminal portion of the term of an individual claim, or individual claims, is not allowed by statute. 35 U.S.C. 253 provides that ''any patentee or applicant may disclaim or dedicate to the public * * * any terminal part of the term, of the **patent** granted or to be granted.'' (Emphasis added.) Therefore, under 35 U.S.C. 253, a terminal disclaimer must be of a terminal portion of the term of the entire patent and cannot be applied to selected claims as advocated in the comment.

Comment 81: Several comments asserted that an applicant filing an additional continuation-in-part application would be able to argue successfully that the amendment or argument could not have been previously submitted because the subject matter was not present at the time of filing the initial application. Thus, the proposed rules would force these applicants to file a *pro forma* petition.

Response: The mere fact that the subject matter was not present at the time of filing the prior-filed application would not be a sufficient showing under § 1.78(d)(1)(vi). The Office will decide these petitions on a case-by-case basis based on the prosecution history of the prior-filed application as well as the records of the continuation-in-part application. The Office will consider the showing of why the new subject matter sought to be entered could not have been previously submitted in the prior-filed application. The Office will also consider the amendment including any new claims to determine whether the claims in the continuation-in-part application are directed to the new subject matter or mainly to the subject matter disclosed in the prior-filed application. For example, if the new subject matter is not being claimed in the continuation-in-part application, but merely being added to circumvent the rule, the Office will not grant the petition. Furthermore, 35 U.S.C. 120 requires that the prior-filed application disclose the subject matter of at least one claim of the later-filed application in the manner provided by 35 U.S.C. 112, ¶ 1, for the later-filed application to actually receive the benefit of the filing date of the prior-filed application. Thus, any claim in the continuation-in-part application that is directed to the subject matter not disclosed in the manner provided by 35 U.S.C. 112, ¶ 1, in the prior-filed application would be entitled only to the actual filing date of the continuation-in-part application (not the filing date of the prior-filed application), and subject to prior art based on the actual filing date of the continuation-in-part application. Applicant should not claim the benefit of the prior-filed application if all of the claims in the continuation-in-part application are directed to the new subject matter. The continuation-in-part application would not be entitled to the benefit of the filing date of the prior-filed application, and the term of any patent resulting from the continuation-in-part application will be measured under 35 U.S.C. 154(a)(2) from the filing date of the prior-filed application. That is, applicant would not receive any benefit of the earlier application but would have a patent term that is measured from the filing date of the earlier application. If there are any claims in the continuation-in-part application that are directed solely to subject matter disclosed in the prior-filed application, applicant must submit those claims in the prior-filed application rather than filing a continuation-in-part application unless applicant provides a showing as to why these claims could not have been previously submitted.

Comment 82: Several comments requested that the Office permit an applicant to file an additional continuing application or request for continued examination when the applicant indicates why the new invention could not otherwise be protected using another type of application, such as a reissue application or a reexamination proceeding. These comments also requested that the Office permit an additional continuing application or an additional request for continued examination that contains claims broader than in the previous application to which priority is claimed and contain claims not subject to a double patenting rejection.

Response: The Office will likely not grant such a petition. Applicant may file a reissue application under 35 U.S.C. 251 or a reexamination proceeding, if appropriate, to submit claims with different scope. A desire to avoid the requirements governing reissue

applications or reexamination proceedings would not be a sufficient showing under § 1.78(d)(1)(vi) or 1.114(g).

Comment 83: One comment sought clarification on whether the required showing under §§ 1.78(d)(1) and 1.114 will preclude explanations that are permitted when filing a reissue application. A further comment stated the required showing under §§ 1.78(d)(1) and 1.114 is greater than the showing required to file a reissue application.

Response: This final rule permits applicant to file two continuation or continuation-in-part applications plus one request for continued examination in an application family, without any justification. Applicant may also file a third or subsequent continuation or continuation-in-part application or a second or subsequent request for continued examination with a petition and showing that the amendment, argument, or evidence sought to be entered could not have been submitted previously. As previously discussed, if an amendment, argument, or evidence could have been submitted during the prosecution of the initial application, two continuation or continuation-in-part applications or a request for continued examination, applicant must submit the amendment, argument or evidence in one of these filings, rather than in a third or subsequent continuing application or second or subsequent request for continued examination to ensure that applicant advances the prosecution to final action and does not impair the ability of the Office to examine new applications.

Under 35 U.S.C. 251, applicant may file a reissue application to correct an error in the patent which was made without any deceptive intent, where, as a result of the error, the patent is deemed wholly or partly inoperative or invalid. *See* MPEP section 1402. The required showing under §§ 1.78(d)(1)(vi) and 1.114(g) is different than the explanation required for filing a reissue application. The showing under §§ 1.78(d)(1)(vi) and 1.114(g) does not require an error made without any deceptive intent and does not require as a result of the error, the patent to be deemed wholly or partly inoperative or invalid. If it is more appropriate for applicant to file a reissue application, applicant should file a reissue application under 35 U.S.C. 251 rather than filing a continuing application.

Comment 84: Several comments suggested that if the Office permits applicant to provide additional evidence of unexpected results with the filing of an additional continued examination filing, then the experimentation leading to the evidence must have been conducted diligently and commenced within six months of the filing of the initial application. Another comment further suggested evidence that an applicant had not previously learned or known that others had developed similar or parallel technology should not be considered as evidence that an amendment, argument or evidence could not have been submitted previously under § 1.78(d)(1) or 1.114.

Response: The Office will decide petitions under § 1.78(d)(1)(vi) or 1.114(g) on a case-by-case basis. The Office will focus on whether the evidence or data submitted with the petition to meet the showing under § 1.78(d)(1)(vi) or 1.114(g) was presented in a timely manner and was diligently obtained. Any evidence or data that petitioner did not act diligently in obtaining in response to a rejection or requirement in an Office action will be considered unfavorably when deciding a petition under § 1.78(d)(1)(vi) or 1.114(g). For example, the Office will likely not grant a petition if the examiner made the rejection in the first Office action of the initial application and maintained it in the subsequent Office actions, but applicants responded only with arguments, instead of with evidence or an amendment, until after the final Office action. In contrast, the Office will likely grant a petition if, in a continuing application or request for continued examination, the data necessary to support a showing of unexpected results just became available to overcome a new rejection under 35 U.S.C. 103 made in the final Office action, and the data is the result of a lengthy experimentation that was diligently commenced and could not have been completed earlier. Applicant should exercise reasonable foresight to commence any appropriate experimentation early rather than wait until the examiner makes a rejection or finds applicant's arguments unpersuasive.

Comment 85: Several comments sought clarification on whether an additional continued examination filing would be permitted under § 1.78(d)(1) or 1.114 for submitting an information disclosure statement or an amendment in view of an information disclosure statement in the following situations: (1) To submit a newly discovered reference, including a reference cited in a foreign counterpart application; (2) to submit a new reference that was not publicly available at the time the previous amendment was filed; (3) to submit an amendment to the claims that is necessitated by previously cited prior art or newly discovered prior art; and (4) to submit broadened claims after receipt of a foreign search or examination report citing new art. One comment argued that submissions of late discovered prior art should be permitted because the consideration of the prior art will improve patent quality and eliminate allegations of inequitable conduct in obtaining patent rights.

Response: The Office will likely not grant such a petition for submitting an information disclosure statement (IDS) or an amendment necessitated by (or in view of) newly discovered prior art. The effectiveness and quality of the examination process as well as patentability determinations would improve if the most pertinent information were presented early in the examination process. An additional continued examination filing is not necessary for the consideration of newly discovered prior art or an amendment to the claims that is necessitated by the newly discovered prior art. *See Changes To Information Disclosure Statement Requirements and Other Related Matters*, 71 FR at 38812–16, 38820–22, 1309 *Off. Gaz. Pat. Office* at 27–31, 34–36 (proposed changes to §§ 1.97 and 1.98 permit applicant to submit prior art for consideration by the examiner, when applicant complies with specific requirements at various time periods, including after final action, notice of allowance and payment of the issue fee).

The proposed IDS changes (if adopted) would permit applicant to submit an IDS after a first Office action on the merits, but before the mailing date of a notice of allowability or a notice of allowance under § 1.311, if applicant files the IDS with either: (1) The certification under § 1.97(e)(1) and a copy of the foreign search report, or (2) an explanation under proposed § 1.98(a)(3)(iv) as to why each reference is being cited, and a non-cumulative description under proposed § 1.98(a)(3)(v) as to how each reference is not cumulative of any other reference cited. Applicant would also be permitted to submit an IDS after allowance but before the payment of the issue fee, if applicant files the IDS with a patentability justification under proposed § 1.98(a)(3)(vi), including any appropriate amendments to the claims.

Applicant would also be permitted to submit an IDS after the payment of the issue fee if applicant files a petition to withdraw from issue pursuant to § 1.313(c)(1), the patentability justification under proposed § 1.98(a)(3)(vi)(B), and an amendment to the claims. Prior to the effective date of the final rule of the changes to IDS

requirements, applicant may submit an IDS after the close of prosecution with a petition under § 1.183 if the IDS submission complies with the proposed rule requirements in §§ 1.97 and 1.98.

Comment 86: Several comments sought clarification as to whether an additional continued examination filing would be permitted under §§ 1.78(d)(1) and 1.114 in the following situations: (1) When the examiner found the earlier arguments and amendments by applicants to be unpersuasive; (2) when the examiner's interpretation of the claims is unusual and only recently understood by the applicant; (3) when the examiner changes his or her interpretation of claim language; and (4) when the practitioner discovers that the examiner is under a misunderstanding.

Response: These circumstances alone more than likely would not be sufficient to establish a showing under § 1.78(d)(1)(vi) or 1.114(g). Applicant should request an interview with the examiner to resolve these types of issues during the prosecution of the initial application, two continuation or continuation-in-part applications and request for continued examination. In addition, applicant in each reply to an Office action must distinctly and specifically point out the supposed errors in the Office action and must reply to every ground of objection and rejection raised in the Office action. *See* § 1.111(b). The reply must also present detailed explanations of how each claim is patentable over any applied references. *See* §§ 1.111(b) and (c). If applicant disagrees with the examiner's decision to maintain a rejection on the basis that the applicant feels that the examiner is misinterpreting the claims, applicant should seek an appeal rather than file additional continuing applications or requests for continued examination.

Comment 87: Several comments sought clarification on whether an additional continued examination filing would be permitted under §§ 1.78(d)(1) and 1.114 when the examiner makes a new ground of rejection in a final Office action using a new prior art reference, a reference already of record but not previously applied, a new basis for the rejection (*e.g.*, changing a rejection under 35 U.S.C. 102 to a rejection under 35 U.S.C. 103), or a different reasoning (*e.g.*, the supporting arguments have changed or the rejection refers to a new portion of the applied art). Several comments stated that permitting a final rejection based on a new ground of rejection while not allowing further opportunity to amend through continued examination applications is unfair and presents an opportunity for abuse.

Response: The Office will decide each petition for an additional continued examination filing on a case-by-case basis, focusing on whether the new ground of rejection in the final Office action could have been anticipated by the applicant. For example, the Office will likely grant a petition if the final rejection, after the two continuing applications and request for continued examination permitted under §§ 1.78(d)(1) and 1.114(g) without a petition, contains a new ground of rejection that could not have been anticipated by applicant. However, the Office will likely not grant a petition under § 1.78(d)(1)(vi) or 1.114(g) if the examiner only changed a rejection under 35 U.S.C. 102 to a rejection under 35 U.S.C. 103 (or maintained a rejection under 35 U.S.C. 103) with the addition of a new secondary reference in response to an amendment adding a new claim limitation because such a new rejection should have been anticipated by the applicant. Therefore, the mere fact that the examiner made a new ground of rejection in a final Office action probably would not constitute a sufficient showing.

Comment 88: Several comments sought clarification on whether an additional continued examination filing would be permitted under §§ 1.78(d)(1) and 1.114 in the following situations: (1) When the examiner indicates in an advisory action that an after-final amendment would require a new search; or (2) to submit evidence or an amendment to overcome a final rejection.

Response: The Office will likely not grant a petition based on the mere showing that the examiner indicates in an advisory action that the entry of an after-final amendment would require a new search, or that the evidence or amendment sought to be entered will overcome a final rejection. Applicants are permitted to submit any desired amendment, argument, or evidence during the prosecution of the initial application, two continuation or continuation-in-part applications and one request for continued examination. Since numerous opportunities are given to submit any desired amendment, argument, or evidence, the mere fact that an amendment, argument, or evidence is refused entry because prosecution in the prior-filed application is closed will not, by itself, be a sufficient reason to warrant the grant of a petition under § 1.78(d)(1)(vi) or 1.114(g). Rather, an applicant will be expected to demonstrate why the amendment, argument, or evidence sought to be entered could not have been submitted prior to the close of prosecution in the prior-filed application.

Comment 89: Several comments sought clarification as to whether the Office will likely grant a petition for an additional continuing application if some of the claims in the prior application are rejected and other claims are allowed, and applicant wishes to appeal the rejected claims and obtain a patent on the allowed claims.

Response: The Office is not likely to grant a petition under § 1.78(d)(1)(vi) in this situation in the absence of special circumstances. Section 1.78(d)(1)(i) permits an applicant whose initial application contains rejected claims and allowed claims to obtain a patent on the allowed claims, and continue prosecution of the rejected or other claims in a continuation or continuation-in-part application. The applicant is expected to use the two continuation or continuation-in-part applications permitted without any petition or showing under § 1.78(d)(1)(i) for this purpose. The applicant needs to pursue an appeal (or cancel the rejected claims) if the application still contains rejected claims after a second continuing application and request for continued examination.

Comment 90: Several comments suggested that applicant should be permitted to file an additional continuing application under § 1.78(d)(1) or request for continued examination under § 1.114 for changing the scope of the claims in the following situations: (1) Pursue claims that have the same or narrower scope as the claims in an allowed application; (2) claim a species or subgenus that falls within a generic claim that has been allowed or issued in one of the prior-filed applications; (3) pursue the rejected or broader claims when other claims are allowable; (4) file broader claims, when applicant recently discovered a limitation in an allowed claim that was unduly limiting; (5) pursue broader claims, or claim aspects of the invention that are disclosed, but not claimed, in the prior-filed application (contains claims to an unclaimed invention disclosed in the prior-filed application); (6) pursue narrower claims; (7) claim inventions of a different scope when the scope of new claims finds specific support in the application as filed; (8) pursue new claims when the scope of new claims was unintentionally omitted from the initial application; or (9) protect a different aspect of the invention revealed by research and development

subsequent to an initial application filing.

Response: If a claim can be submitted during the prosecution of the initial application, two continuation or continuation-in-part applications and one request for continued examination, applicant must present such a claim early in these filings rather than wait to submit it later in an additional continuing application or request for continued examination. The situations described in the comments do not present any reason why claims directed to claims with the same, narrower, or broader scope could not have been submitted earlier. Applicants may file a reissue application under 35 U.S.C. 251, if appropriate, to submit claims with a different scope.

Comment 91: Several comments sought clarification on whether an additional continued examination filing would be permitted under §§ 1.78(d)(1) and 1.114 for the following situations: (1) When a product recently becomes commercially viable; (2) when a competing product is newly discovered; (3) when new information is discovered that could not have been provided in the prior application; (4) when applicant discovered new inherent properties that he or she now wishes to claim; (5) when applicant now has the financial resources to file previously unclaimed inventions; (6) when clinical trials indicate the previously unclaimed subject matter may be useful; or (7) when the court determined that the format of a patented claim is improper and applicant wishes to file a continuing application to seek the proper protection.

Response: The Office likely will not grant such a petition in these situations. Applicant is permitted to file two continuation or continuation-in-part applications and a request for continued examination without a petition and showing. Applicant should have sufficient time to submit any desired claims. Applicant should also know what the applicant regards as his or her invention and claim his or her invention during the prosecution of these applications, regardless of whether applicants have recently discovered a commercially viable product, financial resources, useful subject matter, a competing product, or similar or parallel technology on the market. Applicants may file a reissue application under 35 U.S.C. 251, if appropriate, to correct or amend any patented claims. The Office would not likely grant a petition to permit an applicant to end-run the two-year filing period requirement of 35 U.S.C. 251, ¶ 4.

Comment 92: Several comments suggested allowing an applicant to file an additional continuing application or request for continued examination to claim inventions related to drugs undergoing the FDA approval process. In particular, one comment suggested two ways of satisfying the required showing under §§ 1.78(d)(1) and 1.114: (1) An applicant provides an affidavit or other statement to the Office confirming that the applicant is presently engaged in obtaining information needed for submitting an Investigational New Drug (IND) application for that drug; or (2) an applicant provides evidence to the Office that the applicant has already submitted an IND or a Biologics License Application (BLA) (or an amended IND application or amended BLA) for the particular drug.

Response: Such evidence of ongoing FDA review for a drug allegedly claimed in an application would not by itself be considered a sufficient showing under § 1.78(d)(1)(vi) or 1.114(g). Applicant should know what the applicant regards as his or her invention upon filing an application and should claim the invention prior to, or regardless of, any FDA approval. There is no reason why an applicant must have FDA approval prior to deciding for which aspect(s) of the invention or which invention(s) to seek patent protection. *See In re Brana,* 51 F.3d 1560, 1568, 34 U.S.P.Q.2d 1436, 1442 (Fed. Cir. 1995) (''FDA approval * * * is not a prerequisite for finding a compound useful within the meaning of the patent laws.''). The changes adopted in this final rule permit an applicant to file two continuation or continuation-in-part applications and one request for continued examination in the application family, without any justification. In addition, applicant may file a divisional application directed to each non-elected invention that has not been examined if the prior-filed application was subject to a restriction requirement and the claims to the non-elected invention are cancelled upon filing of the divisional application. Applicant may also file two continuation applications of the divisional application and a request for continued examination in the divisional application family, without justification. And, applicant may file a third of subsequent continuation application or a second request for continued examination with a petition and showing. If applicant is not prepared to particularly point out and distinctly claim what the applicant regards as his or her invention during the prosecution of the initial application, its two continuing applications, and a request for continued examination in each application family, applicant should consider using the deferral of examination process. *See* § 1.103(d).

The Office recognizes that, in certain unpredictable arts (including, for example, biotechnology and certain pharmaceuticals), there may be a need for research or testing to obtain additional evidence or data to obviate a rejection for lack of utility under 35 U.S.C. 101 (and consequently for lack of enablement under 35 U.S.C. 112, ¶ 1). The case law, however, does not shift the burden to the applicant to provide rebuttal evidence or data concerning the invention's utility until the examiner ''provides evidence showing that one of ordinary skill in the art would reasonably doubt the asserted utility.'' *Brana,* 51 F.3d at 1566, 34 U.S.P.Q.2d at 1441 (citing *In re Bundy,* 642 F.2d 430, 433, 209 U.S.P.Q. 48, 51 (CCPA 1981)). Even in situations in which a requirement for such additional evidence is appropriate, the evidence or data that would warrant an applicant's decision to initiate the FDA regulatory process should be sufficient to establish utility for purposes of compliance with 35 U.S.C. 101 and 112, ¶ 1. *See* MPEP § 2107.03 (as a general rule, if an applicant has initiated human clinical trials for a therapeutic product or process, Office personnel should presume that the applicant has established that the subject matter of that trial is reasonably predictive of having the asserted therapeutic utility). With respect to situations in which it is questionable as to whether there is sufficient enablement for the invention as claimed, evidence submitted to the FDA to obtain approval for clinical trials may be submitted. However, considerations made by the FDA for approving clinical trials are different from those made by the Office in determining whether a claim is sufficiently enabled. *See* MPEP § 2164.05 (citing *Scott* v. *Finney,* 34 F.3d 1058, 1063, 32 U.S.P.Q.2d 1115, 1120 (Fed. Cir. 1994)). Thus, situations in which it is necessary for an applicant to submit data to the Office to demonstrate patentability using data obtained from research or testing carried out as part of the FDA regulatory process should be rare.

Nevertheless, in the situation in which there is a rejection such as lack of utility under 35 U.S.C. 101 (and/or consequently for lack of enablement under 35 U.S.C. 112, ¶ 1) in an application claiming subject matter in such an unpredictable art, the Office will likely grant a petition under § 1.78(d)(1)(vi) or 1.114(f) if, in a continuing application or request for

continued examination, the evidence or data to demonstrate utility or enablement just became available or could not have been otherwise earlier presented, and the evidence or data resulted from research or testing that was commenced with reasonable diligence. However, this presupposes that the applicant has taken reasonable steps to resolve the issue during the prosecution of the initial (or divisional) application, its two continuing applications, and a request for continued examination in each application family. In particular, the Office will consider, *inter alia,* whether the applicant: (1) Sought review of the rejection via an appeal that proceeded to at least the appeal conference stage and resulted in an examiner's answer (rather than simply filing continuing applications or a request for continued examination without the evidence or data to again argue patentability before the examiner); (2) initiated the research or testing promptly (rather than waiting for a decision to initiate the FDA regulatory review process); and (3) sought suspension of action (§ 1.103(a) or (c)) or deferral of examination if applicable (§ 1.103(d)) in the continuing applications or the request for continued examination and alerted the Office of the research or testing.

Comment 93: Several comments sought clarification whether the Office would grant a petition for an additional continuing application or request for continued examination to correct the inventorship of the application due to information discovered after prosecution of the application has closed.

Response: The Office will likely not grant such a petition. Applicant should make the correction early in the examination process. Furthermore, the Office has recently proposed changes to § 1.312 to provide that the Office may permit a correction of the inventorship filed in compliance with § 1.48 after the mailing of a notice of allowance if certain requirements are met, such as if the correction is filed before or with the payment of the issue fee or if the correction is filed with the processing fee set forth in § 1.17(i) and in sufficient time to permit the patent to be printed with the correction. *See Changes To Information Disclosure Statement Requirements and Other Related Matters,* 71 FR at 38817–8, 38823, 1309 *Off. Gaz. Pat. Office* at 32, 37. Finally, after the patent has issued, applicant may correct the inventorship by filing a reissue application under 35 U.S.C. 251 or pursuant to 35 U.S.C. 256.

Comment 94: One comment discussed that the limitations on continuing applications may create due process issues because there may be different treatment of joint inventors of an application. The comment provided an example of an application filed naming joint inventors, *e.g.*, Inventors C and D, and ensuing problems caused by the proposed rules as follows: Inventor C files a continuation application to prosecute his or her invention. Inventor D may be deprived of filing a continuation application on his invention because the filing by Inventor D would be a second or subsequent continuing application that would require a petition under § 1.78(d)(1).

Response: This final rule permits applicants to file two continuation or continuation-in-part applications plus one request for continued examination without justification. Applicants may file a third or subsequent continuation or continuation-in-part application or a second or subsequent request for continued examination with a petition and showing. Under § 1.78(d)(1)(i), Inventor C is permitted to file a continuation application (the first continuation application) to prosecute his or her invention, and Inventor D is permitted to file a continuation application (the second continuation application) to prosecute his or her invention.

Comment 95: Several comments sought clarification whether the Office will grant a petition for an additional continuing application or request for continued examination for the purpose of provoking an interference.

Response: The Office will likely not grant a petition with a showing that the additional continuation or continuation-in-part application or request for continued examination is solely for the purpose of provoking an interference. In most situations, applicants should have sufficient opportunity to provoke an interference and copy claims in a timely manner in compliance with 35 U.S.C. 135(b)(2) in the initial application, two continuation or continuation-in-part applications, and one request for continued examination, all of which are available without any justification. In any event, the Office is likely to require that a request for a statutory invention registration under § 1.293 be submitted as a condition of granting any petition under § 1.78(d)(1)(vi) in the situation where a third or subsequent continuation or continuation-in-part application or second or subsequent request for continued examination is for the purpose of provoking an interference. The Office, however, would likely grant a petition under § 1.78(d)(1)(vi) (without requiring a request for a statutory invention registration under § 1.293) in a limited situation where an interference is declared in a second continuation or continuation-in-part application that contains both claims corresponding to the count and claims not corresponding to the count, and the BPAI suggests that the claims not corresponding to the count be canceled from the application subject to the interference and pursued in a separate application.

Comment 96: Several comments sought clarification as to whether the Office will grant a petition for an additional continuing application or request for continued examination when the Office changes the examiner assigned to the application either on its own initiative or in response to the applicant's request.

Response: The Office will not grant such a petition. The mere fact that the Office changes the examiner assigned to the application would not be a sufficient showing under § 1.78(d)(1)(vi) or 1.114(g).

Comment 97: Several comments sought clarification as to whether the Office will grant a petition for an additional continuing application or request for continued examination when applicant changes the practitioner of record, when applicant states that the change of practitioner was made in good faith and certifies that the applicant was dissatisfied with the prior practitioner's claim drafting, or when the delay in filing claims was due to practitioner's error or inaction and was not the fault of the applicant. One comment expressed concern that if changing the practitioner of record is an acceptable reason, it will promote attorney swapping.

Response: The Office will not grant such a petition for these circumstances. A change of practitioner, or errors or delays caused by the practitioner, would not be considered sufficient showings. An applicant is bound by the consequences of the acts or omissions of the applicant's duly authorized and voluntarily chosen legal representative. *See Link* v. *Wabash R. Co.,* 370 U.S. 626, 633–34 (1962).

Comment 98: One comment suggested that an applicant should be permitted to file an additional continuation or continuation-in-part application when the practitioner does not present the claims in the prior application because of excusable neglect.

Response: Rule 60(b) of the Federal Rules of Civil Procedure (Rule 60(b)) does provide ''excusable neglect'' as a basis (among others) for relieving a party of a judgment or order. *See* Fed. R. Civ. P. 60(b)(1). Rule 60(b), however, further provides that a motion based

upon ''excusable neglect'' must be ''made within a reasonable time,'' and ''not more than one year after the judgment, order, or proceeding was entered or taken.'' *See* Fed. R. Civ. P. 60(b). Sections 1.78(d)(1) and 1.114 as adopted in this final rule permit an applicant to file an initial application, two continuation or continuation-in-part applications, and a request for continued examination in any one of these three applications without justification. Given the numerous opportunities provided in §§ 1.78(d)(1) and 1.114 to prosecute an application for patent, the ''mistake, inadvertence, surprise, or excusable neglect'' standard set forth in Rule 60(b)(1) is not an appropriate basis for seeking yet another opportunity to prosecute the application. Therefore, the Office is not likely to grant a petition under § 1.78(d)(1)(vi) or 1.114(g) solely on the basis of ''excusable neglect.''

Rule 60(b)(6), however, does provide for relief on the ''catchall'' basis of ''any other reason justifying relief from the operation of the judgment.'' *See* Fed. R. Civ. P. 60(b)(6). While this language appears to be open-ended, this provision is typically limited to exceptional or extraordinary circumstances suggesting that a party was faultless in the delay. *See Marquip, Inc.* v. *Fosber Am., Inc.,* 198 F.3d 1363, 1370, 53 U.S.P.Q.2d 1015, 1020 (Fed. Cir. 1999) (citing *Pioneer Inv. Serv. Co.* v. *Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 393 (1993)). The patent rules of practice (§ 1.183) provide that ''in an extraordinary situation'' in which ''justice requires,'' the Office may waive or suspend any requirement of the regulations in 37 CFR part 1, which is not a requirement of statute. The Office does not anticipate granting petitions under § 1.78(d)(1)(vi) or 1.114(g) on a basis other than a showing that the amendment, argument or evidence sought to be entered could not have been previously submitted. However, in the rare exceptional or extraordinary situation in which an applicant was faultless in the delay, and the situation does not meet the standard that the amendment, argument or evidence sought to be entered could not have been previously submitted, the Office may grant relief pursuant to § 1.183.

Comment 99: Several comments sought clarification as to whether the Office will likely grant a petition for an additional continuing application or request for continued examination if the prior-filed application was abandoned in favor of a continuing application that was filed using the Office electronic filing system or if the request for continued examination was filed using the Office electronic filing system.

Response: The Office will likely not grant such a petition. The mere fact that a continuing application or request for continued examination is electronically filed via the Office electronic filing system would not be a sufficient showing as to why the amendment, argument or evidence sought to be entered could not have been previously submitted.

Comment 100: A few comments sought clarification as to whether the Office will likely grant a petition for an additional continuing application or request for continued examination if the applicant becomes disabled for a lengthy time during pendency of application.

Response: The Office will likely not grant such a petition on the mere showing that the applicant becomes disabled for a lengthy time during pendency of application. The changes being adopted in this final rule permit applicants to file two continuation or continuation-in-part applications and a request for continued examination, without a petition and showing. Applicant may also file a third or subsequent continuation or continuation-in-part application or a second or subsequent request for continued examination with a petition and showing. Furthermore, applicant may file a petition for suspension of action under § 1.103(a) or a request for deferral of examination under § 1.103(d), when necessary.

Comment 101: Several comments suggested an applicant should be permitted to file an additional continuation or continuation-in-part application or a request for continued examination for patent term extension reasons.

Response: No patent term extension benefits under 35 U.S.C. 154 and 156 will accrue to applicant by filing a third or subsequent continuing application or a second or subsequent request for continued examination. Therefore, a desire to obtain a patent term extension would not be a sufficient reason to permit a third or subsequent continuing application or a second or subsequent request for continued examination. In fact, the filing of a continuing application or request for continued examination may result in the loss of a patent term adjustment under 35 U.S.C. 154(b).

Comment 102: A number of comments expressed concern regarding an example provided by the Office that would meet the showing under §§ 1.78(d)(1) and 1.114 to permit the filing of an additional continuing application or request for continued examination. This example permits the applicant to file an additional continuing application or request for continued examination when the applicant can show that collection of the data necessary to demonstrate unexpected results was started after the applicant received the rejection for the first time, and was completed only shortly before filing the petition for an additional filing. A number of comments stated that granting a petition should only depend on when the information becomes available and not when the tests begin. One other comment stated that experiments are typically ongoing from the date of invention and that it would be inappropriate for the Office to require experimentation to overcome an obviousness rejection to commence only after the rejection has been made for the first time. One comment suggested removing the language, ''could not have been anticipated by applicant,'' from the example provided by the Office of an adequate showing under § 1.78(d)(1) or 1.114. The comment expressed concern that the Office's example is vague and subjective, and that removal of the language, ''could not have been anticipated by applicant,'' would make the standard less arbitrary.

Response: The example is merely one illustration of when a petition under § 1.78(d)(1)(vi) or 1.114(g) will likely be granted. Other appropriate showings could result in a petition under § 1.78(d)(1)(vi) or 1.114(g) being granted. As discussed previously, the Office will focus on whether the evidence or data submitted was obtained and presented in a reasonably diligent manner.

Comment 103: One comment expressed concern regarding the requirement under § 1.78(d)(1) that an applicant must submit a petition within four months from the actual filing date of the later-filed continuing application, stating that applicant may need more time to complete the experimentation or to prepare the submission in response to a rejection or a requirement for information. This comment suggested that the Office should accept an interim statement from the applicant when more time is needed, such as a statement that the experimentation is progressing, but is not completed.

Response: Applicant should prepare a reply diligently upon receiving the final Office action in the prior application, which provides a six-month statutory period for reply. There is no reason why an applicant should delay preparing a petition under § 1.78(d)(1)(vi) until a third or subsequent continuing application has been filed. Applicants

should not rely solely upon the four-month time period under § 1.78(d)(1)(vi) to prepare and file a petition under § 1.78(d)(1)(vi) for a third or subsequent continuing application. Therefore, the four-month time period from the actual filing date of a third or subsequent continuing application is a reasonable deadline to file a petition under § 1.78(d)(1)(vi).

Comment 104: A number of comments requested clarification regarding who will decide the petitions under §§ 1.78(d)(1) and 1.114. Several comments argued that examiners should not decide the petitions under §§ 1.78(d)(1) and 1.114. Furthermore, a number of comments argued that there is a danger that the standard would be applied differently in different Technology Centers. Several comments suggested that the Office of Petitions should decide the petitions to encourage consistency, ensure uniform interpretation of the rules, and reduce the impact on examining resources. Yet another comment suggested that the BPAI should review the showing required under §§ 1.78(d)(1) and 1.114. The comments further argued that there is a potential for both disparate treatment and inconsistent application of §§ 1.78(d)(1) and 1.114 depending on who decides the petitions and that the potential of either would violate the concept of equal protection under the law.

Several comments requested clarification regarding the procedures for appealing the denial of a petition under § 1.78(d)(1)(vi) or 1.114(g). Specifically, the comments questioned whether a denial of a petition should be appealed to the BPAI or petitioned to the Director. The comment further requested that the Office publish the decisions to encourage consistency and understanding of the standard. One comment sought clarification on the remedies available to an applicant if the Office denies a petition for an additional continuing application or request for continued examination when the examiner introduced new prior art in a final Office action. One comment questioned whether petitions under §§ 1.78(d)(1) and 1.114 could be decided objectively due to the Office's desire to dramatically curtail continuing applications and requests for continued examination.

Response: The Office is making every effort to become more efficient, to apply the rules and statutes uniformly, and to allocate Office resources properly. The authority to decide petitions under §§ 1.78(d)(1)(vi) and 1.114(g) has been delegated to the Deputy Commissioner for Patent Examination Policy (who may further delegate this authority to officials under the Deputy Commissioner for Patent Examination Policy). A decision on a petition under § 1.78(d)(1)(vi) or 1.114(g) is not appealable to the BPAI. The denial of a petition under § 1.78(d)(1)(vi) or 1.114(g) may be viewed as a final agency action for the purposes of judicial review under 5 U.S.C. 704. *See* MPEP § 1002.02. Final decisions of the Office of the Commissioner for Patents are accessible in the Freedom of Information Act (FOIA) section of the Office's Internet Web site at (*http://www.uspto.gov/web/offices/com/sol/foia/comm/comm.htm*).

The Deputy Commissioner for Patent Examination Policy and officials under the Deputy Commissioner for Patent Examination Policy will decide petitions under §§ 1.78(d)(1)(vi) and 1.114(g) on their merits and the facts in the record and apply the standard in a consistent manner. The officials who will decide petitions under §§ 1.78(d)(1)(vi) and 1.114(g) are professionals who perform their duties within the framework of the law, rules, and examination practice. The Office only desires to curtail continuing applications and requests for continued examination in situations in which the continued examination filing is for the purpose of presenting an amendment, argument or evidence that could have been, but was not, submitted earlier. The Office recognizes the need for continued examination filings for presenting an amendment, argument or evidence that truly could not have been submitted earlier.

Comment 105: A number of comments requested that the Office set a time limit for rendering decisions on petitions under §§ 1.78(d)(1) and 1.114. The comments suggested that the Office should set up an adequately staffed office to decide the petitions promptly, and in any event, before the close of prosecution of the parent application so that applicants are advised of their prosecution options. The comments further suggested that the Office should grant the petition if it is not decided prior to the close of prosecution.

Response: The Office is continuing to ensure prompt and consistent decisions on petitions. It is the general policy of the Office that petitions are decided in the order that they are filed in the Office. Moreover, the Office will likely deny any petition under § 1.78(d)(1)(vi) or 1.114(g) filed before the close of prosecution because applicant may still submit the amendment, argument, or evidence in the application if the prosecution is open. Further, in such situation, it is unlikely that applicants will be able to show that the amendment, argument, or evidence sought to be entered could not have been previously submitted.

Comment 106: One comment sought clarification regarding the status of an application during consideration of the petition. Specifically, the comment questioned whether an applicant who had filed a petition under § 1.78(d)(1) or 1.114 would be permitted to file a notice of appeal under § 41.31(a) within the time period provided in § 1.134 to avoid abandonment of the application if the petition is dismissed. The comment also inquired whether the notice of appeal fee would be refunded if the petition were granted. Several other comments suggested that the filing of a petition under § 1.78(d)(1) or 1.114 should serve as a notice of appeal if the petition is dismissed. In the alternative, several comments suggested that the Office should allow applicants additional time to file a notice of appeal after the dismissal of a petition.

Response: The Office will make every effort to decide the petitions in a timely manner. The rules have not changed the time period for filing a notice of appeal or an appeal brief. Pursuant to § 41.31(a)(1), an applicant must file a notice of appeal accompanied by the fee set forth in § 41.20(b)(1) within the time period for reply set forth in the Office action. The notice of appeal fee is set by statute and is non-refundable. If the Office grants the petition prior to a decision on the merits by the BPAI, the fees paid for the notice of appeal and the appeal brief can be applied to a later appeal on the same application. *See* MPEP § 1207.04. Additionally, the filing of a petition will not serve as a notice of appeal, and the Office will not allow more time to file a notice of appeal. The filing of a petition, moreover, does not toll the period for reply to any outstanding Office action. An applicant should not use the continued examination practice as a substitute for an appeal. Rather, an applicant should appeal the decision if warranted.

Comment 107: One comment sought clarification of the status of the application if, after filing a notice of appeal under § 41.31(a), an applicant later files a petition under § 1.114 with a request for continued examination (with a submission and the appropriate fees), which is dismissed. The comment questioned whether the application would be abandoned given that the filing of a request for continued examination would be treated as a request to withdraw the appeal.

Response: In the situation described in the comment, the application would be abandoned if the application has no

allowed claims because the request for continued examination would be treated as a request to withdraw the appeal. *See* MPEP § 1215.01.

In the situation where applicant already filed a request for continued examination in the application family, a better alternative is for applicant to file the request for continued examination with a petition under § 1.114(g), and then if the petition is not decided prior to the expiration of the statutory period for reply to the final Office action, applicant may file a notice of appeal within the period for reply (and petition for any extension of this period under § 1.136(a) or (b), if necessary) to avoid abandonment of the application. If the Office subsequently dismisses the petition, the request for continued examination will be treated as an improper request for continued examination. However, the request for continued examination will not be treated as a request to withdraw the appeal because the request for continued examination was filed before the notice of appeal (*i.e.*, the application was not on appeal at the time of filing the request for continued examination).

E. Treatment of Multiple Applications

Comment 108: A number of comments suggested the four-month time period provided in § 1.78(f)(1) for identifying to the Office applications that meet the criteria set forth in § 1.78(f)(1) is unreasonably short and is impractical in view of the time often required by the Office to assign application numbers and communicate these numbers to the applicants. One comment suggested the time period provided in § 1.78(f)(1) for identifying to the Office applications that meet the criteria set forth in § 1.78(f)(1) does not permit an applicant to timely identify an international application designating the United States of America that entered the national stage thirty months after the filing date of a nonprovisional application filed under 35 U.S.C. 111(a) when these two applications meet the criteria set forth in § 1.78(f)(1).

Response: The Office notes the concerns expressed in the public comments concerning the proposed changes to § 1.78(f)(1). The Office has modified this provision relative to the proposed changes such that § 1.78(f)(1) as adopted in this final rule provides applicant four months from the actual filing date of a nonprovisional application filed under 35 U.S.C. 111(a), four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in a nonprovisional application which entered the national stage from an international application after compliance with 35 U.S.C. 371, or two months from the mailing date of the initial filing receipt in the other nonprovisional application, to identify other nonprovisional applications in compliance with § 1.78(f)(1).

Comment 109: A number of comments requested identification of any consequences for failing to identify one or more applications that meet the criteria set forth in § 1.78(f)(1), or for failing to identify such applications within the time period set forth in § 1.78(f)(1).

Response: If applicant inadvertently fails to identify the other nonprovisional applications in compliance with § 1.78(f)(1)(i) within the time period provided in § 1.78(f)(1)(ii), applicant should submit the identification to the Office as soon as practical. If the submission necessitates a new rejection based upon double patenting (including an obviousness-type double patenting rejection) in a second or subsequent Office action on the merits, the examiner may make such an action final (assuming that the conditions for making a second or subsequent action final are otherwise met). The Office may also refer any registered practitioner who repeatedly fails to comply with the rule requirements to the Office of Enrollment and Discipline for appropriate action. Applicants and practitioners are strongly encouraged to revise their practices to ensure timely submissions of the required identification. Applicants and registered practitioners are reminded of their duties under § 10.18 and other professional responsibility rules, and the consequences of any violations (*e.g.*, §§ 10.18(c), 10.18(d) and 10.23).

Comment 110: A number of comments requested clarification of § 1.78(f)(1) and how it interacts with § 1.56, including the preexisting duty of an applicant to disclose similar information to the Office under § 1.56. Several comments stated that § 1.78(f)(1) imposes burdens on the applicants that provide a new basis for inequitable conduct allegations.

Response: Section 1.78(f)(1) provides that an applicant must identify other pending applications or patents that are commonly owned, have a common inventor, and have a claimed filing or priority date within two months of the claimed filing or priority date of the application. This requirement does not supplant an applicant's duty to bring other applications that are ''material to patentability'' of an application (*e.g.*, applications containing patentably indistinct claims) to the attention of the examiner. Section 1.78(f)(1) does not provide a new basis for allegations of inequitable conduct when § 1.78(f)(1) is considered in light of the duties concurrently imposed on applicants and practitioners by § 1.56 and the ethics rules in 37 CFR Part 10, such as § 10.18. *See also Dayco*, 329 F.3d at 1365–69, 66 U.S.P.Q.2d at 1806–08 (individuals covered by § 1.56 cannot assume that the examiner of a particular application is necessarily aware of other applications which are ''material to patentability'' of the application under examination, but must instead bring such other applications to the attention of the examiner).

Comment 111: Several comments requested clarification regarding the applications that must be identified pursuant to § 1.78(f)(1) when common inventor(s) and common ownership exist.

Response: Applicant must identify those pending nonprovisional applications that are filed within two months of each other taking into account any filing date for which benefit is sought, that name at least one common inventor, and that are owned by the same person or subject to an obligation of assignment to the same person. For example, the applicant for application A is required to identify application B and the applicant for application B is required to identify application A in the following situation: The actual filing date of application A is August 8, 2006. Application A claims priority of a foreign application filed on August 10, 2005. The actual filing date of application B is April 11, 2006. Application B claims the benefit of a prior-filed nonprovisional application filed on October 4, 2005, and claims the benefit of a prior-filed provisional application filed on January 4, 2005. Application A and application B have at least one common inventor and common ownership. Each applicant must identify the other application because application A has a filing date (August 10, 2005, the foreign priority date) within two months of a filing date of application B (October 4, 2005, the filing date of the nonprovisional application whose benefit is claimed by application B). ''Filing date'' includes the actual filing date, foreign priority date, and the filing date of a provisional, nonprovisional, or international application whose benefit is sought under title 35, United States Code.

Comment 112: A number of comments objected that §§ 1.78(f)(1) and (2) require applicants to identify and resolve a possible double patenting issue prior to a rejection being issued by the examiner. One comment suggested that the rebuttable presumption in § 1.78(f)(2) was akin to saying that if an

applicant submits prior art, there is a presumption of obviousness. One comment suggested that § 1.78(f)(2) was unnecessary because § 1.78(f)(1) provides the Office with sufficient information to require a terminal disclaimer or require the cancellation of claims. One comment stated that many applicants will attempt to circumvent § 1.78(f)(2) by filing multiple applications that meet the criteria set forth in § 1.78(f)(2), but that include both patentably distinct claims and patentably indistinct claims.

Response: The rebuttable presumption set forth in § 1.78(f)(2) is a procedural tool requiring the applicant to help focus and consolidate the examination process and thus is not akin to a presumption of obviousness. The examination is more efficient when double patenting issues are identified and resolved early in the process. Where an applicant chooses to file multiple applications that are substantially the same, it will be the applicant's responsibility to assist the Office in resolving potential double patenting situations rather than taking no action until faced with a double patenting rejection. Although the ultimate determination of double patenting rests with the Office, applicants are in a far better position than the Office to identify applications that may raise double patenting concerns.

Section 1.78(f)(2) requires applicant to resolve the double patenting issues early in the prosecution by either: (1) Filing a terminal disclaimer and an explanation as to why the multiple applications containing patentably indistinct claims are necessary; or (2) explaining how the application contains only claims that are patentably distinct from the claims of other related applications. Therefore, with the benefit of § 1.78(f)(2), double patenting issues could be resolved more expeditiously before the first Office action on the merits, thus saving the examiner time by eliminating the need to search for related applications, analyze the potentially conflicting claims, and make the rejection. Merely identifying the other applications under § 1.78(f)(1) would not result in these benefits.

If the criteria set forth in § 1.78(f)(2) are met, the rebuttable presumption would apply regardless of whether a few of the claims are patentably distinct from the claims in the other related applications because § 1.78(f)(2) provides that ''a rebuttable presumption shall exist that a nonprovisional application contains at least one claim that is not patentably distinct * * * .'' To rebut this presumption, applicant must explain how the application contains only claims that are patentably distinct. Merely explaining that some of the claims are patentably distinct would not be sufficient to rebut this presumption.

Comment 113: One comment objected that § 1.78(f)(2) would impose an undue burden on inventors because it creates a presumption that commonly owned patent applications which share a common disclosure and at least one inventor, are patentably indistinct. The comment further asserted that the presumption is not in the interest of American competitiveness as American companies often file numerous patent applications with claims directed to different features of the same new product. One comment suggested that § 1.78(f)(1) places an excessive burden on applicants to anticipate all the unique claims that could be filed at the time of filing the initial application.

Response: Section 1.78(f)(2)(i) requires that the related applications must have the same claimed filing or priority date in addition to being commonly owned with one inventor in common and with substantial overlapping disclosure. Multiple patent applications related to the same product are not precluded by § 1.78(f)(2). In the situation where § 1.78(f)(2)(i) actually applies and the multiple applications relate to patentably distinct features of the same new product, it should not be difficult to explain how the applications contain patentably distinct claims under § 1.78(f)(2)(ii)(A), and thereby rebut the presumption. Thus, the presumption of § 1.78(f)(2)(i) does not impose an undue burden on inventors.

None of the criteria under § 1.78(f)(1) for identifying certain related applications has anything to do with claims that could be filed in the initial application as suggested by the comment. Instead, § 1.78(f)(1) merely requires identification of applications that meet the identified criteria. Accordingly, there is no such burden placed on applicants.

Comment 114: Several comments requested clarification of the language ''taking into account any filing date for which a benefit is sought under title 35, United States Code,'' in § 1.78(f)(1). Those comments also inquired whether this language includes provisional applications for which benefit is sought, merely the first nonprovisional application for which benefit is sought, or every nonprovisional application for which benefit is sought.

Response: Section 1.78(f)(1) requires applicant to consider all provisional, nonprovisional, international, and foreign applications for which benefit is sought. If the filing date of an application whose benefit is claimed in a nonprovisional application is within two months of the filing date of another pending nonprovisional application, and the nonprovisional applications name at least one inventor in common and are owned by the same person or subject to an obligation of assignment to the same person, each applicant of the nonprovisional applications must identify the other nonprovisional application to the Office. For example, if two nonprovisional applications claim priority of the same foreign application (or two foreign applications filed within two months of each other), name at least one inventor in common, and are owned by the same person, then each applicant of the nonprovisional applications must identify the other nonprovisional application, no matter the difference in time between their U.S. filing dates.

Comment 115: A number of comments suggested that § 1.78(f)(1) could be eliminated if the Office assigned all related applications to the same examiner.

Response: The Office attempts to assign related applications to the same examiner where possible. However, applicant is in the best position to determine and identify when applications are related, not the Office. By meeting the provisions of § 1.78(f), applicants will reduce the burden on the Office to identify which applications are related and facilitate examination of the related application by the examiner.

Comment 116: Several comments suggested that § 1.78(f)(1) would be burdensome to applicants who file a large number of applications in related areas of research. These comments suggested that the examiners working in these areas of technology will also experience a significant burden. A number of comments suggested that the Office has not sufficiently justified how the benefits of § 1.78(f) outweigh the added costs for both applicants and the Office. These comments suggested that the existing rules relating to double patenting and the filing of terminal disclaimers are sufficient to solve the problems of patentably distinct claims, and that the Office's searchable database of applications makes the § 1.78(f) changes unnecessary. The comments argued that examiners can perform common inventor searches as easily as applicants. A number of comments doubted the Office's reasoning that duplicative applications containing ''conflicting or patentably indistinct claims'' are having a crippling effect on the Office's ability to examine non-continuing applications. A number of comments making such an objection

stated that in fiscal year 2005, less than three percent of the patents granted contained a terminal disclaimer, and accordingly there is no basis for the rebuttable presumption of patentably indistinct claims. One comment suggested that § 1.78(f)(2) would not reduce examiner workloads because examiners would still be required to make their own separate determinations regarding whether claims are patentably distinct in order to evaluate and address arguments made by applicants pursuant to § 1.78(f)(2).

Response: Multiple applications with patentably indistinct claims divert patent examining resources from the examination of new applications. This final rule encourages applicants to submit all of the claims that are patentably indistinct in one single application. *See* §§ 1.78(f) and 1.75(b)(4). By presenting all of the patentably indistinct claims in one application, applicants can alleviate the Office's burden of searching for multiple applications containing patentably indistinct claims, analyzing the applications for double patenting issues, and requiring cancellation of the claims or a terminal disclaimer. This will also ensure that one single examiner will examine the same invention to provide consistent and focused examination. Furthermore, it will preclude applicant from submitting multiple applications to the same subject matter (with claims that are patentably indistinct), each with five or fewer independent claims or twenty-five or fewer total claims, for the purpose of avoiding the requirement to submit an examination support document.

It is envisioned that many applicants will be proactive by filing fewer applications containing patentably indistinct claims, unless there is a good and sufficient reason to do so. By minimizing such filings, applicants will reduce the Office's burden of examining multiple applications containing patentably indistinct claims. Applicants are in a far better position than the Office to identify related applications pursuant to § 1.78(f)(1). The Office's searchable database is not a sufficient substitute for applicant's knowledge of related applications, particularly in view of the fact that ownership identification is not required when an application is filed, and the fact that applications are often filed without executed declarations that correctly name all of the inventors.

The terminal disclaimer statistic cited in the comment covers all granted patents. It does not specifically relate to the limited situation covered by § 1.78(f)(2). Furthermore, double patenting issues must be considered in every application where the applicant filed another related application, not only those applications in which applicant filed a terminal disclaimer. For example, the statistic cited in the comment does not include applications in which the applicants canceled the patentably indistinct claims.

The burden on the examiner to evaluate arguments presented by applicant is less compared to the burden of independently identifying and reviewing each application that meets the criteria set forth in § 1.78(f)(2). Furthermore, the issues would be resolved earlier in the prosecution. Without the presumption of at least one patentably indistinct claim and applicant's assistance under § 1.78(f)(2), it is more difficult to resolve potential double patenting situations.

Comment 117: Several comments suggested that the two-month window between filing dates set forth in § 1.78(f)(1) is overly burdensome on both the Office and the applicant.

Response: The identification requirement under § 1.78(f)(1) is consistent with the duty to disclose information that is material to patentability under § 1.56. The two-month window set forth in § 1.78(f)(1) merely provides guidance to applicants for at least those applications that must be identified to the Office. Often, related applications filed outside the two-month window should also be identified to the Office under § 1.56.

Comment 118: One comment stated that compliance with § 1.78(f)(1) would be difficult for corporations that employ multiple law firms to handle their patent prosecution portfolios.

Response: Each corporation typically has a person or a group of people who oversees its outside counsel and manages its patent portfolio. It is not unreasonable for the Office to assume that the person(s) managing the patent portfolio is aware of the contents of the corporation's applications being prosecuted by different law firms. In any event, it is appropriate for the corporation to bear the burden of tracking applications for compliance with § 1.78(f)(1).

Comment 119: One comment suggested that some docketing systems currently used by practitioners do not permit searching by inventor names in a manner that would enable practitioners to identify applications with common inventors that were filed within two months of each other.

Response: The fact that some practitioners do not have a docketing system to identify applications with common inventors that were filed within two months of each other is not a sufficient reason for the Office to not require the information under § 1.78(f)(1) that would assist the Office in identifying applications that potentially have double patenting issues. Practitioners should have the required information even though their docketing system may not keep track of applications with common inventors. Practitioners should have more reliable information regarding applications with common inventors than the Office's database because many applications are filed without an executed oath or declaration and the actual inventors are not often identified to the Office for a number of months after the filing date. Furthermore, ownership is not required to be identified when an application is filed.

Comment 120: One comment questioned whether extensions of time would be available for applicants attempting to comply with the requirements of § 1.78(f)(1).

Response: Section 1.78(i) as adopted in this final rule provides that ''[t]he time periods set forth in [§ 1.78] are not extendable.''

Comment 121: A number of comments questioned why applicants would need to identify to the Office applications with a common inventor under § 1.78(f)(1) that contain patentably distinct claims because those applications are not candidates for an obviousness-type double patenting rejection.

Response: Applicant is in the best position to identify to the Office applications with potentially conflicting claims. By taking responsibility for identifying such applications, applicant will be reducing the burden on the Office so that the Office can focus its limited examining resources on examining new applications. The ultimate determination of obviousness-type double patenting remains with the Office, which is why it is critical that applications that meet the criteria of § 1.78(f)(1) be identified to the Office.

Comment 122: A number of comments suggested that while an applicant is in a better position to know of related applications that have been filed, they are not in the position to determine whether the claims of these applications are patentably distinct. This is a function of the Office. One comment argued that the Office is making an unsupported assumption that the applicant is in a far better position than the Office to determine whether there are one or more other applications or patents containing patentably indistinct claims.

Response: The applications whose specifications possibly contain patentably indistinct claims were made by or on behalf of the inventor or applicant, and not the Office or the examiner. *See* 35 U.S.C. 111(a). Thus, the applicant is in a better position than the Office or examiner to know when such related applications have been filed. While the ultimate determinations of double patenting and patentability remain with the Office, the Office rejects the position that the applicant has no responsibility to facilitate those decisions. The information provided by applicant in compliance with § 1.78(f)(1) is reasonably necessary for the Office to determine double patenting issues. With the information provided before the first Office action on the merits, the Office could make the patentability determination more efficiently and thereby reduce pendency. For example, the examiner could identify and resolve any double patenting issues earlier in the prosecution.

Comment 123: One comment suggested that the requirements of § 1.78(f)(1) would raise inventorship and ownership issues when entities have entered into a confidential research agreement.

Response: The identification of such applications is reasonably necessary for an efficient and effective examination. This requirement is similar to that imposed upon applicants having knowledge of material prior art that became known to them via information covered by a confidentiality agreement. In such an instance, the existence of a confidentiality agreement does not relieve applicants from their duty to disclose this prior art information to the Office. In any event, § 1.78(f)(1) requires identification of only the commonly owned applications (if certain conditions are met), but not identification of the owner. 35 U.S.C. 115 requires that the inventors identify themselves.

Comment 124: One comment suggested that § 1.78(f) will have the greatest adverse impact on small entities.

Response: The rules apply equally to both non-small entities and small entities. The comment did not provide persuasive data or other evidence supporting the conclusion. The Office's experience is that small entities do not file a larger percentage of multiple applications than non-small entities. Thus, it is doubtful that any impact, if adverse, will affect small entities the most.

Comment 125: Several comments questioned whether the Office should even concern itself with obviousness-type double patenting rejections. They suggested that essentially no harm at all to the public exists through the grant of plural applications having the same, or roughly the same, filing dates, while the technical traps for the unwary and the undue examination burdens established by double patenting rejections unduly complicate procurement and burden the Office.

Response: There are two reasons why the Office still needs to make obviousness-type double patenting rejections in applications filed on or after June 8, 1995, and that are subject to a twenty-year term under 35 U.S.C. 154(a)(2). First, 35 U.S.C. 154 does not ensure that any patent issuing on a utility or plant application will necessarily expire twenty years from the earliest filing date for which a benefit is claimed under 35 U.S.C. 120, 121, or 365(c) because 35 U.S.C. 154(b) includes provisions for patent term extension based upon prosecution delays during the application process. Second, § 1.321(c)(3) requires that a terminal disclaimer filed to obviate an obviousness-type double patenting rejection based on commonly owned patentably indistinct claims include a provision that any patent granted on that application be enforceable only for and during the period that the patent is commonly owned with the application or patent which formed the bases for the rejection. This requirement prevents the potential for harassment of an accused infringer by multiple parties with patents covering the same patentable invention. *See* MPEP § 804.02. If applicant files all of the patentably indistinct claims in one application, applicant could alleviate the Office's burden of searching for multiple applications containing patentably indistinct claims, analyzing the applications for double patenting issues, and requiring cancellation of the claims or a terminal disclaimer.

Comment 126: One comment suggested that § 1.78(f)(2) prevents an applicant from claiming different embodiments unless the embodiments are patentably distinct.

Response: Under this final rule, applicant may present claims during the prosecution of an initial application and two continuation or continuation-in-part applications plus one request for continued examination in the application family, without any justification. Applicant therefore should have sufficient opportunity to present claims to different embodiments of an invention in these filings. Furthermore, applicant is not required to provide an explanation under § 1.78(f)(2)(ii)(B) for a continuation application or continuation-in-part application of a prior-filed application that has been allowed.

Comment 127: One comment suggested that examiners would not have any incentive to find claims patentably distinct.

Response: Examiners are professionals who perform their duties within the framework of the current patent laws, rules and examination practices. No persuasive explanation was given in support of the suggestion that examiners would be less likely to find claims patentably distinct.

Comment 128: One comment suggested that the rebuttable presumption set forth in § 1.78(f)(2) was inconsistent with the Office's restriction practice. The comment suggested that it was inconsistent to presume that claims are patentably indistinct when, if the claims were filed in one application, they would be found to be patentably distinct, and subject to a restriction requirement.

Response: The changes to § 1.78(f)(2) and restriction practice encourage applicant to file a single application for each patentably distinct invention. For example, if two or more independent and distinct inventions are claimed in a single application, the examiner may make a restriction requirement. *See* § 1.142. The filing of multiple applications that together claim only one patentable invention (*i.e.*, the applications contain patentably indistinct claims), however, is diverting the Office's limited examining resources from examining new applications. Applicant should file a single application claiming one patentable invention rather than multiple applications claiming the same patentable invention. Applicant may rebut the presumption that claims in multiple applications are not patentably distinct by explaining how the application contains only claims that are patentably distinct from the claims in each of the other applications. Similar to the restriction practice, applicant may maintain multiple applications if the applications contain patentably distinct claims (*i.e.*, each application is claiming one patentably distinct invention).

Comment 129: One comment objected that remarks by applicants under § 1.78(f)(2) to rebut the double patenting presumption would create prosecution history estoppel before the Office issued a rejection that could impact on the certainty and quality of the patent.

Response: First, applicant remarks under § 1.78(f)(2) would be akin to remarks set forth in response to a double

patenting rejection. The Office does not consider the possibility of prosecution history estoppel to be a sufficient reason to forego the presumption built into § 1.78(f)(2). Second, such remarks would not be required if all patentably indistinct claims are included in one application.

Comment 130: One comment suggested that the rebuttable presumption in § 1.78(f)(2) would require applicants who normally file multiple utility applications within two months of each other, each with more than the threshold number of claims and each claiming benefit of the same provisional application, to now file an examination support document for their applications. The comment suggested that this would be especially true for those applications forming a portfolio being developed for a new technology.

Response: The rebuttable presumption provision of § 1.78(f)(2) would apply only if the nonprovisional applications have the same filing date, taking into account any filing date for which a benefit is sought, name at least one inventor in common, are owned by the same person or are subject to an obligation of assignment to the same person, and contain substantial overlapping disclosure. The rebuttable presumption provision of § 1.78(f)(2) does not apply simply because commonly owned applications are filed within two months of each other. In addition, § 1.78(f)(2) provides for a rebuttable presumption that applications contain patentably indistinct claims. The applications thus will be treated as containing patentably indistinct claims for claim counting purposes under § 1.75(b)(4) if the applicant does not explain how the applications do not contain patentably indistinct claims or if the examiner does not agree with the explanation. If an applicant files multiple applications that contain patentably indistinct claims, there is no reason why the Office should treat an applicant who spreads patentably indistinct claims among multiple applications differently than an applicant who presents all of the patentably indistinct claims in a single application.

Comment 131: Several comments suggested that the filing of multiple applications having at least one common inventor and specifications with overlapping disclosures cannot be presumed to be bad faith prosecution because these applications typically claim distinct inventions that relate to the same product or service and such applications are not used to delay prosecution. One such comment stated that the rebuttable presumption under § 1.78(f)(2) represents an overreaction to tactics engaged in by a small minority of applicants. Another such comment took offense to § 1.78(f)(2) as appearing to be based on underlying presumptions that applicants are gaming the system and their representatives are acting in bad faith whenever applications are filed meeting the criteria of the rule.

Response: There is no presumption of bad faith on the part of applicant. The rebuttable presumption is simply a procedural tool requiring the applicant to help focus and consolidate the examination process. This will help examiners to resolve double patenting issues early in the examination process and contribute to examination efficiency by eliminating the need to search for related applications.

Comment 132: A number of comments stated that the § 1.78(f)(2) criteria do not automatically lead to the conclusion the claims are patentably indistinct and that applicants may easily maintain multiple applications by preparing claims that are uniquely supported only in the application in which they appear. One comment objected that the mere presence of specifications with overlapping disclosures does not create a *prima facie* case of patentably indistinct claims as evidenced by the fact that an obviousness-type double patenting rejection requires a comparison between the claims of the application being examined and those of the co-owned application or patent, not a comparison of their disclosures.

Response: The § 1.78(f)(2) criteria lead to a rebuttable presumption, which is rebuttable that patentably indistinct claims exist. The rebuttable presumption is not a merits determination of patentability, but is simply a procedural tool requiring the applicant to help focus and consolidate the examination process. Further, an overlapping disclosure is not the only condition for the presumption under § 1.78(f)(2). Section 1.78(f)(2) also specifies that the applications must have the same claimed filing or priority date, name at least one inventor in common, and have common ownership. Accordingly, the presumption is limited so that it only applies to applications that most likely contain patentably indistinct claims. The rebuttable presumption does not equate to a *prima facie* case of patentably indistinct claims. An applicant may rebut the presumption by explaining how the application contains claims that are patentably distinct from the claims in each of the other applications or patents. If the applicant cannot rebut the presumption, applicant must submit a terminal disclaimer in accordance with § 1.321(c) and explain why there are two or more pending nonprovisional applications which contain patentably indistinct claims.

Comment 133: One comment suggested that the rebuttable presumption should be provisional as the scope of the claims in question may change during the course of prosecution.

Response: Section 1.78(f)(2) as adopted in this final rule requires the appropriate action within the later of: (1) Four months from the actual filing date of an application filed under 35 U.S.C. 111(a) or four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f); or (2) the date on which a claim that is not patentably distinct from at least one of the claims in the other applications is presented. For example, if the presumption under § 1.78(f)(2) applies, applicant must rebut this presumption within four months from the actual filing date of an application filed under 35 U.S.C. 111(a) for the original claims presented on the filing date of the application. If applicant subsequently files an amendment that adds a new claim after four months from the filing date of the application, applicant must rebut this presumption for such a claim when applicant files the amendment.

Comment 134: One comment suggested that since the Office has stated in MPEP § 804.02 that patent applications which give rise to obviousness-type double patenting rejections are in the public interest, it stands to reason that the rules that seek to preclude such applications are against public interest.

Response: The Office stated that the use of a terminal disclaimer in overcoming an obviousness-type double patenting rejection is in the public interest because it encourages the disclosure of additional developments, the earlier filing of applications, and the earlier expiration of patents whereby the inventions covered become freely available to the public. *See* MPEP § 804.02. The Office did not state that the public interest was served by all applications that contain patentably indistinct claims.

Comment 135: One comment questioned whether applications subject to the requirements of § 1.78(f)(2) would increase examination pendency or add to the Office's backlog since the rejections set forth in applications with patentably indistinct claims are typically overcome by a properly drafted terminal disclaimer.

Response: The changes to § 1.78(f)(2) in this final rule are aimed at reducing pendency and the Office's backlog. Specifically, § 1.78(f)(2) requires applicant to resolve the double patenting issues early in the prosecution (*e.g.*, four months from the actual filing date of the application) by either: (1) Filing a terminal disclaimer and an explanation as to why the multiple applications containing patentably indistinct claims are necessary; or (2) explaining how the application contains only claims that are patentably distinct from the claims of other related applications. Therefore, double patenting issues could be resolved before the first Office action on the merits, thus saving the examiner time by eliminating the need to search for related applications, analyze the potentially conflicting claims, and make the rejection. As a result, examination can be more focused on prior art and other patentability issues.

Without the rebuttable presumption of § 1.78(f)(2), it would be harder for the examiner to identify and resolve the potential double patenting situation. In addition, if an Office action in an application to which the rebuttable presumption applies must include a double patenting rejection, it is because the applicant has not helped to resolve the double patenting situation pursuant to § 1.78(f)(2). Accordingly, a double patenting rejection made for the first time in a second or subsequent Office action will not preclude the Office action from being made final (assuming that the conditions for making a second or subsequent action final are otherwise met). Thus, applicants' responsibility to take the initiative under § 1.78(f)(2) to resolve double patenting situations will expedite examination, even if this responsibility does not result in the prompt resolution of the double patenting situation. Further, the Office envisions that many applicants will file fewer applications containing patentably indistinct claims in light of § 1.78(f)(2) unless there is a good and sufficient reason to do so. Therefore, the Office expects that the requirements of § 1.78(f)(2) will not increase examination pendency or add to the Office backlog.

Comment 136: One comment suggested that the strategy for circumventing the claim requirement set forth in § 1.75 by filing multiple applications in order to receive substantive examination on more than the threshold number of claims conflicts with § 1.78(f)(2).

Response: As suggested by the comment, some applicants might attempt to circumvent the requirements in § 1.75(b)(1) by filing multiple applications. Such a strategy would be ineffective as a result of the provisions of § 1.75(b)(4) and § 1.78(f). For the purpose of determining whether each of the multiple applications exceeds the five independent claim and twenty-five total claim threshold, the Office will treat each application as having the total number of all of the claims (whether in independent or dependent form) from all of the multiple applications. *See* § 1.75(b)(4).

Comment 137: Several comments objected that applicants are being required to explain or justify why they are filing patent applications. Some of the comments stated that such a requirement is unnecessarily burdensome and forces applicants to make statements that could lead to prosecution history estoppel issues. One of the comments questioned why § 1.78(f)(2)(ii) requires applicants to explain why the filing of two applications is necessary if a terminal disclaimer has been filed.

Response: The filing of multiple applications containing patentably indistinct claims is impairing the Office's ability to examine new applications. Applicant has the opportunity to avoid drafting and filing applications that satisfy the criteria of § 1.78(f)(2) by filing a single application containing all of the patentably indistinct claims. Furthermore, § 1.78(f)(2)(i) gives applicant the option to rebut the presumption of patentably indistinct claims rather than filing a terminal disclaimer and an explanation. Also note that the § 1.78(f)(3) provision was similarly set forth in former § 1.78(b).

Comment 138: Several comments were critical of § 1.78(f)(2) and stated that the rule would merely result in applicants filing jumbo patent applications with multiple claim sets drawn to patentably distinct inventions in order to force the Office to issue restrictions instead of filing multiple applications on the same day that meet the criteria of § 1.78(f)(2).

Response: Section 1.78(f)(2) permits applicant to file multiple applications claiming patentably distinct inventions. Applicant may rebut the presumption by arguing that the applications claim patentably distinct inventions. Applicant also has the option of filing a single application to claim patentably distinct inventions or when applicant is unsure whether the inventions are patentably distinct. As noted in *Berg*, 140 F.3d at 1434, 46 U.S.P.Q.2d at 1231, applicants achieve no advantage by choosing to file patentably indistinct claims in separate applications because the claims would be subject to a rejection under the one-way double patenting analysis. The *Berg* court stated that ''[i]f a potential applicant is unsure whether it has more than one patentably distinct set of claims, the PTO advises that it file all of the claims as one application.'' *See id.* at 1435, 46 U.S.P.Q.2d at 1232. The option presented by the Office was considered by the court to be reasonable, notwithstanding the possibility that the examiner might not make a restriction requirement.

Comment 139: One comment suggested that applicants will be unfairly disadvantaged if they fail to convince the examiner that the claims are patentably distinct, as they will likely be simultaneously subject to a final rejection with the probability of just a single continuation application to gain allowance of the claims.

Response: This final rule permits applicant to file two continuation or continuation-in-part applications and one request for continued examination in an application family, without any justification. If a timely rebuttal under § 1.78(f)(2) is filed before the application is taken up for initial examination, the applicant will not be subject to a final rejection in the first Office action on the merits. Only if the rebuttal is not timely filed would the applicant be subject to a final rejection in the succeeding Office action in the event the examiner makes a determination of patentably indistinct claims.

Comment 140: One comment stated that the § 1.78(f)(2) rebuttable presumption of patentably indistinct claims is overreaching and its burden on the applicant cannot be justified since it is very common for an applicant to file multiple applications having a single specification and patentably distinct claims drawn to different inventions.

Response: The rebuttable presumption of § 1.78(f)(2) is not overreaching as it applies only to applications that have the same filing date, taking into account any filing date for which a benefit is sought, name at least one inventor in common, are owned by the same person or are subject to an obligation of assignment to the same person, and contain substantial overlapping disclosure. Thus, it applies only to applications that most likely contain patentably indistinct claims. Applicant who files multiple applications claiming patentably distinct inventions may simply rebut the presumption. Applicant also has the option of filing a single application to claim patentably distinct inventions or when applicant is unsure whether the inventions are patentably distinct. If an

application claims two or more independent and distinct inventions, the examiner may make a restriction requirement. *See* § 1.142.

Comment 141: Several comments requested clarification as to the standard for ''patentably indistinct'' as the term appears in § 1.78 and whether this applies to ''same invention'' double patenting under 35 U.S.C. 101, or ''obviousness-type'' double patenting, or something different. Several comments requested clarification concerning what would be an adequate explanation under § 1.78(f)(2)(i) to rebut the presumption of patentably indistinct claims.

Response: The standard for ''patentably indistinct'' as the term appears in § 1.78 is one-way distinctness in an obviousness-type double patenting analysis. *See* MPEP § 804(II)(B)(1)(a). The presumption under § 1.78(f)(2) may be rebutted by showing that the application claims are directed to a separate invention, or by pointing to a unique claim element(s) in the independent claim(s) that patentably distinguishes them from the claims in the application(s) that gave rise to the § 1.78(f)(2) presumption.

Comment 142: A number of comments questioned whether all patentably indistinct claims in multiple applications meeting the conditions of § 1.78(f)(2) are required to be submitted in a single application absent good and sufficient reason.

Response: If all patentably indistinct claims can be filed in a single application and there is no good and sufficient reason for the patentably indistinct claims to be filed in multiple applications, then applicant should file the patentably indistinct claims in a single application. Section 1.78(f)(3) provides that the Office may require elimination of the patentably indistinct claims meeting the conditions of § 1.78(f)(3) in all but one of the applications in the absence of a good and sufficient reason for there being two or more applications containing patentably indistinct claims.

Comment 143: Several comments suggested that § 1.78(f)(2) be changed to provide that the presumption of patentably indistinct claims be applied to all related applications only when a double patenting rejection is made in one of the related applications.

Response: The suggested change would delay triggering the presumption of patentably indistinct claims and not help reduce the burden on examiners with respect to reviewing and analyzing related applications with potentially conflicting claims.

Comment 144: One comment stated that by requiring more than a terminal disclaimer to overcome an obviousness-type double patenting rejection, the Office is outside its authority.

Response: No more than a terminal disclaimer is required to overcome obviousness-type double patenting if the reference is a patent. However, if the obviousness-type double patenting reference is a pending application, consideration of patentably indistinct claims can be expedited in a single application. Such a requirement is consistent with the Office's statutory authority under 35 U.S.C. 2(b)(2). Nothing in the patent statutes requires the Office to accept patentably indistinct claims in multiple applications absent a good and sufficient reason.

Comment 145: Several comments suggested eliminating the presumption of double patenting in § 1.78(f)(2) and identification of similar applications in § 1.78(f)(1) as such requirements are already in the rules.

Response: The former rules of practice did not expressly require the identification of applications based on filing dates, inventorship and ownership conditions. Some of the applications identified pursuant to § 1.78(f)(1) may be applications with the potential to be material to patentability as prosecution progresses. Section 1.78(f)(2) as adopted in this final rule explicitly sets forth for the first time a presumption of patentably indistinct claims among related applications meeting certain conditions.

Comment 146: Several comments suggested permitting ''voluntary'' divisional applications instead of requiring an explanation adequate to rebut the § 1.78(f)(2) presumption of patentably indistinct claims.

Response: It is unclear how such a strategy would reduce pendency and promote quality. Anytime a terminal disclaimer is filed under the conditions of § 1.78(f)(2), the applicant would also have to file a satisfactory explanation of why there are two or more commonly owned pending nonprovisional applications naming at least one inventor in common which contain patentably indistinct claims. The alternative to filing a terminal disclaimer with the explanation is to rebut the § 1.78(f)(2) presumption with a showing that the application contains only patentably distinct claims.

Comment 147: Several comments requested clarification as to what constitutes ''substantial overlapping disclosure'' and whether it encompasses, for example, a single common sentence or disclosed element, or an incorporation by reference to another application.

Response: As discussed previously, § 1.78(f)(2)(i) provides that substantial overlapping disclosure exists if the other pending or patented nonprovisional application has written description support under 35 U.S.C. 112, ¶ 1, for at least one claim in the nonprovisional application. This written description support may be either by express disclosure or by an incorporation by reference to another application. A single common sentence or disclosed element most likely would not, by itself, constitute ''substantial overlapping disclosure.''

Comment 148: One comment was critical that § 1.78(f)(2)(i) will force applicants to prove a negative in order to show that there are no patentably indistinct claims among the pending nonprovisional applications.

Response: To rebut the presumption under 1.78(f)(2)(i), applicant could identify claim elements that patentably distinguish the applications from one another. It is not required that the applicant prove a negative.

Comment 149: Several comments objected that § 1.78(f)(3) could effectively promote a ban on continuation applications with patentably indistinct claims, and may unnecessarily limit claim broadening in continuation applications.

Response: Section 1.78(f)(3) is a restatement of former § 1.78(b), which previously gave the Office the same discretion to require elimination of patentably indistinct claims in all but one of the pending nonprovisional applications. The only difference is that the Office will now have the benefit of § 1.78(f)(2)(i) to evaluate when to properly exercise that discretion.

Comment 150: A number of comments noted that § 1.78(f)(3) essentially restates former § 1.78(b) and questioned whether § 1.78(f)(3) would achieve anything beyond what former § 1.78(b) achieved during its existence for over thirty-five years.

Response: This provision will be more effectively utilized with the other changes to § 1.78(f).

Comment 151: A number of comments requested clarification of the procedure for reviewing a determination of multiple applications with patentably indistinct claims. One comment requested clarification as to whether an adverse determination is redressed by way of appeal to the BPAI or to a district court.

Response: Applicants may petition the Director for review of administrative requirements by an examiner or other Office official, such as a requirement for

an examination support document under § 1.265 when claims in multiple applications are determined to be patentably indistinct thus causing the involved applications to exceed the five independent claim and twenty-five total claim threshold set forth in §§ 1.75(b)(1), (b)(3), and (b)(4), as well as a requirement that claims in multiple applications that are determined to be patentably indistinct be canceled from all but one application.

The BPAI's jurisdiction and appeal procedure in general has not been changed as a result of this final rule. As before, applicant may appeal the decision of the examiner to the BPAI under 35 U.S.C. 134 and § 41.31 if at least one claim has been twice rejected (*see* § 41.31(a)), including an obviousness-type double patenting rejection.

Comment 152: A number of comments were critical of the ''may require elimination'' in § 1.78(f)(3), suggesting that the discretion would be arbitrarily applied by individual examiners and inconsistently applied by the Patent Examining Corps. Some comments requested clarification of the procedure and questioned whether the Office will make a double patenting rejection and/or require elimination of patentably indistinct claims. Some comments questioned whether a requirement to eliminate patentably indistinct claims would apply to all but a single application.

Response: Section 1.78(f)(3) provides that, in the absence of good and sufficient reason for there being multiple commonly owned applications that contain patentably indistinct claims, the Office may require elimination of the patentably indistinct claims from all but one of the applications. The term ''may'' provides both the Office and applicants with the necessary discretion and flexibility either to eliminate the identified claims found to be patentably indistinct, or to merge multiple applications into one. Substantively, § 1.78(f)(3) is a restatement of former § 1.78(b).

Comment 153: A number of comments stated that requirements to eliminate patentably indistinct claims from all but one of the applications will lead to applicant appeals or petitions before examination resulting in a substantial increase in pendency while consuming Office and applicant resources. Some comments stated that § 1.78(f)(3) requirements will discourage applicants from acknowledging claims that are patentably indistinct and result in increased challenges to double patenting rejections.

Response: As discussed previously, it is envisioned that many applicants will file fewer applications containing patentably indistinct claims unless there is a good and sufficient reason to do so. Because any requirement under § 1.78(f)(3) would be made during examination, there can be no petitions to the Director, or appeals, filed before examination as suggested by the comment. The comment provided no reasoning as to why § 1.78(f)(3) would have the negative impact anticipated by the comment when § 1.78(f)(3) is a restatement of former § 1.78(b).

Comment 154: One comment suggested allowing multiple related applications, keeping the requirement to identify related applications, and adding a requirement for applicant to briefly explain the subject matter claimed in each related application.

Response: The proposed solution would not meet the objectives of these rules and would not prevent the Office from unnecessarily expending the Office's resources in the examination of multiple applications with patentably indistinct claims.

Comment 155: Several comments questioned whether excess claim fees would be refunded upon elimination of patentably indistinct claims pursuant to § 1.78(f)(3).

Response: Applicant may request a refund of any excess claims fees paid on or after December 8, 2004, if applicant cancels the claim before an examination on the merits has been made of the application. *See* § 1.117.

Comment 156: Several comments questioned why there is different language in §§ 1.78(f)(3) and 1.75(b)(4), and questioned whether the language should be the same.

Response: As the comment noted, the proposed provisions that the Office may require elimination of the patentably indistinct claims from all but one of the applications in §§ 1.78(f)(3) and 1.75(b)(4) were duplicative and might have appeared different. In view of the comment, the Office did not adopt the proposed provision that the Office may require elimination of the patentably indistinct claims from all but one of the applications in § 1.75(b)(4). The Office adopted this provision in § 1.78(f)(3) which is substantively a restatement of former § 1.78(b). *See* the discussion of §§ 1.75(b)(4) and 1.78(f)(3).

Comment 157: Several comments requested that implementation of § 1.78(f)(3) be delayed until other rule changes can be evaluated.

Response: Section 1.78(f)(3) is a restatement of former § 1.78(b) which has been in effect since April 30, 1971. *See Conflicting Claims,* 36 FR 7312 (April 17, 1971) (final rule).

Comment 158: One comment stated that the patentably indistinct claims in multiple applications are a necessary and desirable component of United States patent law.

Response: The comment did not provide a reason why the need for applicants to have separate applications with patentably indistinct claims outweighs the needs of the Office to reduce the resources exhausted during the examination of different applications with patentably indistinct claims.

Comment 159: One comment stated that § 1.78(f)(3) imposes an overly stringent standard that jeopardizes applicant's ability to ensure patented claims will be held valid if challenged during litigation. One comment stated that the § 1.78(f) changes are based on the presumption that all patentably indistinct claims can be supported and examined in the same application, but that is not always the case.

Response: Section 1.78(f)(3) is a restatement of former § 1.78(b), which previously gave the Office the same discretion to require elimination of patentably indistinct claims in all but one of the pending nonprovisional applications. Therefore, § 1.78(f)(3) does not introduce a new standard as suggested in the comment. Applicant may file multiple applications, but applicant must, in each application, submit a terminal disclaimer in accordance with § 1.321(c) and explain why there are two or more pending nonprovisional applications containing patentably indistinct claims.

Comment 160: One comment suggested allowing applicants to add patentably indistinct claims to an application after determination that an original set of claims is allowable.

Response: Patentably indistinct claims should not be added to an application upon allowance of the original claims, but should instead be presented earlier.

Comment 161: One comment questioned whether it is really a burden on the examiner to search two applications with patentably indistinct claims versus one application with the claims of both.

Response: It is less burdensome to the Office to have patentably indistinct claims in a single application. A related application with conflicting claims would have to be identified, reviewed and analyzed for double patenting issues.

Comment 162: One comment suggested providing for immediate and expedited review of all decisions

relating to new submissions required by § 1.78.

Response: The Office will strive to promptly act on all petitions related to the changes to § 1.78 in this final rule.

Comment 163: One comment suggested that § 1.78(g) should be amended to require that in response to a statutory or obviousness-type double patenting rejection, the Office may require the assignee to state whether the claimed inventions were commonly owned or subject to an obligation of assignment to the same person at the time the later invention was made, and if not to indicate which named inventor(s) is/are the prior inventor, unless applicant traverses the rejection.

Response: Section 1.78(g) contains the provisions of former § 1.78(c). The Office believes that these provisions, as well as the information that may be required, are currently sufficient for the Office to achieve its goals with respect to identifying commonly owned cases that come within the provisions of 35 U.S.C. 103(c) or with respect to determining the prior invention.

F. Changes to Practice for Examination of Claims

Comment 164: Several comments supported the concept of representative claims. One comment stated that the rules promote more focused examination, reduce delay and help conserve scarce Office resources, require little effort on the part of most applicants, and still make certain that no patent claims will issue without a complete examination. The comments also expressed support for limiting the number of claims that need to be examined and encouraged the Office to reduce overwhelming numbers of claims in favor of quality examinations. One comment suggested that the Office should adopt a rule that only independent claims are examined.

A number of comments, however, argued in a variety of terms that the ''representative claims'' examination approach would lead to piecemeal examination and prolonged examination, would require additional searching when features from non-designated dependent claims are added to designated dependent or independent claims, and would lead to additional filings, increased appeals, and less thorough examination. Several comments suggested that the number of claims examined should not be limited *per se* because the line of novelty in a claim family often falls between the broad independent claims and the narrowest dependent claim. One comment stated that the ''representative claims'' examination approach may adversely affect the treatment given to dependent claims in court. One comment argued that the Office's statistics on applications having more than ten independent claims ignore how many total claims had to be presented to lead to those independent claims.

Several comments argued that since excess claim fees have presumably been determined based on the resources necessary to carry out search and examination of all of the claims, it is not appropriate for the Office to neglect to fully search and examine the entire application for which all fees have been paid. One comment stated that there is no basis for limiting the consideration of a dependent claim during examination because under 35 U.S.C. 112, ¶ 4, a dependent claim is treated as a claim that incorporates all the limitations of the preceding claims.

A number of comments argued that the ''representative claims'' examination approach may be appropriate in other proceedings (such as before the BPAI) or even during examination, but not before first Office action on the merits. One comment argued that statistical data from the appeal stage is misleading because there are fewer issues during an appeal than during prosecution of an application before the examiner. Several comments stated that the BPAI would be forced to perform examination on the merits of the non-representative claims.

A number of comments suggested that the Office should address excessive claiming concerns in a simple and straightforward manner by limiting the number of claims permitted and fully examined under the basic fee structure to, for example, six independent and thirty total numbered claims, and allowing multiple dependent claims that depend on other multiple dependent claims. Several comments suggested that the Office specify that excess claims over a certain number will only be examined if accompanied by an independent search report, rather than burdening all applicants with the requirement to designate claims. Several comments suggested that instead of representative claims, applicants should be allowed to select claims that stand or fall together.

Finally, a number of comments also raised implementation issues, requested clarification concerning implementation issues, or provided suggestions concerning the implementation of the ''representative claims'' examination approach.

Response: As a result of the public comment, the Office is not adopting the ''representative claims'' examination approach under which the Office would limit the initial examination of an application to the ''representative claims'' (the independent claims and the dependent claims that are expressly designated by the applicant for initial examination). The Office is instead making the presentation of more than five independent claims or more than twenty-five total claims (rather than the presentation of more than ten representative claims) the threshold for invoking the examination support document requirement. Thus, this final rule provides that if the number of independent claims is greater than five or the number of total claims is greater than twenty-five, the applicant must provide additional information to the Office in an examination support document covering all of the claims in the application (whether in independent or dependent form).

Although, the ''representative claims'' examination approach is not being adopted, the Office disagrees that such an approach amounts to piecemeal examination or that it would be less efficient than the current examination process. Under such an approach, the Office would have examined a claim before applicant could seek review of any rejection of the claim on appeal, regardless of whether the claim was designated or non-designated under the ''representative claims'' examination approach.

Regarding escalating fees, the Office previously proposed a system of escalating fees and it was overwhelmingly opposed by user groups. The Office has also determined that charging higher fees for large numbers of claims would likely still not result in the desired increase in quality since many applicants would simply pay the higher fees. Furthermore, claim fees are set by statute, not the Office. As discussed previously, 35 U.S.C. 112, ¶ 5, prohibits multiple dependent claims depending on other multiple dependent claims.

Comment 165: One comment stated that examining many claims aids in understanding the invention.

Response: The experience of those who actually examine applications is that examining a large number of claims does not aid in understanding the invention but rather obfuscates the invention. In addition, the issuance of patents containing an excessive number of claims has also long been considered an abuse of the courts and the public, rather than an aid in understanding the invention. *See Carlton* v. *Bokee,* 84 U.S. (17 Wall) 463, 471–72 (1873) (needless multiplication of nebulous claims deemed calculated to deceive and mislead the public); *Wahpeton Canvas Co.* v. *Frontier, Inc.,* 870 F.2d 1546, 1551

n.6, 10 U.S.P.Q.2d 1201, 1206 n.6 (Fed. Cir. 1989) (presentation of the infringement issue on an overgrown claims jungle to a jury and judge at trial is an unprofessional exercise in obfuscation).

Comment 166: A number of comments argued that more claims are needed to protect an applicant's invention adequately, especially in light of restrictions on the doctrine of equivalents, decisions by the Federal Circuit on unclaimed subject matter, the proposed limitations on continuation practice, and because the complexity of some inventions requires more claims to protect the subject matter appropriately. One comment argued that the effects of prosecution history estoppel and the constraints put on reissue applicants by the recapture doctrine demand a broad range of claims. Several comments argued that the proposed changes disproportionately affect the biotechnology and pharmaceutical industries. One comment argued that in chemical or pharmaceutical applications full protection requires applicant to claim a chemical substance, a composition containing the substance, method of making the substance, the chemical substance prepared by a claimed process and at least one method of use, where there is varying scope within each category of invention. The comments argued that individuals and small businesses would be unable to afford the costs of pursuing their inventions and may be discouraged from using the patent system due to the financial and procedural burdens they must overcome to obtain adequate patent protection of their invention. Several comments argued that the proposed rules would have a disproportionate impact on small entities. One comment stated that in the post-*Festo* environment, patent-drafting techniques would suggest filing a large number of picture claims in multiple statutory classes for easy understanding of the invention by the Federal Circuit. One comment stated that the primary reason why large numbers of claims are filed is that the applicants or their representatives do not want the effort and responsibility of determining the differences between the prior art and the invention, and that another reason is that attorneys who are paid a flat fee for applications attempt to induce a restriction requirement.

Response: This final rule provides that if the number of independent claims is greater than five or the number of total claims is greater than twenty-five (a strategy based upon whether an application contains more than a given number of independent and total claims), the applicant must provide additional information to the Office in an examination support document under § 1.265. The overall goal of these changes is to promote early presentation of claimed inventions, enhance quality and improve pendency. The rules do not impose a *per se* limit on the number of claims which can be presented to protect applicant's inventions. Rather, applicant may file any desired number and scope of claims necessary to adequately protect the applicant's invention as long as an examination support document is provided before the issuance of the first Office action on the merits of an application that present more than five independent claims or twenty-five total claims.

The Office notes that, during fiscal year 2006, the percentage of small entity applications that exceeded the five independent claim and twenty-five total claim threshold appeared slightly higher than the percentage of total applications that exceeded the five independent claim and twenty-five total claim threshold (24.4 percent as opposed to 23.7 percent). The Office does not consider this slight differential as establishing that the changes in this final rule have a disproportionate economic impact on small entities. While it is possible to engage in a mathematical exercise to exaggerate the significance of any slight differential, these percentages are based upon data that is available in the Office's PALM system for applications filed during the most recent fiscal year, and this slight differential is not sufficient to establish that the changes in this final rule have a disproportionate economic impact on small entities. In addition, there is no apparent reason why small entity applicants would inherently require more claims to adequately cover their inventions. Thus, even higher differences in these percentages could easily be explained by the fact that small entity applicants pay only one-half of the fees that other applicants pay for excess claims. Moreover, the five independent claim and twenty-five total claim threshold adopted in this final rule has a smaller differential than other alternatives suggested in the comments. For example, in fiscal year 2006: (1) 17.1 percent of small entity applicants exceeded a six independent claim and thirty total claim threshold where only 15.7 percent of all applications exceeded a six independent claim and thirty total claim threshold; (2) 10.3 percent of small entity applicants exceeded a six independent claim and forty total claim threshold where only 9.2 percent of all applications exceeded a six independent claim and forty total claim threshold; and (3) 5.0 percent of small entity applicants exceeded a ten independent claim and fifty total claim threshold where only 4.1 percent of all applications exceeded a ten independent claim and fifty total claim threshold.

The remaining explanations (post-*Festo* patent-drafting techniques, not wanting the responsibility of determining the differences between the prior art and the invention, and attempts to induce a restriction requirement) may be ''reasons'' why some applicants submit a large number of claims. These reasons, however, do not justify not going forward with a change to the rule of practice to require applicants who place an extensive burden on the Office to help focus examination by providing additional information in the form of an examination support document to the Office.

Comment 167: One comment argued that choosing dependent claims to designate at the outset of prosecution forces applicant to make a threshold decision regarding claim scope without the benefit of analyzing cited prior art following an Office action. Thus, applicants either have to guess, or perform their own prior art search prior to filing, which puts a burden on applicant and results in the need to file a previously unnecessary information disclosure under § 1.56.

Response: The Office is not adopting the proposed ''representative claim'' approach. Therefore, no designation is required by this final rule. This final rule requires applicants who present more than five independent claims or more than twenty-five total claims to file an examination support document before the issuance of a first Office action on the merits of an application. Applicants are encouraged to conduct a preexamination search and review the references uncovered from the preexamination search so applicants can better understand where their invention fits in the overall patent landscape. Such action would facilitate presentation of claims more likely to be patentable over the closest prior art, thereby alleviating some of the burden on Office resources. Nevertheless, if applicant chooses not to conduct a preexamination search and does not submit an examination support document before the first Office action on the merits of the application, this does not constitute a justification for filing more than five independent claims or more than twenty-five total claims.

Comment 168: One comment stated that it is unclear as to whether all claims, or only independent (or designated) claims, are counted for the purposes of § 1.75(b)(4).

Response: Pursuant to § 1.75(b)(4) as adopted in this final rule, the Office will count all of the claims in copending applications containing patentably indistinct claims (including applications having a continuity relationship) but not in issued patents containing patentably indistinct claims, in determining whether each such application contains more than five independent claims or more than twenty-five total claims and thus whether an examination support document in compliance with § 1.265 is required. Claims withdrawn from consideration under §§ 1.141 through 1.146 or § 1.499 as drawn to a non-elected invention or inventions, however, will not, unless they are reinstated or rejoined, be taken into account in determining whether an application exceeds the five independent claim and twenty-five total claim threshold set forth in §§ 1.75(b)(1), (b)(3), and (b)(4). *See* § 1.75(b)(5). As discussed previously, this final rule does not implement a ''representative claims'' examination approach.

Comment 169: One comment stated that the rules do not provide speedy and economical administrative relief when the Office errs in determining whether claims are patentably indistinct, or whether there is adequate support in an application for a claim filed in another application.

Response: As discussed previously, the Office already has timely and efficient procedures in place that provide for an applicant to seek relief with respect to matters subject to appeal (*e.g.*, the rejection of claims) by way of an appeal to the BPAI under 35 U.S.C. 134 and § 41.31 *et seq.*, and to seek relief with respect to actions or requirements not subject to appeal by way of a petition to the Director under § 1.181. For example, if a double patenting rejection is made because the claims of two applications are patentably indistinct, applicant may seek relief by way of an appeal to the BPAI. If the Office issues a notice under § 1.75(b) requiring an examination support document in each of the multiple applications that contain patentably indistinct claims, applicant may seek relief by way of a petition to the Director under § 1.181. A grant of relief in a petition, however, does not preclude a subsequent double patenting rejection.

Comment 170: One comment argued that the rule will create more work for examiners by requiring review of all patents and applications assigned to one assignee of an application under examination, and that if certain examiners fail to do so, the rule will be unfairly applied within the Office. One comment argued that implementation of the rules will have a disproportionate effect on assignees holding small patent portfolios because due to time constraints, examiners will be able to review small patent portfolios more thoroughly than large ones.

Response: The rules do not require examiners to review all patents and applications assigned to the same assignee, but rather require applicant to identify certain commonly assigned applications having a common inventor. *See* § 1.78(f)(1). Examiners already face the situation of having to evaluate a potentially large number of commonly assigned patents and applications for the purpose of determining whether a prior art or double patenting rejection is warranted. The rules will enable the examiners to do this analysis more thoroughly and in less time, thus enhancing quality and reducing pendency.

Comment 171: One comment argued that implementation of the rules will create an additional area of contention between examiners and applicants, and an additional drain on examiners' time. The comment further argued that the drain will be greater than that associated with double patenting because double patenting rejections can be overcome by filing terminal disclaimers.

Response: No new issues between the examiner and the applicant are introduced by the changes being adopted in this final rule. Rather, the rules allow the examiner to identify and address issues more thoroughly. Furthermore, as a result of the rules, applicants will be made aware of issues earlier in the prosecution, thus giving applicants more time to formulate appropriate responses. Terminal disclaimers will continue to be available for use as appropriate to obviate non-statutory double patenting rejections.

Comment 172: One comment argued that the changes concerning claims are superfluous in view of the rule changes concerning continuation practice, and that a penalty for filing excessive continuations is already provided in the continuations rules.

Response: The changes to the practice for examination of claims will operate in concert with the changes to the practice for continuing applications and requests for continued examination. The changes for the continued examination filing practice do not by themselves act to lessen the examiner's burden when faced with a large number of claims for examination.

Comment 173: One comment questioned how the Office will implement review of two applications containing claims to the same invention.

Response: If two or more commonly assigned applications contain patentably indistinct claims, the Office will track the applications via the PALM system. The applicant may explain why the claims of one application are patentably distinct from the claims of the other(s). If at least one claim is not patentably distinct and there are a total of more than five independent claims or more than twenty-five total claims in the applications, the applicant will be required to file an examination support document before the first Office action on the merits in each application. Applicant may file a terminal disclaimer to obviate an obviousness-type double patenting rejection.

Comment 174: One comment suggested that the requirement that claims differ substantially according to § 1.75(b) should only apply to independent claims.

Response: The provision that ''[m]ore than one claim may be presented provided they differ substantially from each other and are not unduly multiplied'' has been set forth in § 1.75(b) even prior to this final rule. The comment provides no reason why the requirement that claims differ substantially from each other and not be unduly multiplied should not also apply to dependent claims.

Comment 175: One comment inquired about designation of claims during reexamination. The comment stated that the rules should not apply to reexaminations of patents granted prior to enactment of the rules.

Response: The changes to § 1.75 adopted in this final rule do not apply to reexamination proceedings. Furthermore, this final rule does not adopt the ''representative claims'' examination approach (which provided for a designation of dependent claims).

Comment 176: A number of comments argued that the changes limit the protection paid for by applicant. One comment argued that as a result of the limitation on the number of claims, companies that invest in research and development could be expected to keep more inventions as trade secrets due to the threat posed by ''free riders'' who make minor modifications in an attempt to avoid infringement.

Response: The patent statute requires that an applicant pay certain filing fees (the filing, search, examination, excess

claims, and application size fees) on filing an application for patent. *See* 35 U.S.C. 41(a). The payment of these patent filing fees does not amount to a purchase of patent protection but are simply to help cover the costs of examination and application processing.

Section 1.75 does not limit the number of claims that applicant can present in an application. Section 1.75(b)(1) permits an applicant to present five independent claims and twenty-five total claims for examination without the need for an examination support document. An applicant who considers five independent claims or twenty-five total claims to be insufficient may present more than five independent claims or twenty-five total claims by submitting an examination support document under § 1.265 before the first Office action on the merits of an application.

Comment 177: One comment suggested that if the rules are implemented, the Office should reduce the examination fee and wait to charge the excess claim fees, or refund the excess claim fees if the application goes abandoned.

Response: The basic filing, search, examination, and excess claims fees are set by statute, which the Office cannot change by rule making. The filing fees are due upon filing of the application and the excess claims fees are due when the claims are presented. *See* 35 U.S.C. 41. Applicant may request a refund of any previously paid search and excess claims fees if applicant expressly abandons an application filed under 35 U.S.C. 111(a) on or after December 8, 2004, by filing a petition under § 1.138(d) before an examination has been made of the application. An ''examination has been made of the application'' for purposes of § 1.138(d) once there has been a requirement for restriction including an election of species, requirement for information under § 1.105, first Office action on the merits, notice of allowability or allowance, or action under *Ex parte Quayle*. Applicant may also request a refund of any excess claims fees paid on or after December 8, 2004, if an amendment canceling the excess claims is filed before an examination on the merits has been made of the application. *See* § 1.117. An ''examination on the merits has been made of the application'' for purposes of § 1.117(a) once there has been a first Office action on the merits, notice of allowability or allowance, or action under *Ex parte Quayle*.

Comment 178: One comment argued that the small number of problematic cases with excessive claims that confuse or obscure the invention can be adequately handled through the use of undue multiplicity rejections.

Response: Undue multiplicity rejections based on 35 U.S.C. 112, ¶ 2, are rare. *See* MPEP § 2173.05(n). The rule changes are designed to provide a more focused quality examination of all applications. The Office would not be able to obtain the desired gains in efficiency and quality by merely relying on the use of undue multiplicity rejections.

Comment 179: One comment argued that the impact of the rules on the backlog will be minimal and referred to the Inspector General Report of 2004 which identified suboptimal incentives for examiners as the cause of the backlogs, not the excess number of claims.

Response: The September 2004 Inspector General Report (Final Inspection Report No. IPE–15722), available at *http://www.oig.doc.gov/oig/reports/2004/USPTO–IPE–15722–09–04.pdf*, concluded that the Office should reevaluate patent examiner production goals, appraisal plans, and award systems. The September 2004 Inspector General Report was not the result of a general study of the causes of the growing backlog of unexamined patent applications, but was the result of a review of only patent examiner production goals, appraisal plans, and award systems. Thus, the September 2004 Inspector General Report does not discuss other causes of the growing backlog of unexamined patent applications (*e.g.*, changes in applicant filing tendencies) and does not warrant the conclusion that the September 2004 Inspector General Report identifies suboptimal incentives for examiners as the sole cause of the growing backlog of unexamined patent applications. In any event, the Office is in the process of reassessing patent examiner production goals, appraisal plans, and award systems as recommended in the September 2004 Inspector General Report. Absent significant changes to the patent examination process, the Office does not consider it reasonable to expect that changes to patent examiner production goals, appraisal plans, and award systems alone will be sufficient to address the growing backlog of unexamined patent applications while maintaining a sufficient level of quality.

Comment 180: One comment argued that the Office admitted to previously abandoning a proposal to limit the number of total and independent claims. The comment argued that if such a proposal was deemed inappropriate, it is difficult to see how limiting claims before initial examination is also not inappropriate.

Response: The previous proposal was not abandoned because it was deemed inappropriate; rather, it was abandoned because it was unpopular. The Office subsequently sought increases in excess claims fees via legislative change. There was insufficient public support for all the fee increases that the Office considered necessary and the current fees are not adequately addressing the problem of large numbers of claims. The comments submitted in response to the Claims Proposed Rule indicate that many view an approach similar to that proposed in 1998 to be preferable. The changes being adopted in this final rule (in contrast to the changes proposed in 1998) do not place a limit on the number of claims (independent or dependent) that may be presented in an application. These changes adopted in this final rule simply require the submission of an examination support document if an applicant chooses to present more than five independent claims or more than twenty-five total claims in an application. Furthermore, the backlog of unexamined applications has increased from 224,446 at the end of fiscal year 1998 to 701,147 at the end of fiscal year 2006. The Office expects the backlog of unexamined applications to continue to increase without significant changes to the patent examination process. In addition, the average number of claims per application has not decreased since 1998. Thus, the Office does not consider the fact that the changes being adopted in this final rule may not be popular to be an adequate reason for not going forward at this time.

Comment 181: One comment pointed out inconsistencies between proposed § 1.75(b)(3)(iii), which requires a suggested restriction to be drawn to ''no more than ten'' claims, and the preamble to the proposed rule, which requires the restriction to be drawn to ''fewer than ten'' claims.

Response: Proposed § 1.75(b)(3)(iii) provided that an applicant may file a suggested requirement for restriction accompanied by an election without traverse of an invention to which there are drawn no more than ten independent claims and no more than ten representative claims. This final rule did not adopt the proposed ''representative claims'' examination approach, but requires applicant to file an examination support document when the application contains more than five independent claims or more than twenty-five total claims. Under § 1.142(c) as adopted in this final rule, applicant may file a suggested

requirement for restriction accompanied by an election without traverse of an invention to which there are no more than five independent claims and no more than twenty-five total claims.

Comment 182: One comment argued that applicants would circumvent the proposed rules by designating a ''picture claim'' in all applications, thereby forcing the examiner to perform a complete search and examination, thus obviating any time or effort saved through the proposed changes.

Response: The Office has no objection to an applicant presenting a claim that recites in detail all of the features of an invention (*i.e.*, a ''picture'' claim) in an application. Nevertheless, the mere fact that a claim recites in detail all of the features of an invention is never, in itself, justification for the allowance of such a claim. *See* MPEP § 706.

Comment 183: One comment argued that according to *In re Wakefield*, 422 F.2d 897, 164 U.S.P.Q. 636 (C.C.P.A. 1970), applicant should be allowed to determine the necessary number and scope of claims.

Response: The changes adopted in this final rule do not set a *per se* limit on the number of claims that an applicant may file in an application. The applicant is free to file as many claims as necessary to adequately protect the invention. Applicant may present more than five independent claims or more than twenty-five total claims in an application if applicant files an examination support document before the first Office action on the merits of the application. The information provided by the applicant in the examination support document will assist the examiner in understanding the claimed invention, determining the effective filing date of each claim and the claim interpretation before the prior art search, understanding the state of the art and the most closely related prior art cited by the applicant, and determining the patentability of the claims. Thus, the examiner will be able to perform a better examination on the claims.

Comment 184: A number of comments argued that the rules would lessen the applicant's ability to file applications due to budget constraints and would increase costs for counseling applicants to get the best patent protection. One comment argued that the rules will increase applicant's costs to such an extent that individual inventors and small companies will not be able to afford patent protection. Furthermore, the costs to comply with the rules will cause many people with technology that can spur innovation to be frozen out of the patent process.

Response: The current rules will only impact those applications that are filed with more than five independent claims or more than twenty-five total claims. If applicant presents more than five independent claims or more than twenty-five total claims, then applicant will be required to submit an examination support document under § 1.265. If an application is so significant that the applicant must present more than five independent claims or more than twenty-five total claims, then the additional costs should not be a deterrent.

Comment 185: One comment suggested that if the Office were to follow *Muncie Gear Works* v. *Outboard Marine & Mfg Co.*, late claiming of applications would likely decrease.

Response: In *Westphal* v. *Fawzi*, 666 F.2d 575, 577 (C.C.P.A. 1981), the Court of Customs and Patent Appeals discredited the idea that *Muncie Gear Works* v. *Outboard Marine & Mfg. Co.*, 315 U.S. 759 (1942) should be read as announcing a new ''late claiming'' doctrine. Rather, the Court of Customs and Patent Appeals interpreted the *Muncie Gear Works* holding of invalidity as grounded in the statutory prohibition against new matter.

Comment 186: A number of comments suggested that claims written in alternative form should not be treated differently from other claims, and that the Office should use election of species practice to identify alternatives to be used as representative claims. Several comments stated that claims drafted using Markush or other alternative language should be treated as single claims rather than treating each alternative as a separate claim. One comment stated that if members of Markush groups are counted separately, biotechnology and chemical applicants will file more multiple parallel applications. One comment requested clarification as to whether each element of a Markush claim would be considered to be an independent claim. One comment stated that Markush claims are beneficial to both the Office and applicants, and stated that the proposed changes would unfairly disadvantage members of the pharmaceutical community. One comment suggested that encouraging applicants to adhere more closely to existing 35 U.S.C. 112, ¶ 1 and 35 U.S.C. 101 requirements is a better means of managing the breadth of Markush claims than individualized claim counting schemes and required showings. One comment suggested that the Office should treat a Markush claim as a broad or generic claim. One comment asserted that the Office has not provided any study or anecdotal evidence that identifies an abuse of Markush practice. One comment stated that the MPEP has never required that individual elements in a Markush group be treated separately, and that it is unfair to an applicant to use up claim designations on the individual elements of a Markush group because a reference teaching one element is applied to all.

Several comments argued that the proposed rule relating to determining the presence of separate claims in a Markush grouping will slow down prosecution, in part due to an increased number of petitions to review.

Response: The Office requested comments on how claims written in the alternative form, such as claims in an alternative form permitted by *Ex parte Markush*, 1925 Dec. Comm'r Pat. 126 (1924), should be counted for purposes of proposed § 1.75(b). *See Changes to Practice for the Examination of Claims in Patent Applications*, 71 FR at 64, 1302 *Off. Gaz. Pat. Office* at 1331. This final rule does not change the practice of the Office with regard to claims containing Markush or other alternative language. That is, a claim containing Markush or other alternative language would be considered as one claim for the purposes of determining whether an application exceeds the five independent claim and twenty-five total claim threshold set forth in § 1.75(b). However, the Office is evaluating changes to Markush practice, which could be implemented in a separate rule making.

The Office is also clarifying second action final practice with respect to using alternative language (*e.g.*, Markush claims). MPEP § 803.02 indicates that if an applicant amends a rejected Markush claim to exclude species anticipated or rendered obvious by the prior art, a second action on the rejected claims can be made final unless the examiner introduces a new ground of rejection that is neither necessitated by applicant's amendment of the claims nor based on information submitted in an information disclosure statement filed under § 1.97(c) with the fee set forth in § 1.17(p). MPEP § 803.02 provides this instruction in the context of the situation in which the examiner has determined that the Markush claim encompasses at least two independent or distinct inventions, has required applicant to make a provisional election of a single species, and has rejected the Markush claim on prior art grounds. This has led to some confusion as to when a second action on the rejected claims can be made final when the examiner has not found that the claim encompasses at least two independent

or distinct inventions and applicant amends a claim to exclude unpatentable alternatives. If a Markush claim or other claim that sets forth alternatives is rejected under 35 U.S.C. 102 or 103 on the basis of prior art that anticipates or renders obvious the claim with respect to any one of the alternatives or on any other basis (*e.g.*, 35 U.S.C. 101 or 112) with respect to any one of the alternatives, a second or any subsequent Office action on the merits may be made final. However, such an Office action may not be made final if it contains a new ground of rejection that is not: (1) Necessitated by applicant's amendment of the claims (including amendment of a claim to eliminate unpatentable alternatives); (2) necessitated by applicant's providing a showing that a claim element that does not use the phrase ''means for'' or ''step for'' is written as a function to be performed and does not otherwise preclude application of 35 U.S.C. 112, ¶ 6; (3) based on information submitted in an information disclosure statement filed during the period set forth in § 1.97(c) with the fee set forth in § 1.17(p); or (4) based upon double patenting (statutory or obviousness-type double patenting). The provision in MPEP § 904.02 that a search should cover the claimed subject matter and should also cover the disclosed features which might reasonably be expected to be claimed does not preclude an examiner from making the second or any subsequent Office action on the merits final if the Office action contains a new ground of rejection that was necessitated solely by applicant's amendment of the claims to eliminate the unpatentable species.

Comment 187: A number of comments supported the appropriate use of the proposed requirement in § 1.105(a)(1)(ix) where this information is needed to resolve a reasonable question which is relevant to the determination of a patentability issue before the examiner.

Response: The Office is adopting the change to § 1.105.

Comment 188: One comment argued that the provision in § 1.105(a)(1)(ix) serves no purpose and may be abused. The comment argued that examiners could simply shift the burden on applicant to prove support when there is no basis for making a rejection under 35 U.S.C. 112, ¶ 1. One comment argued that the changes to § 1.105(a)(1)(ix) are unnecessary since examiners already have the power to request such information.

Response: One purpose of the provision in § 1.105(a)(1)(ix) is to assist the examiner in properly examining the application when it is not readily apparent where the specification of the application provides support under 35 U.S.C. 112, ¶ 1, for a claim or a limitation of a claim. This is information that the applicant should be aware of and should be able to provide to the examiner. The Office considers this authority to be inherent under the patent statute and rules existing prior to this rule change, including the previous version of § 1.105, and thus there is no reason to expect such provision to be abused. The Office agrees that examiners inherently have the authority to request this information. *See Star Fruits S.N.C.* v. *United States*, 393 F.3d 1277, 73 USPQ2d 1409 (Fed. Cir. 2005). The Office is amending § 1.105 to make the authority explicit.

Comment 189: One comment suggested that the Office should encourage examiners to use § 1.105 to require a concise, plain-English explanation of the invention and claim set when the application contains large claim sets or the invention cannot be understood.

Response: The examination support document will assist the examiner when there are large numbers of claims. If the invention cannot be understood, the examiner could use § 1.105 to require an explanation.

Comment 190: Several comments suggested that language should be added to the rules to indicate that the information required by § 1.105(a)(1)(ix) is not to be used to read limitations into the claims.

Response: Such a change is not necessary. It is well established that the meaning of the terms in the claims is to be ascertained in light of the specification but that limitations from the specification are not to be read into the claims. *See Phillips* v. *AWH Corp.*, 415 F.3d 1301, 1316, 75 U.S.P.Q.2d 1321, 1329 (Fed. Cir. 2005); *In re American Academy of Science Tech Center*, 365 F.3d 1359, 1369, 70 USPQ2d 1827, 1834 (Fed. Cir. 2004); *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989).

Comment 191: A number of comments supported the extension of the Office's refund authority beyond the expiration date of the legislation and encouraged the Office to accelerate implementation of § 1.117.

Response: The Office is working to make the patent fee and fee structure provisions of the Consolidated Appropriations Act, 2005 (Pub. L. 108–447, 118 Stat. 2809 (2004)), permanent. The Revised Continuing Appropriations Resolution, 2007 (Pub. L. 110–5, 121 Stat. 8 (2007)), keeps the patent fee and fee structure provisions of the Consolidated Appropriations Act, 2005, in effect during fiscal year 2007. The Office is implementing § 1.117 in this final rule.

Comment 192: Several comments questioned whether excess claim fees would be refunded if claims are eliminated pursuant to § 1.78(f)(3).

Response: Applicant may request a refund of any excess claims fees paid on or after December 8, 2004, if an amendment canceling the excess claims is filed before an examination on the merits has been made of the application. *See* § 1.117. Applicant may also request a refund of any previously paid search and excess claims fees if applicant expressly abandons an application filed under 35 U.S.C. 111(a) on or after December 8, 2004, by filing a petition under § 1.138(d) before an examination has been made of the application.

Comment 193: One comment suggested that the Office should refund eighty percent of the fees for claims that are withdrawn because of a restriction requirement.

Response: The Office does not have the statutory authority to refund the excess claims fees for claims that are still pending in an application where the fees were properly paid. The Consolidated Appropriations Act, 2005, authorizes a refund only for a claim that has been canceled before an examination on the merits has been made of the application under 35 U.S.C. 131. *See* 35 U.S.C. 41(a)(2)(C). Claims that are withdrawn due to a restriction requirement are still pending in the application. Applicant may cancel the withdrawn claims prior to a first Office action on the merits of the application and request for a refund of any excess claims fees paid on or after December 8, 2004. *See* § 1.117.

Comment 194: A number of comments noted that since very few examination support documents are likely to be filed, there is not likely to be any opportunity to reduce a patent term adjustment.

Response: The Office is not adopting the changes in this final rule for the purpose of reducing patent term adjustment. The Office simply does not want an applicant to obtain patent term adjustment by delaying compliance with the examination support document requirements.

Comment 195: Several comments argued that it was unfair to reduce patent term adjustment for not complying with the rules for applications pending before the effective date.

Response: Section 1.704(c)(11) as adopted in this final rule is applicable only to applications under 35 U.S.C. 111(a) filed on or after November 1,

2007, or international applications that have commenced the national stage after compliance with 35 U.S.C. 371 on or after November 1, 2007. Thus, other applications for which an examination support document (or other appropriate action) is required would not encounter a patent term adjustment reduction unless the applicant failed to properly reply to an Office notice requiring an examination support document (or other appropriate action) within three months of the date the notice was mailed to the applicant.

Comment 196: One comment argued that § 1.704(c)(11) is contrary to statute because 35 U.S.C. 154(b)(2)(C)(ii) guarantees a minimum of three months to respond before patent term adjustment is lost.

Response: 35 U.S.C. 154(b)(2)(C)(ii) provides that ''[w]ith respect to adjustments to patent term made under the authority of [35 U.S.C. 154(b)(1)(B)], an applicant shall be deemed to have failed to engage in reasonable efforts to conclude processing or examination of an application for the cumulative total of any periods of time in excess of 3 months that are taken to respond to a notice from the Office making any rejection, objection, argument, or other request, measuring such 3-month period from the date the notice was given or mailed to the applicant.'' *See* 35 U.S.C. 154(b)(2)(C)(ii). The patent term adjustment reduction provision of 35 U.S.C. 154(b)(2)(C)(ii) is applicable where the applicant's failure to engage in reasonable efforts to conclude processing or examination of an application involves a failure to reply to an Office action or notice within three months of the date the Office action or notice is mailed or given to the applicant. 35 U.S.C. 154(b)(2)(C), however, contemplates other circumstances that may constitute an applicant's failure to engage in reasonable efforts to conclude processing or examination, by further providing that ''[t]he Director shall prescribe regulations establishing the circumstances that constitute a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application.'' *See* 35 U.S.C. 154(b)(2)(C)(iii). The provisions of § 1.704(c), including § 1.704(c)(11), are promulgated under the Office's authority in 35 U.S.C. 154(b)(2)(C)(iii) to prescribe regulations establishing the circumstances that constitute a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application. For example, an examination support document is required to be filed before the issuance of a first Office action on the merits when the application contains or is amended to contain more than five independent claims or more than twenty-five total claims. *See* § 1.75(b)(1). Therefore, § 1.704(c) provides for a reduction of any patent term adjustment when there is a failure to comply with § 1.75(b), *e.g.*, a failure to file an examination support document in compliance with § 1.265 when necessary under § 1.75(b). The Office does not issue a notice requiring an examination support document (or other appropriate action) until the Office has determined that an examination support document is required under § 1.75(b), but applicant failed to submit an examination support document.

Comment 197: Several comments argued that § 1.704(c)(11) would adversely affect small businesses. One comment argued that some patents owned by universities and small biotechnology companies have values of one million dollars per day, and these patents often have hundreds of days of patent term extension. The comment argued that the proposed reductions in patent term would easily cost small businesses one hundred million dollars per year.

Response: An applicant can avoid a reduction in patent term adjustment simply by providing an examination support document in compliance with § 1.265 before the first Office action on the merits or taking other appropriate action (if necessary) in a timely manner.

Comment 198: One comment questioned whether the proposed changes to § 1.75 (the ''representative claims'' examination approach) as applied to national stage applications violate the PCT. Another comment suggested that the proposed changes to § 1.75 are contrary to PCT Article 17.

Response: As discussed previously, this final rule does not implement a ''representative claims'' examination approach. Nevertheless, nothing in the PCT or the regulations under the PCT requires a designated Office to examine all claims presented (in any particular order or at a particular stage) in a national stage application. Furthermore, PCT Article 27(6) provides that the national law may require that the applicant furnish evidence in respect of any substantive condition of patentability prescribed by such law. Under this final rule, applicant is free to submit as many claims as he or she chooses, as long as applicant files an examination support document before the first Office action on the merits if there are more than five independent claims or more than twenty-five total claims. Article 17 of the PCT concerns procedures before the international searching authorities. The changes to § 1.75 do not apply to international searching authorities and, accordingly, do not conflict with Article 17.

G. Number of Independent and Total Claims Permitted Without an Examination Support Document

Comment 199: A number of comments argued that the proposed change in the definition of an independent claim for determining the number of designated claims and calculating additional claims fees would be complicated and confusing. A number of comments argued that the statutory classes of invention are not necessarily mutually exclusive. A number of comments expressed the opinion that the proposed changes to the way claims are treated for fee purposes will further burden the Office. One comment stated that it would cause disputes and slow down the examination process. One comment argued that it would likely produce inconsistent results. One comment argued that the rule change makes it very difficult to calculate claim fees for anyone other than a registered practitioner. Several comments opined that as a result of the proposed rule, the fee calculation process would no longer be merely administrative, but would involve a legal opinion. The comments questioned whether fee calculations will be handled by examiners, and what the process for dispute resolution will be. A number of the comments also argued that the change would effectively increase fees.

Response: Designation of claims for initial examination is not required because this final rule did not adopt the ''representative claims'' examination approach. This final rule, however, requires applicant to file an examination support document in compliance with § 1.265 before the issuance of a first Office action on the merits of an application that contains more than five independent claims or twenty-five total claims, counting all of the claims in any other copending application having a patentably indistinct claim. If an examination support document in compliance with § 1.265 is not filed before the issuance of a first Office action on the merits of the application, the application may not contain or be amended to contain more than five independent claims or more than twenty-five total claims.

This final rule adopts the proposed changes to § 1.75(b)(2) to provide that a claim that refers to a claim of a different statutory class of invention will also be treated as an independent claim for fee

calculation purposes and for purposes of determining whether an application exceeds the five independent claim and twenty-five total claim threshold under § 1.75(b). Section 1.75(b) (introductory text) as adopted in this final rule clarifies that a dependent claim must contain a reference to a claim previously set forth in the same application, incorporate by reference all the limitations of the previous claim to which such dependent claim refers, and specify a further limitation of the subject matter of the previous claim. *See* 35 U.S.C. 112, ¶ 4; *see also Pfizer*, 457 F.3d at 1291–1292, 79 U.S.P.Q.2d at 1589–1590. If a claim does not incorporate by reference all the limitations of the previous claim to which it refers, it is not a dependent claim under 35 U.S.C. 112, ¶ 4. It would be proper for the Office to consider such a claim as an independent claim for fee calculation purposes and for purposes of determining whether an examination support document is required. The determination of whether a claim is independent or dependent could be difficult when applicant did not clearly draft the claim as an independent claim or a dependent claim under 35 U.S.C. 112, ¶ 4. Applicant may minimize issues related to fee calculation for claims by drafting claims that are in compliance with 35 U.S.C. 112, ¶ 4, and § 1.75(b) (*e.g.*, not presenting claims that refer to another claim of a different statutory class of invention or claims that refer to another previous claim but do not incorporate by reference all of the limitations of the previous claim). Once a determination of whether a claim is independent or dependent has been made, the fee calculation is simple. If applicant disagrees with the Office's determination that a claim is an independent claim, applicant should provide a showing of how the claim is a dependent claim in compliance with 35 U.S.C. 112, ¶ 4, and § 1.75(b) either in a reply to a notice requiring a claim fee or a request for a refund.

Comment 200: One comment stated that a claim that does not make reference to another claim is an independent claim, and a claim that does make reference to another claim is a dependent claim. One comment stated that the Office cannot charge independent claim fees for dependent claims because to do so would violate statute. One comment questioned how a claim can fail to incorporate by reference all of the limitations of the claim to which it refers, and yet be statutory. The comment suggested that the proposed rule is unnecessary and not supported by the case law cited by the Office. One comment suggested that the changes to § 1.75(b)(2) (*e.g.*, treating a claim that refers to a claim of a different statutory class of invention as an independent claim for fee calculation purposes and for purposes of determining whether an examination support document is required) might be contrary to judicial precedent set forth in *In re Ochiai*, 71 F.3d 1565, 37 U.S.P.Q.2d 1127 (Fed. Cir. 1995). The comment also argued that these changes would create a ''tricky fee structure'' and a ''trap for the unwary'' and would increase the administrative/non-substantive workload on the examiner.

Response: A claim that merely refers to another claim is not a dependent claim in compliance with 35 U.S.C. 112, ¶ 4. A proper dependent claim must also incorporate by reference all the limitations of the claim to which it refers and specify a further limitation of the subject matter in the claim to which the dependent claim refers. Some applicants present claims that refer to a previous claim, but fail to comply with the requirements of 35 U.S.C. 112, ¶ 4. *See e.g., Pfizer*, 457 F.3d at 1291–1292, 79 U.S.P.Q. 2d at 1589–1590. The provisions of § 1.75(b)(2) are consistent with 35 U.S.C. 112, ¶ 4, and judicial precedent including *Ochiai* (the use of *per se* rules in determining nonobviousness under 35 U.S.C. 103). A claim that refers to a previous claim of a different statutory class of invention could require a separate search and patentability determination because the patentability of such a claim might not stand or fall together with the previous claim. For example, if claim 1 recites a specific product, a claim for method of making the product of claim 1 in a particular manner would require a separate patentability determination because in accordance with *Ochiai*, there is no *per se* rule in applying the test for obviousness under 35 U.S.C. 103. Furthermore, a claim that refers to a previous claim of a different statutory class of invention does not comply with 35 U.S.C. 112, ¶ 4, because such a claim does not further limit the subject matter of the previous claim.

Comment 201: A number of comments recommended that the Office issue guidance for use by Office employees as well as the public in distinguishing among statutory classes of invention. One comment stated that it is unclear how ''a different statutory class of invention'' will be applied. The comment questioned whether the last sentence of § 1.75(b)(2) would apply only to combination method-apparatus claims or whether it might also be applied to regular dependent claims which add additional limitations of a similar kind such as a method limitation for a method claim or an apparatus limitation for an apparatus claim. One comment stated that § 1.75(b)(2) provides clarification that claims which refer to a claim of a different statutory class would be regarded as independent. One comment stated that § 1.75(b)(2) appears to be a statement of the current state of the law.

Response: The statutory classes of invention are set forth in 35 U.S.C. 101. If a method claim depends from another method claim, incorporates by reference all of the limitations of the method claim from which it depends, and adds additional method limitations, such a claim will be considered as a dependent claim. However, if a method claim refers to a composition claim (*e.g.*, ''A method of using the composition of claim 1 comprising * * *''), it will be treated as an independent claim. The Office will issue any guidance as necessary and appropriate for the implementation of the rules.

Comment 202: Several comments argued that § 1.75(b) is a problem for software-based inventions because it is common for applications to include claims to different classes of invention. The comments argued that there is no reason to discourage a claim drawn to one class of invention which depends from a claim drawn to another class when little additional work is required of the examiner to examine both claims, citing the example of a claim drawn to a manufacture which depends from a claim drawn to a process for making a manufacture.

Response: The rule does not discourage an applicant from submitting whatever claims may be considered desirable for protection of the invention, and does not discourage submission of claims to any statutory class of invention. Rather, the rule clarifies how claims will be treated for the purposes of fee calculation and determination whether an examination support document is required under § 1.75(b)(1).

Comment 203: A number of comments argued that ten representative claims are not sufficient for adequate patent protection and suggested various numbers for the representative claim limit including at least twenty claims, twenty-five claims, or at least thirty claims. Several comments suggested twenty claims, with a maximum of three independent claims, as being more consistent with the fee schedule. Several comments suggested that the limit should be six independent and forty total claims. One comment suggested that the limit should be twelve independent claims and fifty total claims. One comment suggested

that the limit should be ten independent claims and sixty total claims. Several comments suggested that there should be no limit. One comment suggested that there should be no limit on dependent claims.

Several comments stated that the rules affect the vast majority of applications that contain an ordinary number of claims, rather than targeting the small number of problem applications with excessive claims. One comment stated that it was unclear why all applicants should be limited to representative claims when approximately ninety percent of all non-provisional applications currently filed contain six or fewer independent claims and forty or fewer total claims. The comment argued that examining forty or fewer claims does not appear to constitute an undue examination burden. One comment suggested that the rule changes should be more narrowly tailored with respect to the technology areas where the inventions are not capable of being adequately protected using only twenty claims. One comment inquired about the need for establishing a separate procedure for examination of claims if only 1.2 percent of applications fall within the category of excess claims. Several comments argued that there is a lack of statistical analysis relating to the number of applications containing more than ten total claims.

Response: The Office notes the concerns expressed in the public comments concerning the proposed ''representative claims'' examination approach. The Office did not adopt this approach in this final rule. This final rule provides that if the number of independent claims is greater than five or the number of total claims is greater than twenty-five, the applicant must provide additional information to the Office in an examination support document under § 1.265 covering all of the claims in the application (whether in independent or dependent form).

The Office received a significant number of comments suggesting a threshold of six independent claims and thirty total claims. The Office also received a number of comments suggesting independent claim thresholds ranging from three to ten and total claim thresholds ranging from twenty to sixty (or no limit). The comments, however, provided no justification for deeming any particular independent and total claim threshold to be the ideal threshold or even superior to any other possible independent and total claim threshold. The Office arrived at the five independent claim and twenty-five total claim threshold primarily for the following reasons.

First, a significant number of comments suggested a threshold of six independent claims and thirty total claims, but did not suggest such a threshold if it were not considered sufficient to provide adequate patent protection for an invention.

Second, the majority of applications contain no more than five independent claims and no more than twenty-five total claims. Specifically, over 92 percent of the applications filed in fiscal year 2006 contained no more than five independent claims, and over 78 percent of the applications filed in fiscal year 2006 contained no more than twenty-five total claims. These figures do not take into account that many applications contained claims to more than one distinct invention, and the changes in this final rule permit an applicant to suggest a restriction requirement and elect an invention to which there are drawn no more than five independent and twenty-five total claims. In addition, the majority of applications in every Technology Center contain five or fewer independent claims and twenty-five or fewer total claims. Therefore, there is no support for the position that there are technology areas that are just not capable of being adequately protected with five or fewer independent claims and twenty-five or fewer total claims. Finally, the Office notes that the most common number of independent claims presented in an application is three, and the most common number of total claims presented in an application is twenty.

Third, an applicant may present up to fifteen independent claims and seventy-five total claims via an initial application and two continuation or continuation-in-part applications that are prosecuted serially without providing either an examination support document or a justification as discussed previously. Only about five percent of the applications filed in fiscal year 2006 were in an application family that contained more than fifteen independent claims or more than seventy-five total claims.

Finally, this final rule does not preclude an applicant from presenting more than five independent claims or more than twenty-five total claims. Rather, an applicant may present more than five independent claims or more than twenty-five total claims in an application with an examination support document in compliance with § 1.265 if the applicant considers it necessary or desirable in the particular application. Specifically, this final rule requires applicant to file an examination support document in compliance with § 1.265 before the issuance of a first Office action on the merits of an application that contains more than five independent claims or twenty-five total claims, counting all of the claims in any other copending application having a patentably indistinct claim. If an examination support document in compliance with § 1.265 is not filed before the issuance of a first Office action on the merits of the application, the application may not contain or be amended to contain more than five independent claims or more than twenty-five total claims.

Comment 204: A number of comments suggested that the Office should explore the possibility of examining multiple dependent claims that are dependent on other multiple dependent claims to reduce examination burden and better focus the examination process. The comments argued that most foreign countries permit such claims and that this would significantly reduce the number of claims. One comment argued that if the Office adopts representative claims rules, it will move towards the European style of claim sets, but without the benefit of multiple dependent claims and claims stated in the alternative. Several comments expressed the opinion that multiple dependent claims should be encouraged because examining a multiple dependent claim is no more work than examining a single dependent claim.

Response: As discussed previously, the Office did not adopt the ''representative claims'' examination approach in this final rule. Further, 35 U.S.C. 112, ¶ 5, prohibits multiple dependent claims that are dependent on other multiple dependent claims. Moreover, the examination of multiple dependent claims that are dependent on other multiple dependent claims would be at least as burdensome as if these claims were presented as a plurality of single dependent claims or as permitted multiple dependent claims. The Office disagrees that permitting multiple dependent claims that depend on other multiple dependent claims would reduce the examination burden or better focus the examination process. The Office's experience is that multiple dependent claims are significantly more difficult to search and evaluate than a plurality of single dependent claims. Multiple dependent claims that depend on other multiple dependent claims would be even more burdensome. While the use of multiple dependent claims may be a convenient shorthand mechanism, a multiple dependent claim

is considered to be that number of claims to which direct reference is made therein and must be considered in the same manner as a plurality of single dependent claims. *See* MPEP § 608.01(n), paragraph I. The same would be true for multiple dependent claims that are dependent on other multiple dependent claims.

Comment 205: One comment suggested that there should be a limit of twenty claims in every application with no exceptions and no requirement for an examination support document. Another comment suggested that the Office should limit the number of claims of any application to twenty or thirty total claims, and two or three independent claims. One comment suggested that there should simply be a hard cap without an option to file an examination support document to have additional claims examined. The comment argued that this would not take away any substantive rights, as long as applicant's right to file continuing applications and requests for continued examination is preserved.

Response: This final rule appropriately balances applicants' interests to have an adequate number of claims to protect their inventions and the need to reduce the large and growing backlog of unexamined patent applications, improve the quality of issued patents, and make the patent examination process more effective. The changes to § 1.75 in this final rule permit an applicant to present five or fewer independent claims and twenty-five or fewer total claims in the application without submitting an examination support document in compliance with § 1.265. The changes to § 1.75 in this final rule also permit an applicant to present more than five independent claims or more than twenty-five total claims if the applicant files an examination support document in compliance with § 1.265.

Comment 206: Several comments suggested that the Office should adjust the fees if excess claims fees are insufficient to permit examination of the claims for which they are paid. One comment suggested that there should be higher fees for claims in excess of ten. Several comments suggested that there should be higher fees for claims in excess of twenty. One comment suggested higher fees for independent claims in excess of three. One comment suggested that there should be a higher fee for independent claims in excess of ten and total claims in excess of fifty. Several comments suggested that there should be escalating fees for increasing numbers of claims. One comment argued that applicants should be permitted to designate a number of claims, without an examination support document, that varies with the filing fee paid. One comment suggested that applicants should be charged in proportion to the number of designated claims, and that, optionally, an upper bound on the number of claims (*e.g.*, twenty-five total claims, no more than twelve independent claims) could be established.

Response: Excess claims fees are set by statute. *See* 35 U.S.C. 41(a). The Office sought a legislative change to increase excess claims fees, and while some increases were made in the Consolidated Appropriations Act, 2005, the Office did not obtain the increases that it considered necessary. In any event, the changes adopted in this final rule will help to focus examination and increase quality.

Comment 207: Several comments suggested that excessive claiming should be dealt with on a case-by-case basis, rather than by penalizing all applicants. One comment suggested that the Office should consider strategies under present § 1.105 to address problem applications on a case-by-case basis. A number of comments suggested that the requirement for an examination support document should be imposed on a case-by-case basis, only in those situations that impose a unique burden on the Office.

Response: As discussed previously, the Office is not adopting the ''representative claims'' examination approach under which the majority of applicants would have been required to either designate dependent claims for initial examination or file an examination support document. The changes adopted in this final rule require the applicant to file an examination support document under § 1.265 only if the applicant presents more than five independent claims or more than twenty-five total claims. If an examination support document in compliance with § 1.265 is not filed before the issuance of a first Office action on the merits of the application, the application may not contain or be amended to contain more than five independent claims or more than twenty-five total claims. The majority of applications do not contain more than five independent claims or more than twenty-five total claims. Therefore, as a result of the public comment, this final rule adopts an approach that avoids requiring a majority of applicants to make the choice between designating dependent claims for initial examination and filing an examination support document.

Comment 208: One comment suggested that one of the representative claims should be in Jepson format. Another comment suggested that fees should be increased on all non-Jepson claims. One comment suggested that the Office should charge less for claims written in Jepson format.

Response: There is no persuasive explanation as to why Jepson claims should be treated differently from non-Jepson claims. Furthermore, fees are set by statute and the statute does not provide the authority to charge higher or lower fees for Jepson claims.

Comment 209: One comment suggested that there should be an expedited procedure for an application with a limit of five claims, a 1200-word specification, and four drawings, (with the filing fee being $1000 for a small entity or $3000 for a non-small entity), where the application could issue as a patent in fifteen months or less. One comment argued that the representative claim proposal should be an option for applicants and those applications with ten or fewer representative claims should be assigned a higher priority for examination. One comment argued that the examination support document should only be used as an optional procedure for an applicant to advance the application out of turn.

Response: The proposed ''representative claims'' examination approach is not adopted in this final rule. Further, the Office has revised its accelerated examination program with the goal of completing examination within twelve months of the filing date of the application. The application must contain three or fewer independent claims and twenty or fewer total claims, and the applicant must provide an accelerated examination support document and meet a number of other requirements. *See Changes to Practice for Petitions in Patent Applications To Make Special and for Accelerated Examination,* 71 FR 36323 (June 26, 2006), 1308 *Off. Gaz. Pat. Office* 106 (July 18, 2006) (notice). However, requiring an examination support or similar document only as an optional procedure for applicant to advance the application out of turn would not result in the desired gains in efficiency and quality.

Comment 210: One comment suggested that if examination is limited to a certain number of claims, the Office should not be allowed to make a restriction requirement that is not linked to the burden of searching. Thus, the comment suggested that where different statutory classes or independent claims within a class do not really impose an additional burden,

they should not be counted against the examination limit.

Response: Under the current restriction practice, the burden of the search and examination in an application is considered before a requirement for restriction is made. *See* MPEP section 803. This includes where there are different statutory classes of invention or independent claims within a class that do not impose a search burden.

Comment 211: A number of comments argued that the one-month time period to reply to a notification of more than ten representative claims was too short to prepare and submit an adequate examination support document. One comment suggested that the time period should be at least two months with extensions of time being permitted. One comment suggested that the time period should be three months with extensions of time being permitted.

Response: The proposed ''representative claims'' examination approach is not adopted in this final rule. Under this final rule, applicant is required to provide an examination support document if applicant presents more than five independent claims or more than twenty-five total claims in an application. If an examination support document in compliance with § 1.265 is not filed before the issuance of a first Office action on the merits of the application, the application may not contain or be amended to contain more than five independent claims or more than twenty-five total claims. The time period provided in the notice requiring an examination support document is only applicable where it appears that the omission of an examination support document was inadvertent. Therefore, applicant should prepare and file an examination support document when applicant presents more than five independent claims or more than twenty-five total claims in an application. Applicant should not rely on the notification from the Office and a new period within which to prepare an examination support document. Nevertheless, the Office is revising this provision to provide a two-month time period that is not extendable under § 1.136(a), which should be sufficient for those situations in which an applicant inadvertently omitted an examination support document.

Comment 212: A number of comments argued that the notice to the applicant under § 1.75(b)(3) would impose costs because it would have to be generated by an examiner and another round of communications would be needed if applicant suggests a restriction requirement and it is not accepted by the Office.

Response: Since the examination support document is required whenever applicant presents more than five independent claims or more than twenty-five total claims and the notice only applies when it appears that the omission of the examination support document was inadvertent, the Office expects that the number of notices would be relatively low. Furthermore, the Office plans to have a notice under § 1.75(b)(3) generated by someone other than the examiner. While it may be necessary on occasion for the examiner to communicate with the applicant if a suggested restriction requirement is not accepted, this additional communication is far outweighed by the benefits of focused examination and increased quality.

Comment 213: Several comments requested that the Office explain the procedures for how the Office will evaluate a suggested restriction requirement. Some comments questioned how an examiner will approve a suggested restriction requirement. One comment questioned what would occur if the restriction requirement was not accepted by the examiner.

Response: As discussed previously, if the applicant submits a suggested restriction requirement, the suggested restriction requirement is accepted, and there are five or fewer independent claims and twenty-five or fewer total claims to the elected invention, the Office will simply treat the non-elected claims as withdrawn from consideration and proceed to act on the application (assuming the application is otherwise ready for action). The Office action will set out the requirement for restriction under § 1.142(a), *e.g.*, in the manner that an Office action on the merits would contain a written record of a requirement for restriction previously made by telephone. *See* MPEP section 810.

The refusal to accept a suggested requirement for restriction may result in the examiner making a different restriction requirement or making no restriction requirement. If the examiner makes a restriction requirement (different from the suggested restriction requirement), the applicant will be notified (a notice under § 1.75(b)(3) coupled with a restriction requirement) and given a time period within which the applicant must make an election. In addition, if there are more than five independent claims or more than twenty-five total claims to the elected invention and/or species, the applicant must also: (1) Amend the application such that it contains no more than five independent claims and no more than twenty-five total claims to the elected invention and/or species; or (2) file an examination support document in compliance with § 1.265 that covers each claim (whether in independent or dependent form) to the elected invention and/or species.

Comment 214: Several comments argued that the rules should provide guidance on how the non-extendable deadline would be treated in the event of a petition or appeal relating to the requirement for an examination support document. Several comments questioned how the notice and time period would be set when there are multiple applications that have patentably indistinct claims that are being considered together for purposes of determining the number of claims in an application.

Response: Applicant may file a petition under § 1.181 if the applicant disagrees with a determination that an application contains more than five independent claims or more than twenty-five total claims, or a determination that an examination support document does not comply with § 1.265. As stated in § 1.181(f), the mere filing of a petition will not stay any time period that may be running against the application. Applicant must file a reply in compliance with § 1.75(b)(3) within the two-month time period to avoid abandonment even when applicant files a petition under § 1.181. If there are multiple applications with at least one patentably indistinct claim, the Office will issue a notice under § 1.75(b)(3) in each application and set a separate time period in each application.

Comment 215: Several comments argued that applicants would file more applications in parallel with fewer claims to avoid having to file an examination support document and this would create more work for the Office.

Response: This final rule provides that if multiple applications contain at least one patentably indistinct claim, the Office will treat the multiple applications as a single application for purposes of determining whether each of the multiple applications exceeds the five independent claim and twenty-five total claim threshold. *See* § 1.75(b)(4). For example, if one of the claims in an application is patentably indistinct from at least one of the claims in another application, the Office will treat each application as containing the total of all of the claims in both applications when determining whether each application exceeds the five independent claim and twenty-five total claim threshold. This

provision is intended to prevent an applicant from submitting multiple applications to the same subject matter, each with five or fewer independent claims or twenty-five or fewer total claims, for the purposes of avoiding the requirement to submit an examination support document. Furthermore, under § 1.78(f), applicant is required to identify such applications if they: (1) Have filing dates that are the same as or within two months of each other, taking into account any filing date for which a benefit is sought under title 35, United States Code; (2) name at least one inventor in common; and (3) are owned by the same person, or subject to an obligation of assignment to the same person. If the applications also have the same claimed filing or priority date and substantially overlapping disclosures, applicant must rebut a presumption that the applications contain patentably indistinct claims or file a terminal disclaimer and provide good and sufficient reasons why two or more such pending applications are required rather than one. *See* §§ 1.78(f)(2) and (f)(3).

Comment 216: One comment questioned whether the Office would require an examination support document if a parent application issues as a patent with ten claims and a continuation application is filed with indistinct claims.

Response: The Office has revised § 1.75(b)(4) to provide that if there are multiple applications containing at least one patentably indistinct claim the Office will treat each of such applications as containing the total of all of the claims (both independent and dependent) present in all of the multiple applications containing patentably indistinct claims for purposes of determining whether each such application contains more than five independent claims or more than twenty-five total claims. Under § 1.75(b)(4), the Office will count the claims in copending applications containing patentably indistinct claims (including applications having a continuity relationship) but not in issued patents containing patentably indistinct claims, in determining whether each such application contains more than five independent claims or more than twenty-five total claims and thus whether an examination support document in compliance with § 1.265 is required. As discussed previously, this provision is to preclude an applicant from submitting multiple applications to the same subject matter (with claims that are patentably indistinct), each with five or fewer independent claims or twenty-five or fewer total claims, for the purposes of avoiding the requirement to submit an examination support document in compliance with § 1.265. Although claims in an issued patent are not counted for the purposes of § 1.75(b)(4), the pending application may still be subject to a double patenting rejection.

Comment 217: One comment questioned how the Office would determine when an examination support document was ''inadvertently'' omitted.

Response: If the omission of an examination support document is an isolated instance, then generally the omission would be considered inadvertent. Where, however, a particular individual (*e.g.*, applicant or attorney) has a pattern of not including an examination support document when required, then the Office would be less inclined to consider such an omission as being inadvertent. The Office will not generally question whether the omission of an examination support document was inadvertent unless there is a reason to do so.

H. Examination Support Document Requirements

Comment 218: Several comments supported the concept of an examination support document. One comment agreed that the examination support document would help the Office to reduce the backlog.

Response: The Office is adopting the concept of an examination support document in this final rule. Under this final rule, an examination support document is required if applicant presents more than five independent claims or more than twenty-five total claims in an application.

Comment 219: A number of comments argued that the search and analysis necessary to prepare an examination support document would add significant cost to the preparation of an application, that the cost would be significantly more than the $2,500 predicted by the Office, and that this would significantly disadvantage independent inventors and small businesses. Several comments argued that it would be unaffordable for independent inventors and small entities. Several comments argued that the patentability search done by most practitioners is limited to United States patents and United States published applications and does not generally set forth in detail the patentability of each claim element by element. A number of comments argued that the examination support document was more like a validity search and opinion and included various estimates of the cost of preparing an examination support document, which ranged from $5,000 to $30,000. One comment argued that it would cost a minimum of $30,000 for a biotechnology application. One comment argued that even if the Office's estimate is accurate, it would cost a small entity applicant $3,000 to have twenty claims examined, which would be a six hundred percent increase over current costs and would have a significant economic impact.

Response: As discussed previously, the Office has modified the proposed rules with respect to claims. Under the proposed rules, applicants who wished to have more than ten representative claims examined in the initial Office action would have had to file an examination support document. Under the changes in this final rule, applicants may have up to five independent and twenty-five total claims examined in an application without filing an examination support document.

The Office was given feedback that the costs for preparing an examination support document could be anywhere from $5,000 to $100,000. No data to support the alleged costs were submitted. Contrary to some of the comments, the Office is not requiring a validity search and opinion. The pre-filing preparation of an application that contains more than five independent claims or more than twenty-five total claims should involve obtaining a patent novelty search, analysis and opinion. Preparation of an examination support document requires that this information be reduced to writing in a particular format.

The Office commissioned a detailed analysis of the final rule's impacts on small entities. This analysis indicated that the cost of an examination support document is likely to be in the range of $2,563 to $13,121. This analysis also concludes that this final rule is not expected to result in a significant economic impact on a substantial number of small entities. This final rule does provide an exemption from the requirement (§ 1.265(a)(3)) that an examination support document must, for each reference cited in the listing of the references required under § 1.265(a)(2), include an identification of all the limitations of each of the claims that are disclosed by the reference that applies to applications by a small entity as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). *See* § 1.265(f).

Comment 220: Several comments argued that the examination support document is substantially more burdensome than the current procedure for accelerated examination because the search and examination support

document must separately address every claim for which examination is sought, and the rule contains substantial additional burdens. One comment argued that the accelerated examination procedure is too onerous as shown by the very small number of applicants who used the procedure, and the examination support document is even more stringent. Several comments argued that a petition to make special is voluntary, not mandatory. Furthermore, such a petition does not foreclose applicant's opportunity to pursue additional inventive subject matter to protect against design-arounds, as would happen in view of the concurrent continuation proposed rule changes.

Response: The Office has reduced the requirements for an examination support document under § 1.265 as adopted in this final rule. The Office proposed to require applicants to provide a detailed explanation of how each independent and dependent claim was patentable over the cited art (proposed § 1.261(a)(4)). Section 1.265(a)(4) as adopted in this final rule requires applicants to provide the same explanation for the independent claims only. The Office also proposed to require applicants to provide statements of utility of the invention as defined in each independent claim (proposed § 1.261(a)(5)). Section 1.265 as adopted in this final rule does not include such a requirement. These changes reduce the requirements for applicants who wish to file an examination support document while still providing examiners with valuable information to assist in the examination of applications.

Furthermore, an examination support document in compliance with § 1.265 is required under § 1.75(b) only when an applicant presents more than five independent claims or more than twenty-five total claims. It is not required in applications that contain five or fewer independent claims and twenty-five or fewer total claims. Thus, the majority of applications would not need an examination support document since a majority of applications contain five or fewer independent claims and twenty-five or fewer total claims.

In addition, the accelerated examination procedure was recently revised. The accelerated examination procedure has more requirements than are contained in § 1.265. *See Changes to Practice for Petitions in Patent Applications To Make Special and for Accelerated Examination,* 71 FR at 36323–27, 1308 *Off. Gaz. Pat. Office* 106–09. For example, the accelerated examination support document must also identify any cited references that may be disqualified as prior art under 35 U.S.C. 103(c) as amended by the Cooperative Research and Technology Enhancement (CREATE) Act (Pub. L. 108–43, 118 Stat. 3596 (2004)).

Comment 221: Several comments argued that due to the cost and ''duty to search,'' the requirement for an examination support document is tantamount to imposing a *de facto* limit on the number of claims in an application.

Response: The Office has not placed a *de facto* limit on the number of claims. If an applicant wants to present more than five independent claims or more than twenty-five total claims, the applicant simply needs to submit an examination support document in compliance with § 1.265 before the first Office action on the merits. As discussed previously, the accelerated examination procedure has more requirements than are contained in § 1.265. However, over four hundred applications have been filed under the revised accelerated examination procedure in the last nine months.

Comment 222: One comment suggested that § 1.265 should be replaced by a requirement that applicant comply with the rules for a petition to make special. Another comment argued that applicants will file a petition to make special after going through the effort and expense to prepare and file an examination support document.

Response: As discussed previously, the Office has recently revised its accelerated examination program with the goal of completing examination within twelve months of the filing date of the application. An application containing more than five independent claims or more than twenty-five total claims would not be eligible for the revised accelerated examination program. Nevertheless, the Office has no objection to every applicant filing his or her application under the revised accelerated examination program.

Comment 223: A number of comments argued that the requirement for an examination support document transfers to the applicant the costs and responsibilities of the examination process for which fees have been paid. One comment questioned why applicant must pay a search fee and perform a search of their own in order to prepare an examination support document. One comment suggested that the Office should consider eliminating the search and examination fee when an examination support document is provided. One comment argued that the excess claims fees that are paid are more than enough to cover the associated extra expense and burden placed on the Office in examining the excess claims. One comment suggested that the excess claims fee should be increased rather than requiring applicants to submit an examination support document.

Response: Applications which contain a large number of claims absorb an inordinate amount of patent examining resources, and such applications are extremely difficult to process and examine properly. An applicant who presents more than five independent claims or more than twenty-five total claims will be required to assist the Office with the examination by providing an examination support document in compliance with § 1.265. The Office will still conduct a search and examine an application in which an examination support document is filed. Furthermore, the search and examination fees and excess claims fees do not recover the costs of searching and examining an application. The higher cost estimates provided in the comments on the Claims Proposed Rule confirm that the cost of conducting a search and preparing an analysis far exceeds the search and examination fees. The Office, however, cannot increase these fees because they are set by statute.

Comment 224: Several comments argued that the examination support document imposes extra burdens on the applicants that are not performed by the Office since applicants are required to translate any foreign documents not in the native language of the applicant and rejections by the Office do not comply with most of the requirements imposed under the rule.

Response: Examiners frequently obtain translations of foreign documents that they consider to be pertinent. Examiners must obtain a translation of any document that is in a language other than English if the examiner seeks to rely on that document in a rejection. *See* MPEP § 706.02. During examination, examiners cite references that are most closely related to the subject matter of the claims, identify the limitations of the claims that are disclosed by the references being relied upon in a rejection, explain how each of the independent claims are being rejected over the references being applied, and make determinations regarding utility and 35 U.S.C. 112, ¶ 1, support and enablement. The requirements in § 1.265 are intended to assist the examiner with the examination process.

Comment 225: Several comments stated that the costs and requirements of an examination support document would encourage applicants to seek the services of the least qualified searchers.

Response: The Office is not encouraging applicants to seek the services of the least qualified searchers. An applicant who decides to file an examination support document has the option to seek the services of any searcher he or she chooses or to conduct the preexamination search on his or her own. Applicant should have an incentive to hire the most qualified searchers since a better search is more likely to result in a more thorough examination. The requirements of an examination support document are clearly set forth in § 1.265 and an applicant who chooses to file an examination support document must satisfy these requirements. If the preexamination search is poor, then applicant runs the risk that the preexamination search or the examination support document will be deemed insufficient. If the preexamination search or examination support document is deemed insufficient, applicant will be given only a two-month time period that is not extendable under § 1.136(a) in which to file a corrected examination support document to avoid abandonment of the application. *See* § 1.265(e).

Comment 226: One comment argued that the Office's estimate that the burden imposed by the rule change will equate to an additional one minute and forty-eight seconds to twelve hours was unrealistic for applications having multiple independent claims and hundreds of pieces of prior art to be reviewed.

Response: The one minute and forty-eight seconds to twelve hours response time provided in the notice of proposed rule making covered each activity that may occur during the processing of an application for patent (OMB control number 0651–0031). The specific estimate for an examination support document was twelve hours (which has subsequently been increased to twenty-four hours). While the Office received comments suggesting that the Office's cost estimate for an examination support document was low, these comments provided only conclusory statements and contained few facts or information.

Comment 227: A number of comments argued that it was almost impossible to determine the extent to which the prior art must be searched to satisfy the preexamination search requirement. Several comments argued that there is no way to meet the search requirements. One comment argued that it would be impossible to prove the ''non-existence'' of more pertinent art. A number of comments argued that the search should not be required to go beyond the resources that are publicly available in the Office's search room. One comment suggested that the Office's search room would need to be upgraded to allow access to all foreign patents, periodicals and publications as well as all United States patents to meet the examination support document requirements. Several comments argued that applicant would be required to conduct a search that is beyond the scope of the searches performed by examiners and that this was unfair and burdensome to the applicants. Some comments argued that the information that must be identified is significantly more than what the Office provides to an applicant for a search and that a requirement for a statement that applicant has searched on the Office's database, the resources available to examiners, should be sufficient.

Response: The standard for the preexamination search that is required is the same standard that the Office uses to examine patent applications, which is set forth in MPEP §§ 904–904.03. The information that applicant must identify is the same information that the examiner must record in the application file as set forth in MPEP § 719.05. If applicant follows the search guidelines set forth in the MPEP, then the preexamination search should be sufficient. The Office has published patent search templates to define the field of search, search tools, and search methodologies that should be considered when performing a search. The search templates are published on the Office's Internet Web site at *http://www.uspto.gov/web/patents/searchtemplates/*. The Office has requested comments on the patent search templates. *See Request for Comments on Patents Search Templates,* 71 FR 94 (May 16, 2006), 1307 *Off. Gaz. Pat. Office* 22 (Jun. 6, 2006).

The accelerated examination procedure has more requirements than are contained in § 1.265. *See Changes to Practice for Petitions in Patent Applications To Make Special and for Accelerated Examination,* 71 FR 36232 (June 26, 2006), 1308 *Off. Gaz. Pat. Office* 106 (July 18, 2006) (notice). Thus, the information concerning the requirements for a preexamination search document under the revised accelerated examination procedure can be applied to fulfill the requirements for a preexamination search under § 1.265. *See* samples of a preexamination search document and an accelerated examination support document on the Office's Internet Web site at *http://www.uspto.gov/web/patents/accelerated/*.

Finally, a statement that applicant has searched on the Office's database and the resources available to examiners would not be sufficient. A mere statement that the applicant has searched on the Office's database and the resources available to examiners would not identify the field of search, the date of the search, and, for database searches, the search logic or chemical structure or sequence used as a query, the name of the file or files searched and the database service, and the date of the search. *See* § 1.265(a)(1).

Comment 228: One comment argued that the fact that foreign search reports are not sufficient for the preexamination search or examination support document seemed at odds with the objective of promoting greater reliance on and use of work done by other competent patent offices. One comment questioned whether an international search report is sufficient to satisfy the search requirement, and if it is, then why are foreign patent office searches not sufficient.

Response: Neither foreign search reports nor international search reports are *per se* excluded. If a foreign search report or an international search report satisfies the requirements for a preexamination search set forth in § 1.265, then it would be accepted.

Comment 229: One comment argued that the preexamination search requirement that the search must cover all the features of the designated dependent claims separately from the claim or claims from which the dependent claim depends makes no sense. The comment argued that if a dependent claim adds an element to the combination in an independent claim, a search for prior art references that disclose the additional element separately from the elements of the independent claim is likely to produce many references that have no relation to the invention. The comment suggested that the language of the rule be revised to clarify that the preexamination search must include a separate search for each independent claim and each designated dependent claim.

Response: As discussed previously, the Office did not adopt the ''representative claims'' examination approach. Under this final rule, if the application contains more than five independent claims or more than twenty-five total claims, applicant is required to file an examination support document in compliance with § 1.265 that covers each of the claims (whether in independent or dependent form) before the first Office action on the merits. If an examination support document in compliance with § 1.265 is

not filed before the issuance of a first Office action on the merits of the application, the application may not contain or be amended to contain more than five independent claims or more than twenty-five total claims. The Office has revised § 1.265(b) to delete the phrase ''separately from the claim or claims from which the dependent claim depends.'' Section 1.265(b) as adopted in this final rule requires that the preexamination search must encompass all of the features of the claims (whether independent or dependent), giving the claims the broadest reasonable interpretation. For example, if independent claim 1 recites elements ABC and dependent claim 2 depends on claim 1, incorporates all the limitations of claim 1 and additionally recites element D, then, even if applicant cannot find elements ABC and believes elements ABC to be novel, applicant must still search for element D.

Comment 230: One comment argued that the requirement that the search encompass the ''disclosed features that may be claimed'' should be deleted because it gives examiners carte blanche to reject preexamination searches on essentially arbitrary grounds.

Response: The Office notes the concerns expressed in the public comment. The Office has modified the proposed provision such that § 1.265(b) as adopted in this final rule does not require that the preexamination search must encompass the disclosed features that may be claimed. For any amendment to the claims that is not encompassed by the examination support document, however, applicants are required to provide a supplemental examination support document that encompasses the amended or new claims at the time of filing the amendment.

Comment 231: Several comments suggested that there should be an exemption from the limits on the number of claims for independent inventors. One comment argued that many individual inventors lack the skills and requisite knowledge to perform an adequate preexamination search and prepare an examination support document.

Response: The applicant of a patent application should have sufficient knowledge of his or her own invention. Performing a preexamination search and preparing an examination support document should be no more difficult than preparing and prosecuting the patent application. Furthermore, applicants can avoid the need to file an examination support document by not presenting more than five independent claims or more than twenty-five total claims in an application. This final rule, however, provides that a small entity as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) may claim an exemption from the requirement in § 1.265(a)(3) for an identification of all of the limitations of each of the claims that are disclosed by the references cited in the listing of the references required under § 1.265(a)(2). *See* § 1.265(f).

Comment 232: One comment suggested that the Office should hire experienced searchers to perform the searching function.

Response: The Office has recently conducted a pilot using PCT international applications for competitively sourcing search functions to commercial entities, each of which had experience in providing patent searches. The purpose of the pilot program was to demonstrate whether searches conducted by commercial entities could meet or exceed the standards of searches conducted and used by the Office during the patent examination process. The pilot was not proved successful and was concluded after six months.

Comment 233: A number of comments argued that the rules requiring an examination support document are fraught with dangers in the form of inequitable conduct allegations and malpractice. One comment argued that there would be challenges on the sufficiency of the examination support document, the scope of the search of the examination support document, and the timing of the search for the examination support document. A number of comments argued that even a good faith attempt is likely to be attacked on the grounds of inequitable conduct, and that such a duty is contrary to *Frazier* v. *Roessel Cine Photo Tech., Inc.,* 417 F.3d 1230, 75 U.S.P.Q.2d 1822 (Fed. Cir. 2005). A number of comments argued that the risk of inequitable conduct allegations in litigation would effectively force applicants to file ten or fewer claims, which would deny them the right to adequately protect their inventions. Several comments argued that each patent that includes an examination support document in its file history would be inherently weak given current inequitable conduct practices. Several comments argued that the likelihood of having to defend against inequitable conduct would reduce perceived public confidence in the validity of issued patents. Several comments also argued the examination support document will increase litigation costs. Several comments also argued that the added costs in terms of the perceived reduction in patent quality and the potential litigation costs would outweigh any potential speed of examination benefit. One comment argued that forcing applicant's representatives to limit the claims to an arbitrary number is akin to asking them to commit what amounts to malpractice. One comment stated that the rules put applicants in a triple-jeopardy situation for losing patent rights. First, because examiners will not consider all initially filed claims, applicants are put in jeopardy of having to file continuations for unexamined claims. Second, if applicants choose to have more than the threshold number of claims, applicants risk inequitable conduct charges. Third, if only the threshold number of claims is pursued, applicants will be unable to adequately protect their inventions.

Response: Applicants may present as many claims as they feel are necessary to adequately protect their invention. Under this final rule, applicant may present up to five independent claims and twenty-five total claims for examination in an application without providing an examination support document. As discussed previously, the Office has also modified the proposed changes to continuing application practice and continued examination practice to permit an applicant to file two continuation or continuation-in-part applications plus one request for continued examination in an application family, without any justification. Thus, an applicant is permitted to present up to fifteen independent claims and seventy-five total claims for each patentably distinct invention via an initial application and two continuation or continuation-in-part applications that are prosecuted serially without providing either an examination support document or a justification. Applicant may also present additional claims by submitting an examination support document under § 1.265 before the first Office action on the merits.

The changes in this final rule do not force an applicant to carry any affirmative duty that may expose him or her to a greater risk of inequitable conduct. The submission of an examination support document to assist the Office in gathering information for use during examination does not expose an applicant to a greater risk of inequitable conduct. Inequitable conduct is a doctrine based, in part, upon ''intent to deceive.'' *See Molins PLC* v. *Textron, Inc.,* 48 F.3d 1172, 1178, 33 U.S.P.Q.2d 1823, 1826 (Fed. Cir. 1995). To establish inequitable conduct, a party must provide clear and convincing evidence of: (1) Affirmative misrepresentations of a material fact,

failure to disclose material information, or submission of false material information; and (2) an intent to deceive. *See, e.g., Impax Labs., Inc.* v. *Aventis Pharm. Inc.,* 468 F.3d 1366, 1374, 81 U.S.P.Q.2d 1001, 1006 (Fed. Cir. 2006) (citing *Alza Corp.* v. *Mylan Labs., Inc.,* 391 F.3d 1365, 1373, 73 U.S.P.Q.2d 1161, 1167 (Fed. Cir. 2004)). Absent such ''intent to deceive'', inequitable conduct cannot be proven. Unless the applicant has an ''intent to deceive'' when submitting an examination support document, the simple submission of an examination support document, even one containing erroneous information, to the Office does not by itself raise an intent to deceive or mislead the Office. *See Frazier,* 417 F.3d at 1236 n.1, 75 U.S.P.Q.2d at 1826 n.1 (the mere submission of erroneous information to the Office does not by itself raise an inference of intent to deceive or mislead). Moreover, frivolous allegations in litigation are subject to professional responsibility rules and Rule 11 of the Federal Rules of Civil Procedure.

Comment 234: A number of comments argued that the Office must create a ''safe harbor'' that appropriately protects the applicant from inequitable conduct allegations when identifying and characterizing important prior art. Several comments argued that changes to § 1.56 would need to be made to exempt examination support documents from it. One comment argued that legislative reform is needed. Several comments argued that implementation of the examination support document should be delayed until changes to inequitable conduct are made. A number of comments suggested that more meaningful participation by applicants in prosecution of the application requires adequate ''safe-harbor'' provisions from inequitable conduct.

Response: The Office proposed revising § 1.56 to provide a ''safe harbor'' to applicants who make a reasonable good faith effort to comply with the proposed requirements. *See Changes To Information Disclosure Statement Requirements and Other Related Matters,* 71 FR at 38811–12, 38820, 1309 *Off. Gaz. Pat. Office* at 27, 34. Most of the comments indicated that such a ''safe harbor'' at best sets out the current state of the law of inequitable conduct, in that a ''safe harbor'' is unnecessary for applicants who act in good faith (*i.e.*, without an intent to deceive or mislead the Office) because an intent to deceive or mislead the Office is a separate and essential component of inequitable conduct. *See e.g., Weatherchem Corp.* v. *J.L. Clark, Inc.,* 163 F.3d 1326, 1336, 49 U.S.P.Q.2d 1001, 1009 (Fed. Cir. 1998) (a finding that the patentee acted without any intent to deceive disposes of the inequitable conduct issue), and *Manville Sales Corp.* v. *Paramount Systems Inc.,* 917 F.2d 544, 552, 16 U.S.P.Q.2d 1587, 1593 (Fed. Cir. 1990) (materiality does not presume intent, which is a separate and essential component of inequitable conduct). The comments also expressed concern that any ''safe harbor'' would possibly create new requirements with respect to an applicant's duty of disclosure under § 1.56. It is the Office's position that an applicant's duty of disclosure under § 1.56 with respect to an examination support document under § 1.265 is satisfied if an individual as defined in § 1.56(c) acted in good faith to comply with the requirements in § 1.265 for an examination support document. The Office, however, is not adopting changes to § 1.56 in this final rule to provide a ''safe harbor'' to applicants because such a provision would be unnecessary. The Office notes that patent reform legislation is pending in the 110th Congress before both the Senate and House of Representatives. *See* Patent Reform Act of 2007, S. 1145, 110th Cong. (2007), and H.R. 1908, 110th Cong. (2007). The Department of Commerce submitted a letter on May 18, 2007, to the Chairman of the House Subcommittee on Courts, the Internet, and Intellectual Property recommending that H.R. 1908 be amended to address the doctrine of inequitable conduct and unenforceability to ensure that patent applicants are not discouraged from fully and fairly sharing relevant information with the Office.

Comment 235: A number of comments argued that the examination support document would require the applicant to make binding admissions as to the scope of the claims and how they relate to the prior art references and thus force applicant to create prosecution history estoppel and address rejections that would never have occurred during prosecution. Several comments argued that such a requirement shows a complete lack of understanding of the pitfalls that admissions can have in litigation. Several comments argued that such statements can be misinterpreted and distorted in unforeseen ways. One comment argued that this may cause the practitioner to unintentionally and unnecessarily narrow the claims through the effect of prosecution history estoppel, which will decrease the commercial value and the quality of the patent. Several comments argued that the requirement for an examination support document places applicant in a precarious position of having to provide as much information as possible to support patentability of the claimed invention while avoiding statements that can be easily manipulated in litigation. One comment argued that applicants would be put in a position of having to make statements against interest long before the scope of their invention is realized. One comment argued that requiring applicant to examine his or her own application creates a conflict of interest, which would raise a question of concealment or understatement.

Response: The best way to avoid prosecution history estoppel is by knowing what the prior art is and filing claims that initially define patentable subject matter without having to file an amendment. Conducting a preexamination search and preparing an examination support document will help applicants to draft a better written disclosure and more focused claims, thereby minimizing any prosecution history estoppel.

Comment 236: Several comments argued that the one-month non-extendable time period to respond to a notice requiring a corrected or supplemental examination support document is insufficient. Some comments suggested that a three-month time period, which is extendable up to six months with an extension of time, should be given. Some comments suggested that the time period should be at least three months or extensions of time should be permitted.

Response: The Office notes the concerns expressed in the public comment regarding the time period set forth in a notice requiring a corrected or supplemental examination support document when an examination support document is deemed to be insufficient. The Office has revised the proposed provision such that § 1.265(e) provides a two-month time period that is not extendable under § 1.136(a). The two-month time period should be more than sufficient to correct any minor deficiencies. Applicants, however, should not rely on the two-month time period in § 1.265(e) to prepare an examination support document or a supplemental examination support document. The requirements for an examination support document are clearly set forth in § 1.265. Applicant should prepare the examination support document in compliance with the requirements before presenting more than five independent claims or more than twenty-five total claims. Applicant

should also conduct the preexamination search to encompass all of the disclosed features that applicant expects to claim in order to avoid the need to update the preexamination search. Applicant should file a supplemental examination support document at the time applicant presents any amendment to the claims that is not covered by the previous examination support document. Applicant also has the option of canceling the requisite number of claims (independent or total) that necessitate an examination support document, rather than submitting a corrected or supplemental examination support document. Furthermore, extensions of this two-month time period in § 1.265(e) are available to those for which there is sufficient cause (§ 1.136(b)).

Comment 237: One comment suggested that if applicant's examination support document is deemed insufficient, applicant should be afforded an opportunity to undesignate claims, and if applicant fails to undesignate the claims or file a corrected examination support document, then the examiner should undesignate claims and proceed with examination, rather than holding the application abandoned.

Response: The Office is not adopting the ''representative claims'' examination approach in this final rule. Thus, designation (or ''undesignation'') of dependent claims for initial examination is not required in this final rule. Under this final rule, if applicant wants to present more than five independent claims or more than twenty-five total claims in an application, applicant simply needs to submit an examination support document in compliance with § 1.265 before the first Office action on the merits. If applicant files an examination support document and it is insufficient, the Office will notify the applicant and give the applicant the options of either: (1) Filing a corrected or supplemental examination support document in compliance with § 1.265 that covers each of the claims (whether in independent or dependent form); or (2) amending the application such that it contains no more than five independent claims and no more than twenty-five total claims.

Comment 238: One comment argued that applicant should be given the options available under § 1.75(b)(3) and not be limited to submission of a corrected or supplemental examination support document when an examination support document is deemed to be insufficient or in other situations under § 1.265(e) (§ 1.261(c) as proposed).

Response: The Office notes the concerns expressed in the public comment regarding the proposed provision that requires a corrected or supplemental examination support document when an examination support document is deemed insufficient. The Office has modified this proposed provision such that § 1.265(e) provides that if an examination support document is insufficient, the Office will notify the applicant and give the applicant the options of either: (1) Filing a corrected or supplemental examination support document in compliance with § 1.265 that covers each of the claims (whether in independent or dependent form); or (2) amending the application such that it contains no more than five independent claims and no more than twenty-five total claims. However, applicants will not be given the option to submit a suggested requirement for restriction. Such an option would not be appropriate after applicant has already submitted an examination support document.

Comment 239: A number of comments requested clarification on how the Office would use an examination support document. Some comments questioned whether an independent search would be conducted and whether the cited references would be independently evaluated by the examiner. One comment noted that if the examiner simply adopts the results of the search and the conclusions of patentability, there would be a wide variation in quality and thoroughness of the searches performed, and in the quality of analysis of the search results. The comment further argued that if the examiner will perform further searching, then it was difficult to understand how the objective of ''sharing the burden'' is accomplished, since it would not seem to yield time or cost savings for the Office. Several comments argued that examiners should not give any faith and credit to the information in an examination support document. One comment argued that if the examiner does rely on the external search, the uncertainty of the patent will be increased. Another comment argued that the submission of an examination support document may motivate examiners to skip doing a thorough search, thus leading to lower patent quality. One comment argued that requiring an examination support document was a punitive measure because: (1) The examination support document requires information that is rarely if ever required, such as details regarding literal support for the claim elements; (2) the Office does not indicate that examiners will receive additional time to review the examination support document; and (3) the Office has not indicated that it will rely on the external search.

Response: Upon taking up an application for examination, the examiner will consider the prior art submitted in an information disclosure statement in compliance with §§ 1.97 and 1.98 (*see* § 1.97(b)) and those filed with an examination support document in compliance with § 1.265 (required under § 1.75(b)), and make a thorough investigation of the available prior art related to the subject matter of the claimed invention (*see* § 1.104(a)(1)). The examiner will make an independent patentability determination in view of the prior art on the record, other information in the examination support document, and any other relevant prior art or evidence. The examination support document will assist the examiner in the examination process and the determination of patentability of the claims by providing the most relevant prior art and other useful information. It will help the examiner in understanding the invention and to focus on the relevant issues. The examination support document will also assist the examiner in evaluating the prior art cited by the applicant and in determining whether a claim limitation has support in the original disclosure and in any prior-filed application. The requirement for an examination support document is not a punitive measure, nor is it a substitute for the Office's examination. The information required in an examination support document is to assist the examiner with the more extensive examination of an application having more than five independent claims or more than twenty-five total claims.

The Office has reduced the requirements for an examination support document under § 1.265 as adopted in this final rule. The Office proposed to require applicants to provide a detailed explanation of how each independent and dependent claim was patentable over the cited art (proposed § 1.261(a)(4)). Section 1.265(a)(4) as adopted in this final rule requires applicants to provide the same explanation for the independent claims only. The Office also proposed to require applicants to provide statements of utility of the invention as defined in each independent claim (proposed § 1.261(a)(5)). Section 1.265 as adopted in this final rule does not include such a requirement. These changes reduce the requirements for applicants who

wish to file an examination support document while still providing examiners with valuable information to assist in the examination of applications.

Comment 240: Several comments questioned how the Office would determine if an examination support document is insufficient. Some comments also questioned what would happen if the Office knows of closer prior art than that cited by applicant. One comment questioned whether the examiner could hold the examination support document non-compliant if the examiner objects to the search or the claim scope and also what would be applicant's remedy. Several comments argued that applicants currently disregard §§ 1.56, 1.97 and 1.98 and fail to cite their own work. The comments argued that applicant will cite generic references to comply with § 1.265 and will likely not reveal the most pertinent art. One comment argued that the examination support document requirements are subjective. One comment suggested that the Office should institute a petition process for disputing the requirement for an examination support document or the holding that an examination support document is insufficient. The comment suggested that the requirement should be stayed pending the outcome of the petition, or applicants should at least be given sufficient time for the petition to be heard.

Response: The Office will review an examination support document to determine if it meets all the requirements set forth in § 1.265. As discussed previously, the accelerated examination procedure has more requirements than are contained in § 1.265. The Office has provided guidelines for examination support documents filed under the accelerated examination procedure. The Office's guidelines concerning the accelerated examination support document may be helpful to applicants who are preparing an examination support document under § 1.265. The guidelines under the accelerated examination procedure, search templates, and samples of a preexamination search document and an examination support document are available on the Office's Internet Web site at *http://www.uspto.gov/web/patents/accelerated/*. The Office will provide similar guidelines for examination support documents under § 1.265, including the preexamination search statement, and will post such guidelines on the Office's Internet Web site. These guidelines should minimize subjectivity in evaluating whether an examination support document complies with the requirements of § 1.265.

Section 1.265(a)(2) requires a listing of references deemed most closely related to the subject matter of each of the claims (whether in independent or dependent form). As discussed previously, the references that would be most closely related to the subject matter of each of the claims include: (1) A reference that discloses the greatest number of limitations in an independent claim; (2) a reference that discloses a limitation of an independent claim that is not shown in any other reference in the listing of references required under § 1.265(a)(2); and (3) a reference that discloses a limitation of a dependent claim that is not shown in any other reference in the listing of references required under § 1.265(a)(2). References that are only relevant to the general subject matter of the claims would not be most closely related as long as there are other references that are more closely related to the subject matter of the claims. Applicant may not exclude a reference from an examination support document simply because the reference was not the result of the preexamination search provided for in § 1.265(a)(1). References, from whatever source, that have been brought to the applicant's attention must be considered in determining the references most closely related to the subject matter of each of the claims. Accordingly, if applicant merely cites generic references and does not cite the most pertinent art (including applicant's own work), then the examination support document would most likely not be compliant with § 1.265. Simply because the Office knows of a closer prior art reference (that is not applicant's own work) than the prior art cited by the applicant is generally not enough to hold a preexamination search insufficient.

An examination support document could be deemed insufficient based on an insufficient search. If the preexamination search or examination support document is deemed insufficient, applicant will be given only a two-month time period that is not extendable under § 1.136(a) in which to file a corrected examination support document or amend the application to contain five or fewer independent claims and twenty-five or fewer total claims to avoid abandonment of the application. *See* § 1.265(e). Any applicant who disagrees with a requirement for an examination support document or the holding that an examination support document or preexamination search is insufficient may file a petition under § 1.181. As provided in § 1.181(f), the mere filing of a petition will not stay any period for reply that may be running against the application. The Office will make every effort to decide petitions in a timely manner.

Comment 241: A number of comments argued that it was unfair and inconsistent for the Office to require applicants to produce an examination support document when the Office is not effectively using foreign search reports. One comment argued that since the Office is unwilling to accept a foreign search report or use international search reports prepared by the Office itself, the examination support document would not reduce pendency. Another comment argued that since examiners ignore international search reports they would not consider an examination support document.

Response: The Office will consider any prior art submitted by applicant in an examination support document in compliance with § 1.265 (required under § 1.75(b)) and an information disclosure statement in compliance with §§ 1.97 and 1.98 including those that are filed with a foreign search report or an international search report. Any relevant prior art will assist the examiner in the determination of patentability of the claims. The examiner, however, must make an independent determination of patentability of the claims in the application. The examiner cannot accept the determination of patentability by another examiner in a foreign application or an international application because the patentability standard of a foreign or international application is different than the standard in a U.S. application.

Comment 242: A number of comments argued that the requirement for an examination support document would create more work for the examiner since the examiner would have to determine the adequacy of the examination support document. One comment argued that complex cases would continue to be complex and the Office would just have the additional tasks of determining whether or not an examination support document should be required, and whether or not an examination support document is sufficient. One comment argued that examiners will not have sufficient time to review the examination support documents and that examiners would need more time for reviewing the examination support documents. The comment questioned whether this would take the place of the examiner reviewing the specification. Several

comments argued that determining the adequacy of examination support documents would divert resources from examination and prolong pendency. One comment argued that there would be additional burdens on the examiner in having to impose the requirement for designation of claims, issue communications challenging the sufficiency of the examination support document, perform a different search after claims are amended in response to an Office action, and search and examine the non-designated claims after allowance of designated claims. One comment argued that the number of petitions would increase because of petitions regarding whether an examination support document was needed or defective.

Response: Under this final rule, applicant is required to file an examination support document under § 1.75(b)(1) if applicant presents more than five independent claims or more than twenty-five total claims in an application. If an examination support document in compliance with § 1.265 is not filed before the issuance of a first Office action on the merits of the application, the application may not contain or be amended to contain more than five independent claims or more than twenty-five total claims. The majority of the applicants would not need to file an examination support document. The requirements of an examination support document are clearly set forth in § 1.265. Applicants should comply with the requirements at the time applicant presents more than five independent claims or more than twenty-five total claims in an application. As discussed previously, any relevant prior art and other information provided in an examination support document will assist the examiner in the examination process and in the determination of patentability of the claims. During the examination process, the examiner will consider all relevant prior art and information, and interpret the claims in light of the specification. The examiner will review the specification even when applicant files an examination support document. Thus, the benefits obtained by the examination support document would outweigh the Office's additional task of determining whether or not it is sufficient or is required.

Comment 243: One comment questioned whether the Office would give examiners less time to examine those applications in which an examination support document is filed and, if not, then how would the workload be reduced.

Response: Changes to patent examiner production goals are beyond the scope of the proposed changes to the rules of practice. Therefore, whether examiners should be given less time to examine certain applications is not discussed in this final rule. The Office expects that these rule changes will result in a more focused quality examination. The information provided in the examination support document will assist the examiner with the more extensive examination of the application. This information will be available to the examiner up front and will include the most closely related references and a detailed explanation of how the claims are patentable over these references. As a result, the exchanges between examiners and applicants should be more efficient and effective, the number of Office actions should be reduced, prosecution should be concluded faster, and the need to file a continuation application or request for continued examination should be reduced. Thus, the Office's workload would be reduced.

Comment 244: Several comments argued that the requirement for the broadest reasonable interpretation of the claims in conducting the search for an examination support document is inconsistent with current case law citing *In re Johnston* and *In re Donaldson* that require the Office to interpret the claims reasonably in light of the specification.

Response: The requirement in § 1.265(b) is consistent with current case law. The current case law requires that during examination the claims must be given their broadest reasonable interpretation consistent with the specification. According to case law, however, the broadest ''reasonable'' interpretation is necessarily one that is consistent with the specification. *See, e.g., Phillips*, 415 F.3d at 1316, 75 U.S.P.Q.2d at 1329; *In re Morris*, 127 F.3d 1048, 1054, 44 U.S.P.Q.2d 1023, 1027 (Fed. Cir. 1997) (''Some cases state the standard as the broadest reasonable interpretation, others include the qualifier consistent with the specification or similar language. Since it would be unreasonable for the PTO to ignore any interpretive guidance afforded by the applicant's written description, either phrasing connotes the same notion: As an initial matter, the PTO applies to the verbiage of the proposed claims the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification.'') (citations omitted). Therefore, the reference in § 1.265(b) to giving the claims ''the broadest reasonable interpretation'' is consistent with case law.

Comment 245: One comment agreed that the requirements relating to the concise statement of utility and the 35 U.S.C. 112 showing is sharing the burden of examining all of the claims in the application, but argued that requiring applicant to characterize the prior art goes too far and is best left to the examiner since it is the examiner's role to review and analyze the prior art for patentability purposes in view of § 1.104. Several comments argued that the burden of the examination belongs with the Office and that it is against the public interest to shift the burden from the examiner to the applicant. One comment argued that the examination support document requirement asks applicant to prove that patent claims are patentable, which is essentially impossible. One comment argued that the only purpose of an examination support document is to force applicants to do what they already should be doing, that is, carefully comparing their claims to every close prior art reference and adding limitations to distinguish the claims.

Response: Ultimately it is the Office's responsibility to determine patentability. Nevertheless, it is appropriate for applicants to provide information regarding an initial review of claims to assist the Office in determining patentability in applications where they feel they need to have more than five independent claims or more than twenty-five total claims. There is no reasonable explanation as to why it is against public interest for an applicant who presents more than five independent claims or more than twenty-five total claims to provide additional information to the Office. The Office is not requiring applicants to prove that their claims are patentable. The Office is simply requiring applicants who present more than five independent claims or more than twenty-five total claims to provide additional information to the Office by conducting a preexamination search and submitting an examination support document. The Office agrees that applicants should be comparing their claims to every close prior art reference and adding limitations to distinguish the claims.

Comment 246: One comment stated the Office should require a showing of precise written description (35 U.S.C. 112, ¶ 1) support for all amendments made by applicants.

Response: Applicant should specifically point out the support for any amendments made to the disclosure. *See e.g.*, MPEP § 2163.06. Furthermore, when applicant adds a new claim limitation in an application that contains more than five independent claims or more than twenty-five total claims, applicant is required to submit a supplemental examination support document that includes a showing of where such new claim limitation finds support under 35 U.S.C. 112, ¶ 1, in the written description of the specification and in any parent application. In addition, the examiner may require the applicant to show where the specification of the application or a parent application provides written description support under 35 U.S.C. 112, ¶ 1, for a new limitation. *See* § 1.105(a)(1)(ix) (as adopted in this final rule).

Comment 247: One comment argued that the concise statement of utility and the 35 U.S.C. 112 showing required in an examination support document make no sense. The comment argued that cross-referencing each line of the claims back to the specification is a waste of time. One comment argued that applicants should not have to admit what is disclosed, but rather they should only have to admit what is not disclosed.

Response: In view of the comments, the Office is not adopting the requirement that an examination support document contain a concise statement of the utility of the invention as defined in each of the independent claims. The showing of where each limitation of the claims finds support under 35 U.S.C. 112, ¶ 1, however, would be helpful to the examiner. The examiner is responsible for determining whether or not there is 35 U.S.C. 112, ¶ 1, support in the written description for claimed subject matter. If applicant provides this information, it will assist the examiner in the examination of the application by making it easier for the examiner to make the necessary determinations. *See Hyatt* v. *Dudas,* 2007 U.S. App. LEXIS 15350 (Fed. Cir. Jun. 28, 2007). The applicant should be aware of where each limitation of the claims finds support under 35 U.S.C. 112, ¶ 1, in the written description by virtue of having prepared the application. There is no justification for requiring the examiner to duplicate this effort in an application that exceeds the five independent claim and twenty-five total claim threshold set forth in § 1.75(b).

Comment 248: One comment argued that § 1.265(a)(2) through (a)(4) resurrects provisions that used to be in the rules, but were amended out of the rules in 1992 when they were found to be unworkable.

Response: The Office proposed a number of changes to the rules of practice around 1990 related to the duty of disclosure and the filing of information disclosure statements. *See Duty of Disclosure,* 56 FR 37321 (Aug. 6, 1991), 1129 *Off. Gaz. Pat. Office* 52 (Aug. 27, 1991) (proposed rule), and *Duty of Disclosure and Practitioner Misconduct,* 54 FR 11334 (Mar. 17, 1989), 1101 *Off. Gaz. Pat. Office* 12 (Apr. 4, 1989) (proposed rule). The Office ultimately adopted changes to the duty of disclosure provisions of § 1.56 and the information disclosure statement provisions of §§ 1.97 and 1.98 (and deleted § 1.99) in 1992. *See Duty of Disclosure,* 57 FR 2021 (Jan. 17, 1992), 1135 *Off. Gaz. Pat. Office* 13 (Feb. 13, 1992) (final rule). The changes adopted in the 1992 final rule concerning the duty of disclosure provisions of § 1.56 and the information disclosure statement provisions of §§ 1.97 and 1.98 did not eliminate, or decline to adopt as final, provisions similar to the provisions of § 1.265(a).

Comment 249: One comment argued that the requirement for an examination support document was contrary to case law (citing *In re Wilder,* 736 F.2d 1516, 222 U.S.P.Q. 369 (Fed. Cir. 1984)) that applicant is not under a duty to search.

Response: Initially, it is noted that *Wilder* does not stand for the proposition that applicant does not have a duty to search. *Wilder* involved a reissue application. That case held that an attorney's statement that his error was a misunderstanding of the scope of the invention arose resulting from a lack of a prior art search was a sufficient explanation to satisfy the requirements of the reissue rule regarding how the error arose. There is some case law, however, that indicates that applicant does not have a duty to search. *See Nordberg, Inc.* v. *Telesmith, Inc.,* 82 F.3d 394, 397, 38 U.S.P.Q.2d 1593, 1595–96 (Fed. Cir. 1996); *FMC Corp.* v. *Hennessy Indus., Inc.,* 836 F.2d 521, 526 n.6, 5 U.S.P.Q.2d 1272, 1275–76 n.6 (Fed. Cir. 1987); *FMC Corp.* v. *Manitowoc Co.,* 835 F.2d 1411, 1415, 5 U.S.P.Q.2d 1112, 1115 (Fed. Cir. 1987); *Am. Hoist & Derrick Co.* v. *Sowa & Sons, Inc.,* 725 F.2d 1350, 1362, 220 U.S.P.Q. 763, 772 (Fed. Cir. 1984), *cert. denied,* 469 U.S. 821, 224 U.S.P.Q. 520 (1984). In view of these cases, the Office has stated that ''[a]n applicant has no duty to conduct a prior art search as a prerequisite to filing an application for patent.'' *See* MPEP § 410. The case law, however, only discusses applicant's responsibility under the rules in 37 CFR Part 1 that were in effect at the time that was relevant to these particular cases. The case law does not stand for the proposition that the Office cannot change the rules in 37 CFR Part 1 to require a preexamination search, either generally or, when an applicant presents more than five independent claims or more than twenty-five total claims in an application. Indeed, commentators have suggested that, especially after *Festo X,* a practitioner who declines to conduct any pre-filing search as a matter of practice may be falling short of the responsibility under 37 CFR part 10 to perform services with competence. *See* Schneck, *The Duty to Search,* 87 J.P.T.O.S. 689, 696–701 (2005).

Comment 250: One comment argued that an examination support document is not properly compared to an appeal brief since, in an appeal brief, the focus is on the examiner's rejection and interpretation of the references, whereas in an examination support document, applicant is required to provide a search, interpret claims, and identify all issues related to the search results with respect to each element of each claim.

Response: The Office did not compare an examination support document to an appeal brief. The Office simply indicated that the proposed ''representative claim'' examination approach was similar to the BPAI's representative claim practice. Nevertheless, the Office is not adopting the ''representative claims'' examination approach in this final rule.

Comment 251: One comment argued that the rule changes, especially the requirement for an examination support document, are not rationally related to achieving the stated goals of improving patent quality and increasing efficiency.

Response: The Office is requiring an examination support document in those cases where applicants feel they need to have more than five independent claims or more than twenty-five total claims because these applications are the most burdensome for the Office. An examination support document will help the Office improve quality and increase efficiency because it will assist the examiner with the examination of the application. It should provide the examiner with the most pertinent prior art and an analysis of that art. Therefore, the changes being adopted in this final rule are related to the goals of improving quality and increasing efficiency.

Comment 252: One comment argued that the examination support document requirement will increase demand for public searchers and this may drain the examining pool and worsen retention.

Response: It is the Office's experience that only a small number of examiners

who leave the Office do so to become public searchers.

Comment 253: One comment argued that practitioners do not draft patent applications to claim subject matter that they believe is not supported by the specification and thus it should be sufficient to merely assert that the claims are supported by the ''entire specification.''

Response: The purpose of the requirement for a showing of where each limitation of the claims finds support under 35 U.S.C. 112, ¶ 1, is to assist the examiner in determining where the specification provides written description support for each claim limitation. An assertion by the practitioner that the claims are supported by the entire specification would not be of any assistance to the examiner.

Comment 254: Several comments argued that an examination support document should not be required until after the time for issuing a restriction requirement has passed because it is unfair to require applicant to prepare and file an examination support document when claims may be restricted such that fewer than ten representative claims are pending for examination. One comment suggested that a time period should be set in which the examiner must issue a restriction requirement or indicate that there will be none, and then the time period for submission of an examination support document should be set after that.

Response: As discussed previously, an applicant may submit a suggested restriction requirement accompanied by an election without traverse of an invention to which there are no more than five independent claims and no more than twenty-five total claims. *See* § 1.142(c) and the discussion of § 1.142(c). In this situation, an examination support document will not be required if the suggested restriction requirement is accepted. An examination support document will be required only if the suggested restriction requirement is not accepted, and the application contains more than five independent claims or more than twenty-five total claims, or more than five independent claims or more than twenty-five total claims to the elected invention and/or species if the examiner makes a restriction requirement that is different from the suggested restriction requirement.

Comment 255: One comment suggested that the Office should give assurances that: Like an information disclosure statement, nothing in an examination support document is an admission of prior art; nothing in the examination support document would be considered as affecting the scope of the claims; and the examination support document would not be published and examiners would make no references to it in correspondence. One comment supported the use of a limited examination support document that would require applicants to identify where in the specification the corresponding structure, material or acts for functional claim elements may be found since this would improve examination efficiency and have minimal effects in litigation.

Response: Providing assurances that the examination support document would not affect the scope of the claims would not be appropriate. The showing of where each limitation of the claims finds support under 35 U.S.C. 112, ¶ 1, in the written description of the specification and the showing that includes the structure, material, or acts in the specification that correspond to each means-(or step-) plus-function claim element that invokes consideration under 35 U.S.C. 112, ¶ 6, may affect the interpretation of the claims. The determination on patentability is made on the entire record of the application. In order to provide a complete application file history, the examiner may find that it is necessary to state on the record any agreement or disagreement with applicant's explanation of how the claims are patentable over the references or applicant's explanation of where each limitation of the claims finds support under 35 U.S.C. 112, ¶ 1, in the written description. The application record is available to the public upon the publication of the application under 35 U.S.C. 122(b) and the issuance of a patent on the application.

Comment 256: One comment suggested that the Office require applicants to provide claim charts that illustrate the differences between claims. The comment also suggested that applicants could be required to identify where support exists in the specification for the claims, or to identify groups of claims that are similar and define similar limitations.

Response: There is no prohibition against applicants submitting claim charts to illustrate the differences between claims. The Office does not consider it necessary at this time to make claim charts a requirement.

Comment 257: One comment inquired why, when claims in excess of ten are designated, a justification for all designated claims must be supplied and not just the number in excess of ten representative claims.

Response: The Office is not adopting the ''representative claims'' examination approach in this final rule. Under this final rule, applicant is required to file an examination support document when applicant presents more than five independent claims or more than twenty-five total claims in an application. In order to best assist in examination, the examination support document must cover all of the claims (in independent or dependent form) in the application, and not just the independent claims in excess of five or the total claims in excess of twenty-five.

I. The Office's Authority To Promulgate the Changes in This Final Rule

Comment 258: A number of comments argued that the changes to the rules of practice being adopted in this final rule are beyond the Office's rulemaking authority under 35 U.S.C. 2(b)(2). The comments argued that the proposed §§ 1.75(b), 1.78(d), and 1.78(f) are substantive and not procedural in nature because they affect an applicant's right to receive a patent for an invention or an applicant's ability to claim what the applicant regards as the invention.

Response: The Office has the authority under 35 U.S.C. 2(b)(2) to establish regulations, not inconsistent with law, which shall govern the conduct of proceedings in the Office. The ''conduct of proceedings in the Office'' provision of 35 U.S.C. 2(b)(2) (as well as former 35 U.S.C. 6(a)), however, is not limited to what might be characterized as ''procedural'' rather than ''substantive'' rules. *See United States* v. *Haggar Apparel Co.,* 526 U.S. 380, 387–88 (1999). Simply contending that a regulation is ''substantive and not procedural'' fails to address the issue because a regulation that relates to application processing within the Office and that is not inconsistent with law falls within the Office's rulemaking authority. *See In re Van Ornum,* 686 F.2d 937, 945, 214 U.S.P.Q.2d 761, 768 (C.C.P.A. 1982) (''Appellants say the regulation is 'invalid on its face' but they do not explain why beyond contending it is 'substantive and not procedural.' We can give no weight to that contention. True, the rule is substantive in that it relates to a condition under which a patent will be granted which otherwise would have to be denied for double patenting. Much of the content of the PTO rules is 'substantive' in this respect. The regulation clearly relates to application processing within the PTO in a manner consistent with statutory and case law, which is its principal business.'').

The regulations at issue in this final rule concern application processing

exclusively within the Office. The changes to § 1.75 being adopted in this final rule govern the requirements relating to the examination of the claims in an application, as is provided for in 35 U.S.C. 131. The changes to § 1.78(d) being adopted in this final rule govern the conditions under which an application may contain or be amended to contain a claim under 35 U.S.C. 120, 121, or 365(c) to the benefit of a prior-filed application. The changes to § 1.78(f) being adopted in this final rule govern the requirements relating to the filing and examination of multiple applications by a common owner. The filing of an application for patent, amendment of an application, and the examination of an application are proceedings that take place exclusively within the Office. Therefore, regulations governing requirements relating to the filing, amendment, and examination of an application fall squarely within the Office's authority under 35 U.S.C. 2(b)(2) to establish regulations which ''govern the conduct of proceedings in the Office.''

The substantive right at issue during the patent examination process involves whether the applicant has met the conditions and requirements under title 35, United States Code, to be entitled to a patent, rather than the ability to file and maintain an unlimited number of continuing applications or requests for continued examination or the ability to refrain from obtaining and providing information pertinent to the examination of the application to the Office. *See, e.g.*, 35 U.S.C. 101 (''[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title''). The changes in this final rule do not preclude applicants from obtaining a patent on an invention, discourage, impede, or block an applicant's statutory right to a patent, or stifle inventors' rights to protect their inventions.

The changes to continuing application practice adopted in this final rule do not set a *per se* limit on the number of continuing applications that an applicant may file. That is, applicant may automatically file a first and second continuation application without any justification and may file any number of additional continuation applications as long as he or she justifies each filing by a showing as to why the amendment, argument or evidence sought to be entered could not have been previously presented. Therefore, the changes to the final rule do not affect an applicant's right to receive a patent for an invention. The modification to continuation practice simply improves the procedures under which an applicant may file a continuation application by focusing and consolidating the examination process. Furthermore, as an alternative, an applicant may choose to file an appeal when confronted with a rejection that he or she feels is improper. The changes adopted in this final rule to the continuing application practice prevent applicants from unnecessarily prolonging prosecution of applications before the Office.

The changes to the examination of claims practice adopted in this final rule do not prevent an applicant from presenting as many claims as are considered necessary or desirable to protect the full scope of the invention. The changes to the examination of claims practice adopted in this final rule simply provide that if an applicant exceeds or contemplates exceeding a specified threshold (five independent claims or twenty-five total claims), the applicant can provide for that eventuality by submitting additional information to the Office in an examination support document in order to facilitate effective examination of the application. The submission of an examination support document does not change the substantive criteria applied during examination (*i.e.*, the statutory standards of patentability set forth in title 35, United States Code) to determine the applicant's entitlement to a patent.

The patentably indistinct claims provisions do not affect applicant's patent rights because once the required explanation of patentable indistinctness has been provided, the claimed invention is examined on the merits and patentability is determined by the Office. The requirement that applicant show that claims are patentably distinct up front is simply a tool to focus and consolidate the examination of multiple applications.

Comment 259: A number of comments suggested that a requirement of a showing to obtain an additional continuation application is contrary to 35 U.S.C. 120, 121, 365, 132(b), and other sections of title 35, United States Code, under which an applicant has a right to file an unlimited number of continuation applications. The comments suggested that: (1) The proposed rules disregard case law, in particular, *In re Hogan,* 559 F.2d 595, 194 U.S.P.Q. 527 (C.C.P.A. 1977), and *In re Henriksen,* 399 F.2d 253, 158 U.S.P.Q. 224 (C.C.P.A. 1968); (2) the Office does not have authority to limit the number of continuing applications under 35 U.S.C. 2(b)(2) because the proposed rules are inconsistent with the law, and specifically do not ''facilitate and expedite the processing of patent applications''; (3) the changes to § 1.78 cut off substantive rights for reasons other than patentability (as set forth in 35 U.S.C. 102, 103 and 112 of title 35, United States Code) and procedural misconduct, and thus are in violation of 35 U.S.C. 131; (4) the changes to § 1.78 are inconsistent with 35 U.S.C. 131 or 132, because the Director does not have the statutory discretion under these provisions to refuse to examine or to reexamine any application; (5) the requirement for a ''showing'' is contrary to law because the Office has no authority to deny an applicant the right to file a continuation application or a request for continued examination; (6) no justification or legal basis exists for the petition requirements set forth in the rules to get the benefit of an earlier filing date under 35 U.S.C. 120 or 365; (7) the Office has no statutory authority to delete a claim to priority in a continuing application filed according to the statutory provisions; and (8) applicants have a right to file a continuation application, as long as the reason is not improper, unduly successive or repetitive, citing *Godfrey* v. *Eames,* 68 U.S. (1 Wall.) 317, 325–26 (1864). Other comments, however, suggested that the proposed rules are consistent with both statute and case law given that: (1) The Office is not instituting a *per se* numerical limit on the number of continuation applications that an applicant may file; and (2) applicants are afforded an opportunity to justify by a showing the need to file additional continuation applications.

Response: None of the statutory provisions or case law cited by the comments provides that an applicant may file an unlimited number of continuing applications or requests for continued examination.

None of the statutory provisions related to continuing applications cited by the comment provide that an applicant may file an unlimited number of continuing applications. 35 U.S.C. 120 simply provides that an applicant may claim the benefit of the filing date of a prior-filed application provided that certain conditions are satisfied. 35 U.S.C. 121 provides that if the Director requires that an application containing claims to two or more independent and distinct inventions be restricted to one of the inventions and a non-elected invention is made the subject of a divisional application, the applicant in the divisional application may claim the benefit of the filing date of prior-filed

application provided that the conditions specified in 35 U.S.C. 120 are satisfied. 35 U.S.C. 365(c) provides that an applicant in an international application designating the United States may claim the benefit of the filing date of a prior-filed national application or a prior-filed international application designating the United States, and that an applicant in a national application may claim the benefit of the filing date of a prior-filed international application designating the United States, again provided that the conditions specified in 35 U.S.C. 120 are satisfied.

Since 35 U.S.C. 120, 121 and 365(c) all hinge upon 35 U.S.C. 120, the response focuses on that provision. 35 U.S.C. 120 provides that:

> An application for patent for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in an application previously filed in the United States, or as provided by section 363 of this title, which is filed by an inventor or inventors named in the previously filed application shall have the same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of or termination of proceedings on the first application or on an application similarly entitled to the benefit of the filing date of the first application and if it contains or is amended to contain a specific reference to the earlier filed application. No application shall be entitled to the benefit of an earlier filed application under this section unless an amendment containing the specific reference to the earlier filed application is submitted at such time during the pendency of the application as required by the Director. The Director may consider the failure to submit such an amendment within that time period as a waiver of any benefit under this section. The Director may establish procedures, including the payment of a surcharge, to accept an unintentionally delayed submission of an amendment under this section.

35 U.S.C. 120 (2000).

35 U.S.C. 120 has been revised significantly since its codification as part of the 1952 Patent Act. 35 U.S.C. 120 as codified in the 1952 Patent Act provided that: ''[a]n application for patent for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in an application previously filed in the United States by the same inventor shall have the same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of or termination of proceedings on the first application or on an application similarly entitled to the benefit of the filing date of the first application and if it contains or is amended to contain a specific reference to the earlier filed application.'' 35 U.S.C. 120 (1952). 35 U.S.C. 120 was amended in 1975 to add ''or as provided by section 363 of this title'' to provide for claims under 35 U.S.C. 120 to the benefit of an international application filed under the PCT (*i.e.*, international applications filed under 35 U.S.C. 363). Pub. L. 94–131, section 9, 89 Stat. 685, 692 (1975). 35 U.S.C. 120 was amended again in 1984 to substitute ''by an inventor or inventors named in the previously filed application'' for ''by the same inventor'' for consistency with the changes to the inventorship provisions of 35 U.S.C. 116. Public Law 98–622, section 104(b), 98 Stat. 3383, 3385 (1984). 35 U.S.C. 120 was finally amended in 1999 to give the Director greater authority with respect to setting forth the time period within which claims to the benefit of a prior-filed application must be submitted by adding:

> No application shall be entitled to the benefit of an earlier filed application under this section unless an amendment containing the specific reference to the earlier filed application is submitted at such time during the pendency of the application as required by the Director. The Director may consider the failure to submit such an amendment within that time period as a waiver of any benefit under this section. The Director may establish procedures, including the payment of a surcharge, to accept an unintentionally delayed submission of an amendment under this section.

Public Law 106–113, 113 Stat. 1501, 1501A–563 through 1501A–564 (1999). Thus, 35 U.S.C. 120 has never contained any language either expressly or implicitly stating that an applicant may file an unlimited number of continuing applications.

Turning to the legislative history of the 1952 Patent Act, it does not mention whether an applicant may file an unlimited number of continuing applications. The Senate Report simply documents that ''[s]ections 120 and 121 express in the statute certain matters which exist in the law today but which had not before been written into the statute, and in so doing make some minor changes in concepts involved.'' S. Rep. No. 1979, at 2400 (June 27, 1952). The House Report contains basically the same description for 35 U.S.C. 120. The testimony from hearings before a Subcommittee of the Committee on the Judiciary, House of Representatives, for the 82nd Congress, held on June 13, 14, and 15, 1951, contains the same description for 35 U.S.C. 120 and little else of substance. For example, P.J. Federico testified: ''Sections 120 and 121 express in the statute certain things which exist in the law today that have not been written into the statute, and in so doing make some changes in the concepts involved.'' Patent Law Codification and Revision, 82d Cong. 39 (June 13, 1951) (statement of P.J. Federico, Examiner-In-Chief, United States Patent Office). Additionally, as noted in the congressional record for the 1952 Patent Act, 35 U.S.C. 120 codified existing patent practice. 98 Cong. Rec. 7, 9323 (June 28, 1952 to July 7, 1952) (statements of Senators Saltonstall and McCarran). In particular, ''[t]he provisions set out in section 120 giving the applicant the benefit of the date of an earlier application by him for the same invention constitute a restatement of the former practice which was not, however, spelled out in the former law.'' Charles L. Zinn, Commentary on New Title 35, U.S. Code ''Patents'' 2515.

Secondary sources providing information about 35 U.S.C. 120 also do not offer guidance with respect to whether an applicant may file an unlimited number of continuing applications. The 1952 Patent Act was drafted by: (1) P.J. Federico, Examiner-In-Chief of the Patent Office; (2) Giles S. Rich, then an attorney of some twenty years representing the National Council of Patent Law Associations; (3) Paul Rose, chairman of the laws and rules committee of the American Patent Law Association; and (4) Henry Ashton, a representative of the coordinating committee on revision and amendment of the patent laws of the National Council of Patent Law Associations. *See generally*, Giles S. Rich, Congressional Intent—Or, Who Wrote the Patent Act of 1952, Patent Procurement and Exploitation (BNA 1963), reprinted in Nonobviousness—The Ultimate Condition of Patentability (John F. Witherspoon ed., 1983) (hereinafter ''Rich on Congressional Intent''). Following enactment, Federico gave a series of lectures to teach the patent bar about the new law. Federico's lectures were transcribed, consolidated, and reprinted for many years in title 35, United States Code Annotated. *See* 35 U.S.C.A. sections 1 to 110 (1954). The Federal Circuit has considered Federico's Commentary to be ''an invaluable insight into the intentions of the drafters of the Act.'' *Symbol I*, 277 F.3d at 1366, 61 U.S.P.Q.2d at 1519.

Federico explained that 35 U.S.C. 120 was ''not specified in the old statute but was developed by decisions of the courts beginning with a decision of the Supreme Court of 1864, *Godfrey* v. *Eames*.'' P.J. Federico, Commentary on the New Patent Act, 75 J. Pat. & Trademark Off. Soc'y 3, 192 (Mar. 1993) (hereinafter ''Federico's Commentary''). After offering this opening statement, he then set forth the three requirements for

a continuation application required by 35 U.S.C. 120 and elaborated on the meaning of each of these three requirements.

Although Federico's Commentary did not expressly mention any limits or conditions on an applicant's ability to file a continuation, it also did not state that the drafters contemplated allowing an applicant to file an unlimited number of continuation applications. Thus, there is nothing which indicates that the drafters intended to permit an applicant to file an unlimited number of continuing applications. What is more, Federico described examples of situations where continuations were used before the codification of the 1952 Patent Act:

> Continuing applications are utilized in a number of different situations; for example, in the case of a requirement to restrict an application to a single invention a second application might be filed for the invention excluded from the the [sic] first application as explained in connection with the next section of the law, or a second application might be filed for a separable invention even though no requirement was made. A continuing application with the disclosure the same as a first application might sometimes be filed for procedural reasons with the first application thereafter being abandoned. And a continuing application with added subject matter may sometimes be filed when the inventor has additional details relating to the invention which he wishes to disclose in the application; in such cases the second application would be entitled to the date of the first application only as to the common subject matter.

Federico's Commentary, 5 J. Pat. & Trademark Soc'y at 194.

Federico's list, albeit not exhaustive, suggests that patent practitioners used continuing applications in more limited circumstances before the 1952 Patent Act than today. His first example focuses on the divisional-type situation where a continuing (divisional) application is pursued to protect a second invention as a result of a restriction in the initial application. His third example focuses on a continuation-in-part situation where a continuing application is filed to enable an applicant to add subject matter to the application. Only his second example contemplates anything like current continuation practice where a continuing application is filed to pursue protection for an invention disclosed in the initial application. Federico nevertheless explained that the first application to which the continuing application claims priority is abandoned after the continuation is filed.

Federico did not include the then-rare situation in which the first application issued as a patent and the continuing application was filed to pursue further protection for the invention of the patent on the first application. At the time of the 1952 Patent Act the double patenting doctrine did not permit a patentee to obtain more than one patent on patentably indistinct subject matter. *See e.g., Miller* v. *Eagle Mfg. Co.*, 151 U.S. 186, 199 (1894) (the ''a patent'' for an invention provision does not permit a patentee to obtain more than one patent on patentably indistinct subject matter). Even after the 1952 Patent Act, the double patenting provision of 35 U.S.C. 101 (''a patent'' for an invention), like its predecessor, was interpreted as precluding a patentee from obtaining more than one patent on patentably indistinct subject matter. *See, e.g., In re Ockert*, 245 F.2d 467, 469, 114 U.S.P.Q. 330, 332 (C.C.P.A. 1957)). It was not until 1970 that the Court of Customs and Patent Appeals held that the double patenting provision of 35 U.S.C. 101 precluded only ''same invention'' double patenting (*i.e.*, two patents containing claims to identical subject matter) and permitted the use of a terminal disclaimer to overcome double patenting unless the application and patent were claiming identical subject matter. *See In re Vogel*, 422 F.2d 438, 441, 164 U.S.P.Q. 617, 622 (C.C.P.A. 1970). Thus, applicants today frequently do not abandon the initial application, but instead prosecute the initial application in parallel with the continuation application. Because of the development of terminal disclaimer practice, the authors of the 1952 Patent Act would not have contemplated a continuing application system under which an applicant would file an unlimited number of continuing applications.

Moreover, both before and long after the 1952 Patent Act applicants did not file long strings of continuation applications as is often done today. Indeed, the Board of Patent Appeals (Board) in *Henriksen* attempted to identify cases involving a series of more than three patents from cases litigated in the courts and patents issued by the Office during the week of April 26, 1966. *Ex parte Henriksen*, 154 U.S.P.Q. 53, 58–59 (Pat. Off. Bd. App. 1966). The Board in *Henriksen* was unable to isolate a single case involving a priority chain longer than three applications, with one exception that the Board nevertheless dismissed because the case was quite old, dating to 1867, and because the factual record was developed under different law. *Id.* at 58, n.2 (referring to the case as ''an antique curiosity''). Based on the Board's research, it appears that priority chains having more than three family members were actually uncommon, if they existed at all, before the 1952 Patent Act. Thus, if anything, the drafters of the Act, seeking to codify existing practice, did not envision that an applicant would use the provisions of 35 U.S.C. 120 to file and maintain an unlimited number of continuing applications.

Following the enactment of the 1952 Patent Act, case law has specifically addressed the imposition of limits or conditions on continuation practice in the two cases cited by the comments (*Henriksen* and *Hogan*). In *Henriksen* and *Hogan*, the Court of Customs and Patents Appeals (C.C.P.A.) overturned rulings by the Board denying an applicant's priority claim to earlier—filed applications. In *Hogan*, the Board sought—without prior warning—to limit the number of continuations by restricting the applicant from claiming priority where the continuation applications covered a pendency period of twenty-four years. In *Henriksen*, the Board took the position that 35 U.S.C. 120 imposed a *per se* limit on the number of permissible continuations.

The changes adopted in this final rule, however, do not set a limit on the applicant's ability to claim the benefit of a prior-filed application regardless of the pendency period, nor do they set a *per se* limit on the number of continuing applications that an applicant may file. *See Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims*, 71 FR at 50, 1302 *Off. Gaz. Pat. Office* at 1320 (''No limit is placed on the number of continuing applications.''). Applicant may automatically file a first and second continuation application and further extend examination by filing a request for continued examination. After these options are exhausted an applicant may also file any number of third and subsequent continuation applications as long as the applicant justifies each filing by a showing that amendment, argument, or evidence sought to be entered could not have been presented earlier. The *Henriksen* court objected to the approach taken by the Board in changing continuing application practice retroactively. The *Henriksen* court objected to the Board changing the interpretation of the provisions of 35 U.S.C. 120 and applying that interpretation to previously filed applications. The *Henriksen* court specifically stated that:

> The action of the board is akin to a retroactive rule change which may have the effect of divesting applicants of valuable rights to which, but for the change in Patent

Office position brought about by the board's decision, they were entitled. Nothing appears in the Patent Office Rules of Practice or the Manual of Patent Examining Procedure which sanction such a result.

Henriksen, at 399 F.2d at 261–62, 158 U.S.P.Q. at 231. In *Henriksen* and *Hogan*, the Office had not promulgated any rules, let alone given the public notice of, or an opportunity to respond to, the *ad hoc* limits imposed. By contrast, the Office here is pursuing prospective rule making, having given the public notice of the changes to § 1.78 and an opportunity to comment.

Although the Court of Customs and Patent Appeals in a ''post script'' mentioned congressional resolution to remedy the abuses associated with continuation applications in both *Henriksen* and *Hogan*, the court seemed more concerned with the openness of the process for effecting change. *Henriksen*, 399 F.2d at 262, 158 U.S.P.Q. at 231. Here, the Office is adopting the prospective and open process missing in *Hogan* and *Henriksen*. The Office has given the public the opportunity to participate in shaping the rules for continuing application practice, received hundreds of comments, and has modified the proposed rules in response to those public comments.

More recent case law demonstrates that an applicant does not have the right to file an endless stream of continuing applications. *See Symbol I, supra, In re Bogese II*, 303 F.3d 1362, 64 U.S.P.Q.2d 1448 (Fed. Cir. 2002), and *Symbol Techs.* v. *Lemelson Medical, Educ. & Research Found.*, 277 F.3d 1361, 61 U.S.P.Q.2d 1515 (Fed. Cir. 2002) (*Symbol II*). *Symbol II*, *Bogese II* and *Symbol I* suggest that the Office has the authority to place reasonable restrictions and requirements on the filing of continuing applications, just as it can place reasonable restrictions and requirements on the prosecution of those applications. In addition, the court in *Bogese II* expressly rejected the view that its previous case law (*e.g.*, *Henriksen*) stood for the broad proposition that 35 U.S.C. 120 gave applicants *carte blanche* to prosecute continuing applications in any desired manner. Rather, it held that, while the statute itself provided no limit on the number of applications that may be co-pending, ''[n]owhere does [the prior case law] suggest or imply that the PTO must allow dilatory tactics or that the PTO lacks inherent power to prohibit unreasonable delay in prosecution.'' *Bogese II*, 303 F.3d at 1368 n.6, 64 U.S.P.Q.2d at 1452 n.6.

By amending the procedures under which an applicant may file continuation applications, the Office is seeking to encourage the prompt presentation of amendment, argument and evidence in patent prosecution. To do so, the Office has determined that it must, at some point, change the continuing application practice that has facilitated the past dilatory presentation of amendment, argument and evidence that could have been presented earlier. The changes adopted in this final rule allow an applicant the flexibility to choose between filing a continuing application and filing an appeal, but do not permit an applicant to persist indefinitely before the examiner rather than seek an appeal. Therefore, this final rule does not preclude an applicant from obtaining a patent on an invention when requirements of title 35, United States Code, are satisfied. As explained in the Continuing Applications Proposed Rule, the changes to § 1.78 will ''make the exchange between examiners and applicants more efficient, get claims to issue faster, and improve the quality of issued patents.'' *See Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims*, 71 FR at 50, 1302 *Off. Gaz. Pat. Office* at 1320.

Like the statutory provisions for continuing applications, the statutory provision for requests for continued examination, namely, 35 U.S.C. 132(b), does not provide that an applicant may file an unlimited number of requests for continued examination. As discussed previously, the provisions of 35 U.S.C. 132(b) were added relatively recently by section 4403 of the AIPA. *See* Public Law 106–113, 113 Stat. 1501, 1501A–560 (1999). 35 U.S.C. 132(b) provides that:

The Director shall prescribe regulations to provide for the continued examination of applications for patent at the request of the applicant. The Director may establish appropriate fees for such continued examination and shall provide a 50 percent reduction in such fees for small entities that qualify for reduced fees under section 41(h)(1) of this title.

35 U.S.C. 132(b) (2000). The Office first implemented the provisions of 35 U.S.C. 132(b) by a final rule in August of 2000 that was preceded by an interim rule in March of 2000. *See Request for Continued Examination Practice and Changes to Provisional Application Practice*, 65 FR 50092 (Aug. 16, 2000), 1238 *Off. Gaz. Pat. Office* 13 (Sept. 5, 2000) (final rule), *Changes to Application Examination and Provisional Application Practice*, 65 FR 14865 (Mar. 20, 2000), 1233 *Off. Gaz. Pat. Office* 47 (Apr. 11, 2000) (interim rule).

The AIPA is title IV of the Intellectual Property and Communications Omnibus Reform Act of 1999 (S. 1948), and was incorporated and enacted into law as part of Public Law 106–113. The Conference Report for H.R. 3194, 106th Cong., 1st. Sess. (1999), which resulted in Public Law 106–113, does not contain any discussion (other than the incorporated language) of S. 1948. *See* H.R. Conf. Rep. No. 106–497, at 37 and 1089–174 (1999). A section-by-section analysis of S. 1948, however, was printed in the Congressional Record at the request of Senator Lott. *See* 145 Cong. Rec. S14,708–26 (1999) (daily ed. Nov. 17, 1999). This section-by-section analysis of S. 1984 provides with respect to 35 U.S.C. 132(b) that:

Section 4403 amends section 132 of the Patent Act to permit an applicant to request that an examiner continue the examination of an application following a notice of ''final'' rejection by the examiner. New section 132(a) authorizes the Director to prescribe regulations for the continued examination of an application notwithstanding a final rejection. The Director may also establish appropriate fees for continued examination proceedings, and shall provide a 50% fee reduction for small entities which qualify for such treatment under section 41(h)(1) of the Patent Act.

145 Cong. Rec. S14,718.

35 U.S.C. 132(b) does not specify the conditions and requirements for continued examination under 35 U.S.C. 132(b), but rather authorizes the Director to ''prescribe regulations to provide for the continued examination of applications for patent at the request of the applicant.'' *See* 35 U.S.C. 132(b). There is nothing in 35 U.S.C. 132(b) that precludes the Office from promulgating regulations that provide for no more than a single request for continued examination under 35 U.S.C. 132(b), or precludes the Office from requiring that any request for continued examination under 35 U.S.C. 132(b) include a showing as to why the amendment, argument or evidence could not have been previously presented.

Comment 260: A number of comments expressed the opinion that any limitation on continuations should be done legislatively by congressional action and not by the Office via rule making. Some comments argued that the Office is usurping the legislative role of Congress by modifying continuation practice via regulation, arguing Congress by inaction tacitly endorses the current practice, and that the Federal Circuit has acknowledged that limiting continuation practice is an issue best left to Congress, citing *Ricoh Co., Ltd.* v.

Nashua, 185 F.3d 884 (Fed. Cir. 1999) (nonprecedential decision). Some comments suggested that the Office should not adopt sweeping changes unless and until Congress acts to address the issues through the pending patent reform legislation, which would ensure consistency with previous legislative acts. Some comments argued that questions regarding the Office's statutory authority to make the proposed changes would likely lead to litigation and a period of uncertainty until the matter can be resolved either judicially or legislatively. Several comments also suggested that the proposed changes to continuation practice will ultimately result in an even larger backlog at the Office should the Federal Circuit hold the proposed changes to be contrary to law, arguing that applicants in the meantime are left in a state of limbo until the courts finally resolve the matter. One comment argued that the Office's stated rationale regarding the public notice function of claims is not consistent with the law and is more appropriately addressed by Congress or the courts. Two comments also suggested that rules limiting the number of continuing applications are unconstitutional because they exceed the rule making authority of the Office, thereby suggesting that the Office should have sought these changes via legislation, not rule making.

Response: The Office is not usurping the legislative role of Congress, but instead acting consistently with the authority given to the Office by Congress. Pursuant to 35 U.S.C. 2(b)(2)(A), Congress has given the Office the authority to establish regulations that ''govern the conduct of proceedings in the Office.'' By the grant of authority in 35 U.S.C. 2(b)(2)(A), ''Congress [is understood] to have 'delegated plenary authority over PTO practice' * * * to the Office.'' *Stevens* v. *Tamai*, 366 F.3d 1325, 1333, 70 U.S.P.Q.2d 1765, 1771 (Fed. Cir. 2004) (quoting *Gerritsen* v. *Shirai*, 979 F.2d 1524, 1527 n.3, 24 U.S.P.Q.2d 1912, 1915 n.3 (Fed. Cir. 1992)). Therefore, the decision to make these changes via rule making is not an unconstitutional exercise of the Office's rule making authority under 35 U.S.C. 2(b)(2).

Additionally, the provisions of § 1.78, which concern continuing applications, govern proceedings in the Office because they set forth the process by which an applicant can file a continuing application. *See Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims*, 71 FR at 50, 1302 *Off. Gaz. Pat. Office* at 1320 (noting that continuation practice is ''a procedural device that permits an applicant to amend his application after rejection and receive examination of the 'amended' (or new) application'') (citing *In re Bogese I,* 22 U.S.P.Q. 2d at 1824). Specifically, under revised § 1.78, an applicant may automatically file a first and second continuing application and then may file any number of third and subsequent continuing applications as long as the applicant justifies each filing by a showing as to why the amendment, argument or evidence sought to be entered could not have been previously presented. Furthermore, as an alternative, an applicant may choose to file an appeal when confronted with a rejection that he or she feels is improper. The changes adopted in this final rule do not impede or block an applicant's statutory right to a patent.

The Office is responsible for the granting and issuing of patents and has the authority and responsibility to establish regulations that govern the conduct of proceedings in the Office and facilitate and expedite the processing of patent applications. *See* 35 U.S.C. 2(a)(1) and (b)(2). The Office has the responsibility to take appropriate action in the near term to improve patent quality and pendency issues rather than wait for possible legislative solutions to these issues. The Office is implementing the rule changes via the rule making procedures set forth in 35 U.S.C. 2(b)(2)(A) and 5 U.S.C. 553 by publishing the proposed rules in the **Federal Register** and giving the public the opportunity for comment. Thus, the Office is acting under the broad rule making authority delegated to it by Congress. Were the Office to sit idle and not set forth procedures to govern a continuing application practice that has become problematic, the Office would be ignoring the responsibility imposed on it by Congress in 35 U.S.C. 2(b)(2)(A). Finally, inaction by Congress is not a tacit endorsement of the current continuing application practice (*see United States* v. *Price*, 361 U.S. 304, 310–11 (1960) (''nonaction by Congress affords the most dubious foundation for drawing positive inferences'')), and the Federal Circuit has cautioned against reliance upon nonprecedential decisions such as *Ricoh Co., Ltd.* v. *Nashua* (*see Symbol I*, 277 F.3d at 1368, 61 U.S.P.Q.2d at 1520, declining to consider the nonprecedential opinions *Ricoh Co., Ltd.* v. *Nashua* and *Bott* v. *Four Star Corp.*, 848 F.2d 1245 (Fed. Cir. 1988)).

Comment 261: A few comments suggested that patent reform legislation indicates that the Office does not have the authority to limit the number of continuing applications, citing *The Patent Reform Act of 2005*, H.R. 2795, 109th Cong. § 8 (2005). One comment specifically suggested that Congress' decision to remove authority to limit continuations from later patent reform legislation indicates that Congress is still debating the issue and that the Office does not have that authority. One comment suggested that Congress' intent is not to limit the number of applications that an applicant may file or the number of inventive concepts that an application may pursue, because that would stifle inventors' rights to protect their inventions.

Response: The Office notes that legislation was pending before the 109th Congress (*The Patent Reform Act of 2005*) which, as introduced on June 8, 2005, contained a provision (section 8) that expressly authorized the Office to limit certain continuing applications. The Office also notes that the House Subcommittee on Courts, the Internet, and Intellectual Property held a hearing on September 15, 2005, on a proposed substitute that did not contain such a provision. No further action, however, was taken on this legislation by the 109th Congress. The Office does not consider this course of events as constituting any evidence of ''congressional intent'' because the legislation at issue (*The Patent Reform Act of 2005*) was not voted on by either House of Congress, or even a Committee or Subcommittee of either House of Congress. Thus, this change between the legislation as introduced and as amended is at most evidence of the intent of a drafting committee. In any event, the 109th Congress did not enact changes to the provisions of 35 U.S.C. 2(b), 120, 121, 131, 132, or 365. Rather, the provisions at issue were enacted by earlier Congresses. The views of a subsequent Congress have little relevance in determining the intent of an earlier Congress. *See United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (''The views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance.''). This is especially true when the gap is as broad as the one here, spanning more than half a century (*i.e.*, 1952–2005).

Furthermore, this final rule does not stifle inventors' rights because it provides inventors with ample opportunity to present their claims and secure protection for their inventions. In fact, this final rule encourages inventors to fully disclose and fully claim their inventions promptly, on first filing. Applicants may file two continuation or continuation-in-part applications and a

request for continued examination in an application family, without any justification and may file additional continuing applications or requests for continued examination on a showing that the amendment, evidence or argument could not have been earlier presented. Finally, this final rule does not affect the patentability requirement of title 35, United States Code.

Comment 262: A few comments asserted that the doctrine of prosecution *laches*, originally set forth by the Federal Circuit in *Bogese II*, and more recently endorsed by the Federal Circuit in *Symbol II*, does not extend the Office's authority to deny benefit claims to legitimate continuing applications.

Response: The Office is not using the doctrine of prosecution *laches* as a sword to sever an applicant's priority claim. Nor are the changes adopted in this final rule an attempt to codify *Bogese II* or to combat extreme cases of prosecution *laches. See Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims*, 71 FR at 50, 1302 *Off. Gaz. Pat. Office* at 1320. Applicants and practitioners have a duty to refrain from submitting an application or other filing to cause unnecessary delay or needless increase in the cost of prosecution before the Office. *See* § 10.18(b)(2). Applicants also have a duty throughout prosecution of an application for patent to make a *bona fide* attempt to advance the application. *See Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims*, 71 FR at 49, 1302 *Off. Gaz. Pat. Office* at 1319. In *Symbol I, Symbol II*, and *Bogese II*, the Federal Circuit recognized that an applicant has a duty of good faith in advancing the prosecution of an application. The Federal Circuit likewise held that an applicant does not have the right to file an endless stream of continuing applications in order to prolong prosecution for the purpose of gaming the system. That is, applicants should not rely on an unlimited number of continuing applications to either correct deficiencies in the claims and disclosure, or to delay the conclusion of examination in a calculated manner. By requiring applicants to show why the amendment, argument, or evidence sought to be entered in a third or subsequent continuing application or second or subsequent request for continued examination could not have been presented earlier, the Office is ensuring that applicants are not unnecessarily prolonging prosecution of the application before the Office.

The possibility that, without justification, a string of continuing applications could last as long as two decades has created inefficiencies and opportunities for the delay of proceedings before the Office that, as a practical matter, can only be addressed by general rule making. Requiring that, at a given stage in the continuing application process, an applicant must make an affirmative showing of need is necessary for the Office to assure an effective examination process. Relying only on a case-by-case approach to address the most egregious cases of abuse would not be sufficient when continued examination filings (other than divisional applications) have grown from less than twelve percent of total filings in 1980 to over twenty-nine percent of total filings in fiscal year 2006. The Federal Circuit specifically indicated in *Bogese II* that the Office has the inherent authority to set reasonable deadlines and requirements for the prosecution of patent applications. *See Bogese II*, 303 F.3d at 1368 n.6, 64 U.S.P.Q.2d at 1452 n.6 (''The PTO is the administrative agency that is 'responsible for the granting and issuing of patents * * *' 5 U.S.C. 2 (2000). Like other administrative agencies, the PTO may impose reasonable deadlines and requirements on parties that appear before it. The PTO has inherent authority to govern procedure before the PTO, and that authority allows it to set reasonable deadlines and requirements for the prosecution of applications.''). Thus, consistent with the Office's inherent authority to set reasonable deadlines and requirements for the prosecution of applications, and to improve the effectiveness of the patent examination process, the Office is revising the rules of practice to require that an applicant make an affirmative justification for a third or subsequent continuing application or second or subsequent request for continued examination.

Comment 263: Two comments argued that the proposed rules prevent an applicant from filing even a single continuation application of an application in which a request for continued examination was previously filed, thereby eliminating access to the benefits conferred by 35 U.S.C. 120.

Response: The Office has modified the proposed changes such that an applicant is permitted under this final rule to file a first and second continuation application or continuation-in-part application without any justification, and is also permitted to file a request for continued examination in any one of the initial application, the first continuing application, or the second continuing application without any justification. Thus, under § 1.78 as adopted in this final rule, an applicant may file two continuation applications without any justification, even if a request for continued examination was previously filed in the initial application.

Comment 264: Several comments suggested that the definition of a ''divisional application,'' as specified in proposed § 1.78, is inconsistent with 35 U.S.C. 121 because, under proposed § 1.78, a divisional application is limited to only one application, whereas 35 U.S.C. 121 permits applicants to file a divisional application for each invention restricted out. Another comment suggested that 35 U.S.C. 121 permits applications that are both a divisional application and a continuation-in-part application and any rule to the contrary is void.

Response: This final rule defines a ''divisional application'' as an application ''that discloses and claims only an invention or inventions that were disclosed and claimed in a prior-filed application, but were subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121 in the prior-filed application and not elected for examination and not examined in any prior-filed application.'' *See* § 1.78(a)(2). This definition is consistent with 35 U.S.C. 121, which states that the divisional application resulting from a restriction requirement is ''entitled to the benefit of the filing date of the original application,'' where the ''original application'' within the context of 35 U.S.C. 121 is the application from which the divisional application has been restricted. Additionally, §§ 1.78(a)(2) and (d)(1)(ii) permit there to be as many divisional applications as there are inventions restricted out of the prior-filed application. Therefore, the changes adopted in this final rule allow an applicant to file a plurality of divisional applications resulting from a restriction requirement in the prior-filed application so that the applicant may obtain examination of the claims that were withdrawn from consideration in the prior-filed application due to the requirement for restriction. Section 1.78(d)(1)(ii) as adopted in this final rule also does not require that any divisional application be filed during the pendency of a single prior-filed application, but permits a divisional application to be filed as long as it meets the copendency requirement of 35 U.S.C. 120. Therefore, the definition of divisional application set forth in

§ 1.78(a)(2) is consistent with 35 U.S.C. 121.

This final rule also permits an applicant to file an application that is in substance both a divisional application and a continuation-in-part application. Specifically, § 1.78(d)(1)(i) as adopted in this final rule permits an applicant to file an application directed both to an invention that was disclosed and claimed, but not elected for examination, in a prior-filed application, and an invention or subject matter that was not described or claimed in the prior-filed application. Such an application would be subject to the conditions applicable to other applications that disclose subject matter that was not disclosed in the prior-filed application (*i.e.*, the conditions applicable to continuation-in-part applications). This is, because such application is not limited to inventions that were subject to a requirement for restriction by the Office in the prior-filed application, but instead includes subject matter not disclosed in the prior-filed application and thus was not subject to any requirement for restriction by the Office in any prior-filed application, it is a continuation-in-part application rather than a divisional application. The provisions of § 1.78(d)(1)(ii) apply to divisional applications that disclose and claim only an invention or inventions that were disclosed and claimed in a prior-filed application, but were subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121 in the prior-filed application and not elected for examination and not examined in any prior-filed application.

Comment 265: A number of comments argued that requiring an applicant to designate a limited number of (ten) representative claims for examination is contrary to statute, specifically, 35 U.S.C. 131 and 112, as well as contrary to *In re Wakefield*, 422 F.2d 897, 164 U.S.P.Q. 636 (C.C.P.A. 1970), because the rules limit an applicant's ability to claim the full scope of his or her invention and that it is the applicant, not the Office, who should determine the proper number of claims that particularly point out and distinctly claim the subject matter that applicants regard as their invention. Two comments argued that the courts have not recognized any statutory authority for rejecting claims as being ''unnecessary,'' citing *Wakefield* where the court held that the forty claims presented in the application at issue were not unduly multiplied. One comment also argued that Congress intended for each claim to be examined on the merits when it enacted 35 U.S.C. 112, ¶ 2, citing *In re Weber*, 580 F.2d 455, 198 U.S.P.Q. 328 (C.C.P.A. 1978), and one comment suggested that limiting the number of claims to be examined is contrary to 35 U.S.C. 131 because the invention is defined by all of the claims. A few comments suggested that the Office has a duty to examine all of the claims in a patent application when the applicant has paid the search, examination, and claim fees because Congress has authorized dependent claims and specified charges for those claims, and the Office is required to examine all claims, not just the designated ones. A number of comments argued that the Office lacks the statutory authority under 35 U.S.C. 102, 103, 131, and 132 to presume that claims are patentably indistinct by requiring the applicant to designate representative claims from among copending, related applications. Finally, one comment argued that the patent statutes do not permit the Director to examine part of an application or less than the whole invention, and that the Director does not have statutory authority under 35 U.S.C. 2(b)(2) or 112, ¶ 2, to cause an application to be examined only if it does not result in too much work for the examiner, and then if it does, to shift the burden to the applicant to do the search and the examination.

Response: The Office notes the concerns expressed by the public comment concerning the proposed ''representative claims'' examination approach. The Office also recognizes numerous comments suggested a claim threshold in place of representative claims. The Office took these comments into consideration and is not implementing a ''representative claims'' examination approach. Instead, this final rule provides that if the number of independent claims is greater than five or the number of total claims is greater than twenty-five (a strategy based upon whether an application contains more than a given number of independent and total claims), the applicant must provide additional information about the claims to the Office in an examination support document to enable the Office to efficiently and effectively examine the application.

Thus, the changes adopted in this final rule do not limit the number of claims that will be examined in an application because an applicant is always free to file as many claims as necessary to adequately protect the invention provided that applicant files an examination support document before the first Office action on the merits of the application. This final rule simply provides that an applicant who puts a disproportionate burden on examination by presenting more than five independent claims or twenty-five total claims must provide additional information to the Office to facilitate effective examination of the application. The Office, in turn, will ensure that every claim submitted in an application is examined prior to the issuance of a patent. Neither 35 U.S.C. 112 nor 131 provides that an applicant has an unfettered right to submit an unlimited number of claims. In contrast to *Wakefield*, where the Office declined to examine certain claims due to undue multiplicity, the changes adopted in this final rule do not limit the number of claims that will be examined in an application because an applicant is always free to file as many claims as necessary to adequately protect the invention.

While this final rule does not implement a ''representative claims'' examination approach, that proposal approach was simply a mechanism to focus the examination process and in no way impacted the merits of the examination. Even under a ''representative claims'' approach, the Office would examine and determine the patentability for every claim in an application before issuing a patent on the application. Thus, a ''representative claims'' approach would have altered the examination process (*i.e.*, determining when examination of certain claims takes place), but would not have changed the merits requirements of examination (*i.e.*, the statutory standards of patentability).

Comment 266: A number of comments suggested that the rationale presented in the Claims Proposed Rule is contrary to 35 U.S.C. 2(b), 102, 131 and 132, in that the Office is responsible for granting and issuing patents. These comments stated that the examiner bears the initial burden of presenting a *prima facie* case of unpatentability, that the search is not the duty of the applicant but rather is the Office's responsibility under 35 U.S.C. 131, and the rules are inconsistent with the new fee structure which contemplates filing of additional claims with higher fees. A few comments suggested that the examination support document requirement improperly shifts the burden of assessing patentability to an applicant when that burden resides with the Office in the first instance under 35 U.S.C. 102. A few comments asserted that requiring an applicant to submit an examination support document constitutes an abdication of an inherently governmental function,

moves the United States one step closer to a registration system, and places an affirmative duty on an applicant to perform searches, ultimately exposing the applicant to a greater risk of an inequitable conduct challenge.

Response: The changes adopted in this final rule do not mandate the submission of an examination support document. That is, an examination support document is only required if an applicant chooses to present more than five independent claims or more than twenty-five total claims for examination in an application. If an applicant will not present more than five independent claims and no more than twenty-five total claims for examination in any particular application, an examination support document is not required.

The requirement for submission of an examination support document is not an abdication of the examination function, or a shifting of the burden to applicant to make a *prima facie* case of entitlement to a patent. The examination support document simply requires the applicant to provide additional information to the Office so that the Office may more effectively conduct a substantive examination of the application. The Office will examine and determine patentability for every claim in an application before issuing a patent.

Comment 267: A few comments stated that the examination support document requirement transfers the costs of examination to applicants when applicants already pay filing fees.

Response: The changes to § 1.75(b) do not impose any additional Office fees on the applicant. The changes to § 1.75(b) may increase costs for an applicant who presents more than five independent claims or twenty-five total claims in an application. The Office, however, considers it appropriate for applicants who place a disproportionate burden on examination by presenting more than five independent claims or twenty-five total claims to bear these additional costs to facilitate effective examination of the application. In any event, the Office's actual cost of examining an application for patent far exceeds the ''filing fees'' (*i.e.*, the filing, search, examination, excess claims, and application size fees) charged to applicant. *See United States Patent and Trademark Office Performance and Accountability Report Fiscal Year 2005* at 23 (2005) (Patent Efficiency Table).

Comment 268: Several comments objected to the rebuttable presumption in § 1.78(f)(2) as being contrary to the judicial precedent in other areas of patent law such as obviousness and enablement. One comment suggested that the patentably indistinct presumption is contrary to 35 U.S.C. 101, which allows a ''patent on an invention.'' One comment objected to the rebuttable presumption as being contrary to the patent statute that states in part that ''a person is entitled to a patent unless * * *.'' The comment suggests that these words in the patent statute evidence that the burden is on the Office to establish a *prima facie* case of unpatentability. A number of comments stated that as part of its statutory duty to determine patentability, the Office has the burden to determine patentable distinctness, and even under the conditions of § 1.78(f)(2), it is improper to shift that burden to applicants. Further, some of the comments argued that the patentably indistinct presumption is contrary to case law because the Federal Circuit has repeatedly held that the burden of showing that the claims recited in copending, related applications are patentably indistinct rests with the Office, citing *In re Kaplan*, 789 F.2d 1574, 229 U.S.P.Q. 678 (Fed. Cir. 1986); *In re Longi*, 759 F.2d 887, 225 U.S.P.Q. 645 (Fed. Cir. 1985); *In re Epstein*, 32 F.3d 1559, 31 U.S.P.Q.2d 1817 (Fed. Cir. 1994); *In re Oetiker*, 977 F.2d 1443, 24 U.S.P.Q.2d 1443 (Fed. Cir. 1992); and *In re Piasecki*, 745 F.2d 1468, 223 U.S.P.Q. 785 (Fed. Cir. 1984).

Response: The presumption of patentably indistinct claims appearing in multiple applications as set forth in § 1.78(f)(2) of this final rule is not contrary to the cited statutes or case law. Even if the applicant shows that the claims in question are patentably distinct from each other, it does not mean that the claims are also patentable over the prior art. That is, the rebuttable presumption is not a merits determination of patentability. It is simply a procedural tool requiring the applicant to help focus and consolidate the examination process.

When the Office is faced with multiple applications containing overlapping subject matter, it is in the best interest of the applicant, the Office, and the public to ensure that patentably indistinct claims are identified early in the examination process. The applicant is responsible for drafting the application, including the claims, and is in the best position to identify indistinct claims spanning across multiple applications so that they can be consolidated in a single application, or so that the Office will at least be alerted to evaluate them for double patenting. Further, requiring the applicant to ferret out which claims are indistinct from each other is procedural in nature and assists the Office with processing multiple related applications, but should not be confused with a patentability determination on the merits. Such a procedural requirement is not contrary to statute or case law, but is fully within the Office's authority to regulate the procedure of examination.

Comment 269: One comment suggested that 35 U.S.C. 116 provides for the filing of continuation applications and the Office does not have the authority to make changes.

Response: 35 U.S.C. 116 provides for joint inventorship (35 U.S.C. 116, ¶ 1), application for patent by the remaining inventors in the absence of a joint inventor (35 U.S.C. 116, ¶ 2), and correction of inventorship in an application for patent (35 U.S.C. 116, ¶ 3). 35 U.S.C. 116 does not pertain to continuing applications.

Comment 270: One comment suggested that the changes to § 1.114 violate 35 U.S.C. 133 because the Office would be assuming authority to hold an application ''abandoned'' even when a *bona fide* reply was timely filed.

Response: 35 U.S.C. 133 provides that: ''[u]pon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Director in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Director that such delay was unavoidable.'' An applicant's reply in prosecuting an application under a final Office action is limited to either appealing in the case of rejection of any claim (§ 41.31 of this title), or amending the claims as specified in § 1.114 or 1.116. *See* § 1.113(a). The admission of, or refusal to admit, any amendment after final rejection (§ 1.116) will not operate to save the application from abandonment. *See* § 1.135(b). Therefore, a reply to a final Office action other than an appeal, an amendment after final (§ 1.116) that places the application in condition for allowance, or a request for continued examination in compliance with § 1.114 (including the requirement that any second or subsequent request for continued examination be accompanied by a grantable petition under § 1.114(g)) is not a *bona fide* reply to the final Office action.

Comment 271: A few comments suggested that the Office has a duty to examine all of the claims in a patent application when the applicant has paid the search, examination, and claim fees. The comments also argued that because Congress has authorized dependent claims and specified charges for those

claims, the Office is required to examine all claims, not just the designated ones. One comment also argued that the recently revised fee structure was put in place based on an allocation of resources for search workload on the examiner and therefore the Office is obligated to perform the search and cannot shift the burden to the applicant.

Response: The Office recognizes the concern expressed in the public comments that the ''representative claims'' examination approach could be perceived as allowing claims to be issued that had not been fully examined. The Office is not adopting the ''representative claims'' examination approach in this final rule. This final rule instead provides that an applicant who puts a disproportionate burden on examination by presenting more than five independent claims or twenty-five total claims must provide an examination support document to the Office before the first Office action on the merits to facilitate effective examination of the application. An applicant who presents five or fewer independent claims and twenty-five or fewer total claims need not provide an examination support document or other additional information to the Office. In either situation, the Office will ensure that every claim submitted in an application is examined prior to the issuance of a patent.

Further, neither the excess claim fees nor the search fee is directly proportional to actual agency costs. The fee provisions are not a restriction on the agency's ability to promulgate reasonable regulations governing the application process.

Comment 272: A few comments stated that the rules are arbitrary, capricious, and represent an overly aggressive interpretation of statutes, are beyond the power of the Office permitted under 35 U.S.C. 2(b)(2), expose the Office to legal action under 5 U.S.C. 706(2)(c), and may require the Office to reimburse attorney fees under the Equal Access to Justice Act.

Response: The changes adopted in this final rule are not arbitrary, capricious, an overly aggressive interpretation of the patent statute, or beyond the power of the Office rule making authority under 35 U.S.C. 2(b)(2) for the reasons previously discussed in detail. Concisely put, the Office considers the changes being adopted in this final rule to be an appropriate exercise of its rulemaking authority under 35 U.S.C. 2(b)(2). *See, e.g., Lacavera* v. *Dudas,* 441 F.3d 1380, 77 U.S.P.Q.2d 1955 (Fed. Cir. 2006), *Star Fruits S.N.C.* v. *United States,* 393 F.3d 1277, 73 U.S.P.Q.2d 1409 (Fed. Cir. 2005), and *Arnold P'ship* v. *Dudas,* 362 F.3d 1338, 70 U.S.P.Q.2d 1311 (Fed. Cir. 2004).

J. Changes to Internal Practice

Comment 273: A number of comments expressed support for the elimination of the first Office action final practice, and one comment encouraged the Office to adopt a practice of no first action final rejection in any continuing application where the factual record has changed. A number of comments, however, stated that a first action final may be appropriate where no effort has been made to advance prosecution, *e.g.*, by adding to the factual record with additional evidence or amendments to the claims. One comment supported developing rules whereby an applicant's failure to prosecute could result in the close of prosecution unless adequate and sustained progress is being made in the application.

Response: This proposed change has not been adopted. As discussed previously, this final rule, however, provides that an applicant may file two continuing applications plus a request for continued examination in any one of the initial application or two continuing applications (rather than only one continuing application or request for continued examination as proposed) without any showing. Therefore, the Office is retaining its first action final rejection practice.

Comment 274: Several comments recommended that the Office develop procedures whereby an Office action could not be made final until the examiner was applying the exact same rejection as in the previous Office action, and/or to encourage the Office to issue non-final second Office actions. Several comments suggested reforming examination procedures so that the examiner does not issue a final rejection as long as prosecution is advancing.

Response: The practice suggested by the comments would unduly prolong prosecution, which is counter to the Office's goal for reducing pendency. Thus, the Office and the applicants need to be efficient to reduce the backlog of applications and most importantly, to meet the public notice function of patent claims as quickly as possible. Further, as one comment recognized, a practice under which an Office action could not be made final until the examiner was applying the exact same rejection would result in an applicant being able to avoid a final Office action by continually amending the claims.

Comment 275: A number of comments proposed that the Office permit amendments after final as matter of right, and assess a modest fee for the added examination burden. Most of these comments are in the context of a graduated credit system for continuation filings, with more credit being given during the first application and fewer ''counts'' or less time given in subsequent continuations. Several comments proposed that applicants should be permitted to respond to any new ground of rejection made in the final Office action without having to file a continuation application. Several comments suggested that the examiner should not make an Office action final whenever new art is applied, and one comment suggested an examiner must explain why the new art could not have been located during the first search.

Response: To permit entry of amendments after final as a matter of right would unduly delay prosecution. An applicant may file an amendment to place the application in condition for allowance or in better form for consideration on appeal under § 1.116. Furthermore, a new ground of rejection is only permitted in a final Office action under the limited circumstances. As discussed previously, in this final rule, the Office is revising second action final practice to provide that a second or any subsequent Office action on the merits may be made final, except when the Office action contains a new ground of rejection that is not: (1) Necessitated by applicant's amendment of the claims, including amendment of a claim to eliminate unpatentable alternatives; (2) necessitated by applicant's providing a showing that a claim element that does not use the phrase ''means for'' or ''step for'' is written as a function to be performed and does not otherwise preclude application of 35 U.S.C. 112, ¶ 6; (3) based on information submitted in an information disclosure statement filed during the period set forth in § 1.97(c) with the fee set forth in § 1.17(p); (4) based upon double patenting (statutory or obviousness-type double patenting); or (5) necessitated by applicant's identification of the claim or claims in a continuation-in-part application for which the subject matter is disclosed in the manner provided by 35 U.S.C. 112, ¶ 1, in the prior-filed application. Since the applicant is often adding limitations that raise new issues that would require further consideration and/or search, it has long been the Office practice to make the action final at this point. Allowing an expanded practice in this area would undermine the goal of reducing patent pendency.

Comment 276: A number of comments suggested providing examiners with additional time to consider replies after final rejection and

to provide a new full evaluation of the content of those replies.

Response: No changes in after final practice are planned at this time. Under current practice, examiners consider any requests for reconsideration submitted after final rejection in accordance with § 1.116.

Comment 277: A number of comments suggested that the Office require a patentability review conference with others, similar to the pre-appeal conference proceeding, prior to an Office action being made final, in order to address the problem of improper final Office actions and to expedite indication of allowable subject matter. One comment noted that the statistics show that less than half of applications that had a pre-appeal conference are going forward to appeal and indicate that many improper finals are being made. One comment stated that a supervisor should review all first Office actions in a second request for continued examination to determine if prosecution is proper.

Response: The Office recognizes that it is important to make sure the final Office action is proper. The pre-appeal brief conference program is still an ongoing pilot program. The results of that program will help to determine whether the Office replaces it with, or adds, a ''pre-final conference'' as suggested. Further, the pre-appeal brief conference program is designed for situations in which the applicant believes that the rejections of record are clearly not proper (and is not designed for ''close cases''). *See New Pre-Appeal Brief Conference Program,* 1296 *Off. Gaz. Pat. Office* at 67. Thus, data collected during pre-appeal brief conferences (*e.g.*, with respect to re-opening rates) cannot validly be extended to all applications.

In addition, the Office has an ongoing ''in process review'' of applications to identify problems and trends. Each Technology Center develops ongoing action plans and training each year to address the problems/trends found via the ''in process reviews'' and the pre-appeal brief conferences. Additionally, the Office will reinforce, during the training on this final rule, issues such as proper final rejection practice, the importance of making proper final rejections, and the importance of indicating allowable subject matter at the earliest possible time. Furthermore, if an applicant believes a rejection was improperly made final, applicant may seek review by filing a petition under § 1.181.

Comment 278: A number of comments stated that the Office should continue and expand ongoing efforts to hire and retain patent examiners. One comment suggested that ''[h]iring should be the centerpiece of the Office's strategy.'' A number of comments stated that the Office has not provided sufficient evidence to show why the Office could not solve the backlog problem by hiring more examiners. One comment argued that the Office should have sufficient funding to pay for additional resources (*e.g.*, more examiners) needed to examine the backlog of applications in view of the recent increase in patent fees. One comment stated that the Office has not supported its assertion that it cannot hire enough examiners to reduce pendency. Another comment stated that the Office should seriously consider hiring retired or former examiners or patent practitioners to be trainers or to assist examiners. In particular, one comment stated retired examiners should be hired to work on specific big applications to reduce the burden on examiners. Another comment stated the Office should hire ''generalists'' instead of ''ultra specialized advanced degree scientists and engineers'' to obtain more flexibility in the workforce.

Response: Hiring additional examiners remains an important component of the Office's overall plan to reduce pendency of patent applications. The Office is committed to the hiring of as many examiners as resources permit. The ability to hire qualified new examiners is affected by many components, such as budget, the economy, the availability of scientists and engineers, and the ability to absorb and train new employees. Furthermore, it will take many years to develop an experienced patent examining corps of sufficient size to address the growing backlog of unexamined patent applications. The Office recognizes that hiring alone will not reduce the backlog of pending applications in the near future. As a result, the Office is actively seeking ways for retaining more employees, such as retention bonuses. The Office continues to become more efficient by implementing many initiatives, such as the current regulatory changes, to reduce pendency.

The Office plans to hire 1,200 examiners each year for the next five fiscal years. *See United States Patent and Trademark Office Fiscal Year 2008 President's Budget* at 20–21 (2007). This will result in the number of patent examiners increasing from 4,779 at the end of fiscal year 2006 to 7,118 at the end of fiscal year 2012 (accounting for attrition). *See id.* Even with this increase in the size of the Patent Examining Corps, the Office anticipates that average pendency to first Office action will increase from 22.6 months in fiscal year 2006 to 28.9 months in fiscal year 2012, and that average total pendency will increase from 31.1 months in fiscal year 2006 to 38.6 months in fiscal year 2012. *See id.*

Comment 279: A number of comments stated that the current examiners' production system in the Office encourages the filing of continuing applications and requests for continued examination. In addition, several comments stated that the production system also encourages more restrictions and unwillingness to consider any after-final amendment. The comments suggested several alternative accounting schemes to encourage examiners to examine more non-continuing applications and provide more thorough first Office actions, including giving less credit for work done in continuation applications, divisional applications and requests for continued examination, giving examiners more credit for first Office actions as opposed to disposals, giving examiners credit for claims disposed as opposed to applications disposed, or giving examiners credit based on numerous application factors such as specification length, technology complexity, number and complexity of the claims, and pertinence of prior art submitted. One comment suggested only having team examination and production goals. One comment suggested the Office should use a performance system, such as the system recently established by the Department of Defense. One comment suggested that examiners should not have any time constraints. Another comment stated the hours per disposal should be decreased to improve production. Several comments argued that timesaving for examiners needs to be tied with an agreement with the Patent Examining Corps to increase productivity and decrease pendency due to the amount of time saved in light of the proposed changes to the examination of claims. One comment argued the rule changes will likely result in less time for the examiners and it is unclear how this will result in more thorough and reliable examination. The comments strongly suggested that any changes to the examiners' production system should be transparent to the public to install public confidence in such changes.

Response: The Office expects to gain a more focused quality examination as a result of these rule changes. It is expected that these rules will make the exchange between the examiner and applicants more efficient and effective. Issued patents will be examined more

thoroughly, making them easier to evaluate, enforce and litigate. Furthermore, the patents will issue sooner, giving the public a clearer understanding of what is patented. In any event, the Office is in the process of reassessing patent examiner production goals, appraisal plans, and award systems. Absent significant changes to the patent examination process, the Office does not consider it reasonable to expect that changes to patent examiner production goals, appraisal plans, and award systems alone will be sufficient to address the growing backlog of unexamined patent applications while maintaining a sufficient level of quality.

Comment 280: Several comments stated that examiners should be given more production time for certain situations, such as for applications with more than twenty claims, for consideration of over fifteen to twenty cited references and for responding to after-final amendments. One comment stated that primary examiners should be given more time to review a junior examiner's work.

Response: Changes to patent examiner production goals are beyond the scope of the proposed changes to the rules of practice. Therefore, whether examiners should be given more production time for certain situations is not discussed in this final rule. An examination support document in compliance with § 1.265 will assist the examiner in the examination of an application that contains more than five independent claims or more than twenty-five total claims, resulting in a more effective and focused examination. For example, citing the most relevant references and identifying all of the limitations of each of the claims that are disclosed by the references will help the examiner to consider the most relevant prior art more thoroughly. The Office already provides time for training junior examiners and reviewing their work. Furthermore, a sampling of ''in process reviews'' for each Technology Center helps identify training needs in a focused manner. The Office of Patent Training is thoroughly preparing each new examiner in proper practice and procedure with access to a dedicated trainer for the first eight months; after that, the examiner is placed in a traditional setting with proper supervision and review of his or her work.

Comment 281: A number of comments suggested that the Office could retain more examiners by increasing compensation and offering better working conditions. A number of comments also suggested that if it is necessary to increase examiner salaries, changes to Title 5 of the United States Code should be requested by the Office. One comment stated that the salary for starting examiners should also be doubled. One comment stated that the Office should seek authority to increase salaries through either existing OPM processes or through restructuring to a quasi-government corporation. One comment suggested charging fees for responding to an Office action and for interviews, and using this money to hire more examiners and pay for retention initiatives. Another comment suggested establishing a salary increase when an examiner passes a test at a number of pay grades. One comment stated that a bonus system should be established. Another comment has suggested increased salary levels for art units with high backlogs. Several comments stated that increased filing fees should go towards increased salary for examiners. One comment explained that the Office could give examiners better working conditions by placing less stress on the more experienced examiners. Another comment suggested the Office should explore more flexible work schedules, including part-time arrangements.

Response: The Office already provides many first rate benefits to its employees. The Office is at the forefront in government for teleworking opportunities for the staff. The Office has also adopted a variety of creative work schedules such as: Maxi-flex, compressed and alternate work schedules, part-time and flex-time for all employees. Additionally, the Office offers paid overtime, compensatory time and credit hours programs. The Office has transitioned into a paperless environment and deployed state-of-the art technology to its employees. The Office has relocated to a new campus, and provides amenities such as a first class child-care facility, a state-of-the-art fitness center and a cafeteria.

The Office already provides a robust bonus system for examiners that enables one to earn up to ten percent of one's salary per year in bonus compensation. Examiners are already on a special pay scale, with the most recent increase of seven percent for all patent professionals, granted in December 2006. In addition, an examiner receives regular salary increases upon promotions to increasing levels of responsibilities.

Comment 282: Several comments stated the Office should authorize overtime to work on the backlogs. One comment specifically suggested that overtime pay should be 125 percent of the current pay rate, and should only be available to work on first Office actions on the merits.

Response: Examiners who have been certified as capable of working independently by their supervisors are currently authorized to work overtime. The overtime pay rate is set by statute. *See* 5 U.S.C. 5542. The Office has recently begun distributing laptop computers to examiners to further encourage overtime.

Comment 283: A number of comments encouraged the Office to consider establishing satellite offices in different areas in the United States to assist in recruiting and retaining of examiners. The comments further explained that satellite offices could tap into a greater pool of potential new examiners, as there would be multiple working locations. In addition, the comments stated that satellite offices could specialize in certain technologies that are prevalent in the area of the satellite office. Another comment pointed out that a satellite office would facilitate more personal interviews, which would expedite prosecution. The comments also stated that salary structures could be adjusted depending on the cost of living within the area surrounding the satellite office.

Response: The Office is considering establishing satellite offices as reflected in the Office's 2007–2012 Strategic Plan.

Comment 284: A number of comments stated that the Office should increase training requirements for examiners in order to improve patent quality and retain more examiners. One comment suggested using any increase in patent fees to provide training. Several comments offered assistance in providing technical and legal training to the examiners. One comment suggested that examiners should receive more training on making proper rejections under 35 U.S.C. 103, and also suggested testing examiners periodically. Another comment stated that examiners' prior art searching is poor, and that the Office is not making efforts to stem poor rejections, which lead to rework. One comment suggested that the Office should train examiners using self-training programs utilizing videos. Another comment stated that training should be outsourced. Several other comments suggested training potential new examiners by creating a patent examination curriculum for universities.

Response: The Office has redesigned the training program of new examiners and increased technical and legal training for other examiners and patent professionals. Currently, the first classes of new hires have completed their training in the new Patent Training Academy program, wherein examiners

go through eight months of intensive training prior to being assigned to an art unit. Mirroring a collegiate environment, examiners are trained in a variety of disciplines, including technology skills, legal skills, and procedural requirements.

For non-first year examiners, the Office has expanded training to include patent law and evidence. Each employee must attend a specified number of training hours in a variety of pertinent legal and technical subjects. Additionally, the Office also offers a Law School Tuition Assistance Program (LSTAP) to qualified employees as an extension of the Office's internal training program. Reimbursements for university technical training courses related to the technology being examined are also available for employees. Creating a partnership between the Office and interested universities to offer an undergraduate course in patent law and examination practice to highlight career opportunities in the intellectual property field is also being investigated.

Comment 285: A number of comments stated that the Office did not address improvements in the internal examination process. One comment alleged that the Office did not consider any changes to address examiners' errors that extend the prosecution. Several comments suggested that the Office should improve the examination process before implementing the rule changes.

Response: The Office is implementing many initiatives including improvements in the internal examination process as well as the rule changes in this final rule. To realize the effectiveness of these initiatives in the near term, the Office is implementing many of them simultaneously. The Office seeks ways to improve internal examination processes by providing training created as a result of internal reviews that identify areas where challenges exist.

Comment 286: Several comments encouraged the Office to take additional measures to improve the quality and clarity of Office actions, in particular first Office actions. One comment stated that examiners should use ''plain English'' in explaining the rationale behind rejections.

Response: The Office recognizes that the quality of Office actions is of great importance. There are several quality initiatives in place to insure that quality continues to improve. The new Patent Training Academy emphasizes the importance of high quality Office actions. Current interview practice encourages the use of interviews to clarify the examiner's position, as necessary. The Office also has writing classes available to employees.

Comment 287: Several comments stated that examiners should be encouraged to allow an application, or to point out allowable subject matter, in the first Office action, if appropriate. Several comments also suggested requiring examiners to propose amendments when prosecution reaches a certain point, such as the filing of a second request for continued examination.

Response: The Office has previously adopted, in part, these comments. It is current Office policy to encourage examiners to suggest allowable subject matter as early as possible in the prosecution in order to achieve the Office's goal of compact prosecution. It has long been a standard in the examiner's performance appraisal plan, and it is indeed an indicia of outstanding performance, to indicate allowable subject matter at the earliest time possible. (*See also*, *e.g.*, MPEP § 707.07(j)(III) EARLY ALLOWANCE OF CLAIMS, ''Where the examiner is satisfied that the prior art has been fully developed and some of the claims are clearly allowable, the allowance of such claims should not be delayed''; MPEP § 2106 (II), ''Whenever practicable, Office personnel should indicate how rejections may be overcome and how problems may be resolved * * * .''; and MPEP § 2164.04, ''In other words, the examiner should always look for enabled, allowable subject matter and communicate to applicant what that subject matter is at the earliest point possible in the prosecution of the application.'').

Comment 288: There were a number of comments pertaining to the quality review of examiners' work product. A number of comments stated that the Office should limit its ''second-pair-of-eyes'' review to the work of examiners that have been identified as needing more review in their annual performance appraisal. The comment further explained that the Office should focus more intensive review on an examiner's work if it is the principal cause for the failure to close prosecution on an invention (*e.g.*, by making poor rejections). Another comment suggested eliminating the review of allowed applications and having the ''review'' examiners work on the backlog. One comment stated that supervisors should review all Office actions for examiners that have fewer than three years experience unless they have passed a proficiency examination. Another comment stated the review should spot factual issues instead of just legal issues to better improve Office action quality.

Response: The Office already has focused ''second pair of eyes'' reviews only for those examiners and/or technology areas where it has been determined necessary. Additionally, the Office has an ongoing ''in process review'' of applications to identify problems and trends. Each Technology Center develops ongoing action plans and training each year to address the problems/trends found via the ''in process reviews'' and other sources, such as the pre-appeal brief conferences. Supervisors, or their designated primary examiners, currently review all the work of examiners who do not have signatory authority. All of these reviews do encompass both factual and legal issues.

Comment 289: A number of comments stated that examiners should be encouraged or required to conduct more interviews throughout the prosecution, including preexamination interviews and after-final interviews. Several comments suggested that all interviews should include the supervisor of the examiner or a person with signatory authority. Several other comments suggested giving examiners a count, or credit, for an interview, and charging a fee for interviews. Another comment stated that examiners should be trained to give more productive interviews.

Response: Interview practice is set forth in § 1.133 and MPEP §§ 713 through 713.10. Normally, one interview after final rejection is permitted. *See* MPEP § 713.09. The Office also provides examiners extra time to conduct an interview. In June 2006, this practice was expanded to allow extra time for telephone interviews initiated by applicants or their representatives; it had previously only been available for personal (face-to-face) interviews. The Office conducted a pilot program permitting an interview before the first Office action in applications that were assigned to certain art units in Technology Center 3600. *See Notice of Pilot Program to Permit Pre-First Office Action Interview for Applications Assigned to Art Units 3624 and 3628 and Request for Comments on Pilot Programs*, 1281 *Off. Gaz. Pat. Office* 148 (Apr. 27, 2004). Section 1.133(a)(2) was amended in November of 2005 to permit an interview before the first Office action in any application if the examiner determines that such an interview would advance prosecution of the application. *See Provisions for Claiming the Benefit of a Provisional Application With a Non-English Specification and Other Miscellaneous Matters,* 70 FR at

56121, 56128, 1299 *Off. Gaz. Pat. Office* at 144, 150. As discussed previously, if the examiner, after considering the application and any examination support document, still has questions concerning the invention or how the claims define over the prior art or are patentable, the examiner may request an interview before the first Office action.

Comment 290: One comment stated that the Office should encourage the submission of more useful information disclosure statements, which contain statements of materiality and have provisions to discourage ''dumping'' of references. Such an information disclosure statement may be filed at a reduced fee amount. Another comment questioned whether the Office has considered a rule that states that duty of disclosure terminates at the close of prosecution.

Response: The Office recently published proposed changes to the information disclosure statement practice which will encourage the submission of more useful information. *See Changes To Information Disclosure Statement Requirements and Other Related Matters,* 71 FR at 38812–16, 38820–22, 1309 *Off. Gaz. Pat. Office* at 27–31, 34–36.

Comment 291: A number of comments suggested that the Office should make better use of search and examination reports from other intellectual property offices and PCT search and examination authorities. On the other hand, one comment stated that the Office should not rely on foreign office searches. Several comments further suggested separating the search and examination functions and outsourcing the search function. One comment stated that U.S. and PCT prosecution should be done at the same time.

Response: The Office recognizes the importance of leveraging the search results from other intellectual property offices. One of the specific action plans of the United States Patent and Trademark Office 21st Century Strategic Plan is to share search results with other intellectual property offices. Since the beginning of 2003, the Office, the European Patent Office and the Japan Patent Office (the Trilateral Offices) have participated in search exchange projects aimed at promoting the mutual exploitation of search results. The Office implemented the Patent Prosecution Highway pilot program in July 2006. *See Patent Prosecution Highway Pilot Program between the United States Patent and Trademark Office and the Japan Patent Office,* 1307 *Off. Gaz. Pat. Office* 61 (June 13, 2006). Under the Patent Prosecution Highway pilot program, an applicant whose claims are determined to be patentable by the Japan Patent Office may request that the corresponding application filed in the Office be advanced out of turn for examination provided certain conditions are met. The Patent Prosecution Highway pilot program allows the Office to exploit the search and examination results of the Japan Patent Office and applicants to obtain corresponding patents faster and more efficiently. Additionally, whenever the Office is designated as the International Searching Authority, both the international application and the application filed under 35 U.S.C. 111(a) are assigned to the same examiner, if possible.

Comment 292: A number of comments stated that all related applications should be assigned to the same examiner, including applications with overlapping disclosures.

Response: The Office will continue to make reasonable efforts to ensure that related applications are assigned to the same examiner, if possible. However, the Office normally assigns divisional applications to the technology area most appropriate for the claimed subject matter. In fact, this is in part why this final rule requires applicants to identify certain related applications. *See* § 1.78(f).

Comment 293: A number of comments suggested creating a new or modified accelerated examination procedure. One comment requested a procedure to permit accelerated examination for applications that enter the national stage under the Patent Cooperation Treaty. Another comment stated that accelerated examination could be available to applications containing ten or fewer representative claims. Another comment suggested allowing accelerated examination if the applicant permits an *inter partes* submission of a prior art statement and applicant provides either an examination report from either the European Patent Office or the Japan Patent Office, or pays a high fee for a special search. One comment stated high technology areas should be given examination priority. Another comment suggested requiring expedited replies in continued examination applications and not giving extensions of time under § 1.136(a). Another comment requested accelerated examination for independent inventors.

Response: The Office has long provided for advancement of examination upon granting a petition to make special. *See* § 1.102 and MPEP § 708.02. The Office also announced a revised accelerated examination procedure, and the goal is to complete examination within twelve months of the filing date of the application under this program. *See Changes to Practice for Petitions in Patent Applications To Make Special and for Accelerated Examination,* 71 FR at 36323–27, 1308 *Off. Gaz. Pat. Office* 106–09. Any applicants, including independent inventors, may participate in the revised accelerated examination program which provides an expedited reply procedure. As discussed previously, under the Patent Prosecution Highway pilot program, an applicant whose claims are determined to be patentable by the Japan Patent Office may request that the corresponding application filed in the Office be advanced out of turn for examination provided certain conditions are met.

Comment 294: Several comments suggested that examiners should strictly follow the guidance set forth in MPEP section 708 and examine applications with the oldest effective filing date first. On the other hand, several comments stated the Office should promote earlier examination of non-continuing applications by giving continuation applications a lower priority in the examination queue.

Response: The Office will continue to follow the guidance set forth in MPEP section 708 pertaining to the order of examination of applications, including that ''[e]ach examiner will give priority to that application in his or her docket, whether amended or new, which has the *oldest effective U.S. filing date.*'' An exception to this guideline is an application in which examination has been advanced pursuant to § 1.102.

Comment 295: One comment suggested examiners should not just search the claimed invention, but also subject matter that might be reasonably claimed at a later time.

Response: MPEP § 904 sets forth that ''[t]he first search should cover the invention as described and claimed, including the inventive concepts toward which the claims appear to be directed.'' Additionally, MPEP § 904.02(a) states that ''[t]he field of search extends to all probable areas relevant to the claimed subject matter and should cover the disclosed features which might reasonably be expected to be claimed.''

Comment 296: Several comments encouraged the Office to hire efficiency experts, or a task force, to find the best ways to improve the quality and efficiency of examination.

Response: The Office expects these rule changes to improve the quality and efficiency of examination. The Office will evaluate the effectiveness of the rule changes in partnership with the

Office's customers and employees as all gather experience in operating under these adjustments. The Office is currently studying all suggestions, including those in the various studies made of the Office.

Comment 297: One comment requested that the panel involved in a pre-appeal brief conference be required to provide legal and factual reasoning for the decision to both the examiner and the practitioner so as to better make the decision a teaching tool.

Response: The Pilot Pre-Appeal Brief Conference Program has been extended until further notice. *See Extension of the Pilot Pre-Appeal Brief Conference Program,* 1303 *Off. Gaz. Pat. Office* 21, (February 7, 2006) (notice). Since this program is still in the pilot phase, it would be premature to make any changes until a full evaluation of the entire program is completed. Furthermore, the purpose of this program is to provide a quick relief for applications that are clearly not in condition for appeal, so that applicant does not have to go through the expense of preparing and filing an appeal brief. Preparing a written decision of the conference would unduly delay the process.

Comment 298: Several comments stated that the Office should create an Ombudsman position to decide issues regarding examination errors by examiners.

Response: The Office has many effective mechanisms to decide issues regarding alleged ''examination errors'' by examiners. Practitioners have several options, including but not limited to, responding on the record, calling a supervisor, requesting a pre-appeal brief conference, filing a petition, and filing an appeal.

Comment 299: One comment requested a return to the appeal rules where the examiners are not able to make new grounds of rejection during appeal.

Response: The rules of practice for the appeal process were changed in 2004 to permit a new ground of rejection in an examiner's answer. *See Rules of Practice Before the Board of Patent Appeals and Interferences,* 69 FR 49960, 1286 *Off. Gaz. Pat. Office* 21 (September 7, 2004) (final rule). The approval of the appropriate Technology Center Director, or his or her designee, is needed for such a new ground of rejection, which should be rare. In response to any new ground of rejection made in an examiner's answer, appellant has the options to request that prosecution be reopened and to request that the appeal be maintained under § 41.39(b). There have been no demonstrated problems to date, thus the Office does not plan to change this practice.

Comment 300: One comment suggested accepting more ''variations'' in filings to reduce the number of non-compliant notices sent.

Response: The Office waives certain requirements set forth in § 1.121(c) and may accept certain non-compliant amendments. *See Acceptance of Certain Non-Compliant Amendments Under 37 CFR 1.121(c),* 1296 *Off. Gaz. Pat. Office* 27 (July 5, 2005). Practitioners and applicants, however, are responsible to know the laws and rules relating to prosecuting patent applications and to keep current with any changes. The Office will continue to review common problems that arise, and implement solutions as appropriate.

Comment 301: One comment requested that the Office publish, once a month, a projection of when a new application will be taken up for examination so that applicants can better manage the filing of preliminary amendments.

Response: The Office currently publishes in each issue of the *Official Gazette* the average filing date of the applications that received a first Office action during the preceding three months for each Technology Center Work Group.

Comment 302: One comment suggested that the Office should allow more documents to be filed via the Office electronic filing system. Another comment stated the Office should require electronic filing and that all prosecution be performed electronically.

Response: The Office permits applicants to file many applications, fees, and correspondence (*e.g.*, amendments and replies) electronically via the Office electronic filing system (EFS–Web) with a few exceptions (*e.g.*, Credit Card Authorization Form (PTO–2038), maintenance fees, new plant applications and color plant drawings). There are no plans to make electronic filing mandatory, although special programs (*e.g.*, accelerated examination) do require electronic filing. *See Changes to Practice for Petitions in Patent Applications To Make Special and for Accelerated Examination*, 71 FR at 36323–27, 1308 *Off. Gaz. Pat. Office* 106–09.

Comment 303: One comment proposed requiring applicants to give an opinion of the usefulness or commercial potential of the invention.

Response: The Office is not adopting the requirement that an examination support document contain a concise statement of the utility of the invention. An opinion from the applicant on the commercial potential of the invention is generally unnecessary in determining the patentability of the claimed invention. However, applicant may submit objective evidence of commercial success when applicant seeks to rebut an obviousness rejection under 35 U.S.C. 103. *See* § 1.132 and MPEP § 716.03.

Comment 304: One comment requested prioritizing the order of examination based on such factors as the economic impact and value to society, the quality of the technical description of the invention and the quality of prior art cited. The comment also suggested requiring applicants to state in their application how the invention will be distributed to the public.

Response: It would be very difficult to evaluate and assess these subjective factors for each application filed. In addition, most of this information would not be helpful in determining the patentability of the claimed invention.

Comment 305: One comment suggested creating an electronic search tool that would automatically compare the claim language to prior art and provide complete searches in under ten minutes.

Response: The Office has been evaluating tools to improve the examination practice. Although the Office is routinely seeking ways to improve automated tools, the resources needed for implementation and the applicability of the tools must be considered and weighed. Often, the application of search tools is limited to specific technologies. For example, in many biotechnology applications, the Office employs an Automated Biotechnology Sequence Search System (ABSS) to compare genetic sequences submitted with applications to a number of sequence databases. The Office's Scientific and Technical Information Center (STIC) conducts between 10,000 and 15,000 of these searches a year. Due to the number of requests and because the search runs against multiple databases, ABSS searches can be time-consuming. In other technologies, such as electrical and mechanical arts, STIC provides the option of conducting a Patent Linguistic Utility Service (PLUS) search, which runs significant words from sections of the specification against the full text of the United States Patent and United States Pre-Grant Publication databases. STIC is performing over 20,000 of these searches a year. While these searches are done quickly, limitations in key word searching are not always reliable in finding relevant prior art.

Comment 306: One comment stated that the Office should create a better

search engine so inventors can more easily perform better searches.

Response: The Office continues to explore various ways to disseminate information and improve the searching capabilities of the public. Currently, the Office allows applicants and inventors to search on-line using Patent Full-Text and Full-Page Image Databases (*http://www.uspto.gov/patft/index.html*) and works in concert with eighty-three Patent and Trademark Depository Libraries (*http://www.uspto.gov/go/ptdl/*) throughout the United States to offer the public extension research capabilities. The Office also has a library and tools at the Alexandria campus for the public to use.

Comment 307: One comment suggested that procedures for appeals and petitions should be changed to be less costly and to result in more timely decisions. One comment suggested the Office waive the notice of appeal fee and the appeal brief fee while the applicant awaits a decision on petition to invoke supervisory authority relating to a premature final rejection in an Office action.

Response: Most petition fees are set by regulation. The petition fee amounts that are set by regulation are set at an amount based upon the resources required to handle and decide the petition. *See Changes to Support Implementation of the United States Patent and Trademark Office 21st Century Strategic Plan*, 69 FR 56482, 56491–93 (Sept. 21, 2004), 1287 *Off. Gaz. Pat. Office* 67, 75–76 (Oct. 12, 2004). The notice of appeal fee and the appeal brief fee are set by statute and cannot be waived. Additionally, the appeal fees recover only a fraction of the Office cost of handling and deciding the appeal.

With respect to petitions, the Office is taking the necessary steps to minimize the backlog and to respond to petitions in a timely fashion. Within the Technology Centers, almost all petitions for relief from improper final rejections or restrictions are answered in a timely fashion. The Office is working to ensure that most of the petitions for relief from improper final rejections or restrictions are decided within four months from when they are filed, and continues to work on ways to make the process consistent across the different Technology Centers. The Office has also taken major steps to eliminate delays with the appeal process. The BPAI has radically reduced the inventory of pending appeals during the last five fiscal years.

The Office also recognizes that it is important to make sure that the finality of any final Office actions is proper. It is the Office's experience that applicants who seek review of the finality of an Office action also request review of the merits of the rejections contained in the final Office action. The propriety of the finality of an Office action is purely a question of Office practice that is wholly distinct from the merits of the rejections contained in the final Office action rejection. *See* MPEP § 706.07(c). The propriety of the finality of an Office action is properly raised in a petition under § 1.181, and is not a proper basis for an appeal or complaint to the BPAI during an appeal. *See id.* Likewise, arguments relating to the merits of the rejections contained in the final Office action rejection are properly raised in an appeal to the BPAI, and are not a proper basis for a petition under § 1.181 or for contesting the propriety of the finality of an Office action.

The rules of practice provide that the mere filing of a petition under § 1.181 will neither stay any period for reply that may be running against the application, nor act as a stay of other proceedings. *See* § 1.181(f). While the Office has put in place procedures to decide the appeals and petitions in a timely manner, the applicant is responsible to continue to prosecute the application consistent with § 1.181(f). Thus, there may be situations in which it is necessary for an applicant to file a notice of appeal to maintain the pendency of an application while a petition under § 1.181 requesting review of the finality of an Office action is being decided. The filing of a notice of appeal, however, does not moot such a petition under § 1.181, so the Office will decide a petition under § 1.181 requesting review of the finality of an Office action even if the applicant has filed a notice of appeal in the application. In such a situation, applicants should also request a pre-appeal brief conference with the filing of a notice of appeal. The pre-appeal brief conference will be conducted and the applicant will be notified of the result of the pre-appeal brief conference before the appeal brief and appeal brief fee must be filed. This should ensure that any petition under § 1.181 requesting review of the finality of an Office action is decided before the applicant must file the appeal brief and appeal brief fee. If the Office determines that the finality of the rejection was premature, the finality of the Office action will be withdrawn and any fees paid for the notice of appeal and the appeal brief can be applied to a later appeal on the same application. *See* MPEP § 1207.04.

Comment 308: Several comments stated that the Office should exercise better control over restriction practices. Several comments stated that the Office should encourage claims of different statutory classes to be filed in one application to improve examiner efficiency. One comment asserted that disposal pressures on examiners in the biotechnology area are totally unrealistic and have led to legally ridiculous restriction requirements. Several comments suggested that restriction reform is needed. Several comments suggested that the Office adopt the unity of invention standard. Several comments suggested an interim standard based on current PCT unity of invention practice should be available at the option of the applicant as an alternative to adopting unity of invention practice. Some comments expressed the opinion that current restriction practice in Technology Center 1600 (biotechnology and organic chemistry) requires applicants to file too many continuing and divisional applications. One comment expressed the opinion that current restriction practice is a result of the examiners' production system. Several comments stated that restriction is necessary to avoid abusive filing tactics by applicants seeking to circumvent the proposed regulation of continued examination filings. Several comments suggested that the Office eliminate restriction practice. Another comment stated that if proposed § 1.78(d)(1)(ii) is adopted, the Office should be bound by an initial restriction requirement and § 1.146, authorizing species restrictions, should be repealed. One comment suggested that if restriction practice must be maintained, it should be limited to applications in which two claimed inventions are literally unrelated, and all divisional applications should be examined by the same examiner.

Response: As part of the United States Patent and Trademark Office 21st Century Strategic Plan, restriction reform was studied extensively. *See Request for Comments on the Study of Changes Needed to Implement a Unity of Invention Standard in the United States*, 68 FR 27536 (May 20, 2003), 1271 Off. *Gaz. Pat. Office* 98 (June 17, 2003) (notice). A revision of the study was posted in November 2003, and the study was expanded to include four restriction reform options. *See Notice of the Availability of and Request for Comments on Green Paper Concerning Restriction Practice*, 70 FR 32761 (June 6, 2005), 1295 *Off. Gaz. Pat. Office* 146 (June 28, 2005) (notice) and the extension of the comment period announced at 70 FR 45370 (August 5,

2005) (notice). There were sixteen responders, and there was no consensus as to which of the four options to adopt. In addition, the restriction reform study concluded that a change to unity of invention under PCT Rule 13 under any of the four restriction reform options would significantly increase patent pendency. Thus, the Office is maintaining its current practices with respect to requirements for restriction under 35 U.S.C. 121 or unity of invention under PCT Rule 13.

Technology Center 1600 (biotechnology and organic chemistry) has implemented a comprehensive restriction training plan. This includes training examiners on proper restriction practices, including proper grouping of claims and rationale supporting the restriction requirement, using Art Unit and Work Group specific examples. Training has been ongoing, using materials that are published on the Office's Internet Web site. Feedback from the training to date has been incorporated into the initial patent examining training given to new hires.

Although the Office will continue to assign divisional applications to the technology area most appropriate for the claimed subject matter, they are not necessarily assigned to the same examiner.

Comment 309: Several comments asserted that restriction practice will increase as a result of the rule changes. One comment suggested that the Office needs to coordinate any changes in continuation practice with restriction reform. Another comment expressed the opinion that the proposed rule changes will exacerbate problems with the current restriction practice. One comment suggested that divisional application filings would likely drop in view of designating ten representative claims because examiners usually do not bother to make restriction requirements when they only have a few claims to examine. Another comment stated that an increase in restrictions is a desirable alternative to the rule changes. Another comment argued that current restriction practice adequately limits the claims for examination. The rules would complicate restriction practice resulting in multiple exchanges between the examiner and applicant when designated claims are subject to restriction.

Response: The Office is not adopting the ''representative claims'' examination approach in this final rule. As noted previously, the Office received comments that restrictions would increase and comments that restrictions would decrease as a result of the changes to the rules. The changes being adopted in this final rule do not encourage more or fewer restrictions. Thus, the Office is maintaining its current practices with respect to requirements for restriction under 35 U.S.C. 121 or unity of invention under PCT Rule 13. *See* §§ 1.141, 1.142, and 1.499.

Comment 310: One comment suggested that the Office require all restriction requirements to be made within six months of filing, with no excess claim fees charge until after that period. Another comment stated that excess claims fees should only be determined after any restriction requirement has been made.

Response: In fiscal year 2006, the average pendency to first Office action was 22.6 months for the entire Patent Examining Corps. Therefore, the Office's current first Office action pendency does not allow for an examination of the application to determine whether restriction is appropriate within six months of filing in most applications. Excess claims fees are required by the statutory requirement ''on filing or on presentation at any other time.'' *See* 35 U.S.C. 41(a)(2). In response to a restriction requirement, applicant may file an amendment canceling the non-elected claims and request a refund of any excess claims fees paid on or after December 8, 2004, for the non-elected claims, if the amendment is filed before an examination on the merits has been made of the application. *See* § 1.117.

K. Suggestions Relating to Legislative Changes

Comment 311: A number of comments suggested that Congress should adequately fund the Office by making the United States Patent and Trademark Fee Modernization Act of 2005 (H.R. 2791, 109th Cong. (2005)) permanent and eliminating fee diversion. One comment also suggested that Congress provide additional funds (outside of fees collected) to the Office. A number of comments suggested that the fees for continued examination filings in excess of one should be increased (*e.g.*, graduated fee schedule for subsequent filings). A number of comments suggested charging a fee for each priority claim made. One comment suggested that the fee would be proportional to the years of benefit requested. Several comments suggested that the current fee structure encourages continuations since it is cheaper to file multiple applications than to file a large number of claims (*e.g.*, sixty total claims with nine independent claims) in a single application, and that the Office should revisit the fee structure if it wants to encourage filing the claims in a single application. A number of comments suggested that there should be higher fees on claims exceeding a certain minimal number, which is proportionate to the increased burden on the Office. One comment suggested permitting applicant to pay additional search and examination fees for those who want to submit more than ten representative claims. At least one comment suggested increasing fees based on complexity of the claims and art. One comment suggested that the Office should permit an applicant to file a third or subsequent continuing application with an appropriate higher fee. One comment suggested a three-tiered system: The first tier would allow three independent claims and twenty total claims; the second tier would activate a very high surcharge; and the third tier, in applications of more than ten independent and thirty total claims, would require a showing as to why such additional claims are necessary. Several comments suggested an overall general fee increase, especially for those areas with high workloads. One comment suggested that doubling the basic filing fee, search and examination fees would not be a hardship for applicants. Several comments suggested a number of changes to the fee schedule: Tripling fees for large entities; instituting a graduated fee scale for adding new matter rather than limiting the number of continuation-in-part applications; charging a higher filing fee for an application with greater than five claims and more than 1200 words in the specification; raising fees if more than ten or more than twenty claims are submitted; increasing fees for independent claims in excess of three; increasing fees on all non-Jepson claims; and eliminating search and examination fees if an examination support document is submitted.

Several comments stated that surcharges should be imposed on independent claims in excess of three and total claims in excess of twenty in order to address the problem of applications with excess numbers of claims. Several comments argued that the current fees appear to be having a significant impact in reducing the number of claims filed, that the Office has not fully evaluated that impact, and that the Office should give the fee increase more time to see if it will be effective.

Response: Patent fees are primarily set by statute, and Congress has considerable authority in setting patent fees and funding of the Office. *See Figueroa* v. *United States*, 466 F.3d 1023, 1031–32, 80 U.S.P.Q.2d 1437, 1443 (Fed. Cir. 2006). Thus, patent fee

and Office funding issues are beyond the scope of the proposed changes to the rules of practice.

In 2002, the Office proposed a patent fee structure that included a graduated excess claims fees schedule and additional fees for continuing applications. The House Subcommittee on Courts, the Internet, and Intellectual Property held a hearing on July 18, 2002, at which patent user groups expressed strenuous opposition to the Office's 2002 proposed patent fee structure. *See The U.S. Patent and Trademark Office: Fee Schedule Adjustment and Agency Reform: Oversight Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary*, 107th Cong., 2nd Sess., Final Print Serial No. 92 (2002). The Office was unable to garner public support for a patent fee structure including a graduated excess claims fees schedule or any additional fees for continuing applications. Therefore, the patent fee structure proposed in the United States Patent and Trademark Fee Modernization Act of 2003 (introduced as H.R. 1561) included the former ''flat'' excess claims fee schedule (with an adjustment to the fee amounts) and no additional fees for continuing applications.

Section 801 *et seq.* of Division B of the Consolidated Appropriations Act, 2005, provided that 35 U.S.C. 41(a), (b), and (d) shall be administered in a manner that revises patent application fees (35 U.S.C. 41(a)) and patent maintenance fees (35 U.S.C. 41(b)) during fiscal years 2005 and 2006. *See* Public Law 108–447, 118 Stat. 2809 (2004). In essence, the Consolidated Appropriations Act, 2005, made the patent fees set forth in the United States Patent and Trademark Fee Modernization Act effective during most of fiscal year 2005 and all of fiscal year 2006. The Revised Continuing Appropriations Resolution, 2007 (Pub. L. 110–5, 121 Stat. 8 (2007)), kept the patent fee and fee structure provisions of the Consolidated Appropriations Act, 2005, in effect during fiscal year 2007.

Moreover, the examination fee in effect under this legislation does not recover the entire cost of examination. The excess claims fee structure in effect under this legislation does not provide sufficient incentive for all applicants to keep the number of claims in an application at a reasonable number. The application filing fees in effect under this legislation provide no incentive for applicants to keep the number of continuing applications to a reasonable number. Thus, increasing fees, as suggested by many of the comments, is not, by itself, a sufficient solution for the large and growing backlog of unexamined applications.

Comment 312: One comment suggested permitting applicants to pay an additional search fee for inventions that are restricted.

Response: The Office studied such a proposal and determined that it would result in an unacceptable increase in patent pendency. *See Green Paper Concerning Restriction Practice* at 14–18 (2005). The *Green Paper Concerning Restriction Practice* is available on the Office's Internet Web site at: *http://www.uspto.gov/web/patents/greenpaper.htm.* Thus, the Office is not pursuing such a change to patent practice.

Comment 313: One comment suggested that fees for small entities should be maintained and that fees for others should be increased.

Response: The Office believes that Congress has set an appropriate discount for fees paid by small entities. 35 U.S.C. 41(h)(1) currently provides for a fifty percent reduction in patent fees charged under 35 U.S.C. 41(a), (b), or (d)(1) for applicants who qualify as a small entity under 35 U.S.C. 41(h)(1), and 35 U.S.C. 41(h)(3) further provides a seventy-five percent reduction in the filing fee charged under 35 U.S.C. 41(a)(l)(A) for small entity applicants who file their applications electronically. The Office notes that small entity applicants file excess claims and continuing applications at virtually the same rate as other (non-small entity) applicants.

Comment 314: One comment suggested that if a specification is a poor-quality literal or machine translation of a non-English language application, the examiner should be permitted to reject the specification as indefinite and provide a time period for applicant to provide a better quality translation.

Response: The goal of the changes in this final rule is to increase quality and decrease pendency of patent applications. To assist the Office in meeting that goal, applicants should file applications that are in condition for examination, or provide corrections no later than the time they are taken up for examination. It should not be necessary for the Office to issue an Office action rejecting or objecting to an application due to informalities. However, if a specification is a poor quality literal translation of a non-English application, the examiner has the authority to object to the specification.

Comment 315: One comment suggested that the Office adopt a ''utility model'' type of patent as used in Australia in which a patent issues without a search being done, and a search is only conducted when the patent is enforced.

Response: The Office is currently studying the concept of alternative types of patents, thus allowing an applicant to select a patent product based upon the applicant's needs. *See Draft 2007–2012 Strategic Plan* (Objective 2 of Goal 1). A copy of the Office's draft proposed five-year (2007–2012) strategic plan can be found at *http://www.uspto.gov/web/offices/com/strat2007/.* However, implementing such a practice would need legislative changes.

Comment 316: One comment indicated that Congress recently endorsed and expanded opportunities for double patenting via the CREATE Act (Cooperative Research and Technology Enhancement Act (Pub. L. 108–43, 118 Stat. 3596 (2004)).

Response: The legislative history of the CREATE Act (Cooperative Research and Technology Enhancement Act (Pub. L. 108–43, 118 Stat. 3596 (2004)) indicates that Congress appreciated that the CREATE Act would result in additional double patenting situations. *See* H.R. Rep. No. 108–425, at 6 (the Office may require a terminal disclaimer when double patenting is determined to exist for two or more claimed inventions for any application for which the applicant takes advantage of the ''safe harbor'' provision in 35 U.S.C. 103(c) as amended by the CREATE Act). Congress' acknowledgment of the possibility of double patenting is not, however, an expression of support for applicants to intentionally submit claims that would result in a double patenting situation. Instead, it shows that the Congress is aware of the problems created by multiple patents covering the same or substantially the same invention, and expects the Office to address these issues.

Comment 317: Several comments suggested eliminating the two-year limit for filing a broadening reissue. One comment suggested amending the ''reissue'' or ''reexamination'' statute to permit broadening of claims at any time for a number of reasons such as: (1) To replace continuing applications which are now being filed to avoid the two-year statutory period for broadening patent claims; (2) to allow correction of simple drafting mistakes which may not be caught before the patent issues; and (3) to provide certainty to industry. The comment stated that to encourage participation by patentee, legal (as opposed to equitable) intervening rights should be provided that are linked to the date of the amendment. Also, such an amendment should provide for

intervening rights after eighteen months to patent applications as well as patents to put an end to the submarine patent situation.

Response: The suggested changes to reissue or reexamination practice are not consistent with the Office's goals of increasing quality and reducing pendency. The Office, nevertheless, appreciates that continuing application practice may currently be used improperly to avoid the two-year bar and the broadening ''error'' requirement of the reissue statute (35 U.S.C. 251). The changes to continuing application practice in this final rule will reduce a patentee's ability to end-run the reissue statute via continuing application practice.

Comment 318: One comment suggested instituting a tiered search and examination procedure, which provides for a refund of the examination fee if applicant decides to abandon the application after the search but before the examination. If applicants can save money by abandoning applications no longer deemed viable, applications will drop out of the application process, thereby freeing up valuable Office examination resources to focus on quality examination of the remaining applications, as well as reducing pendency.

Response: The current fee legislation authorizes the Office to refund the search fee but not the examination fee if the applicant chooses not to pursue an application after it has been filed. *See* 35 U.S.C. 41(d)(1)(D). This provision has been implemented in § 1.138(d). Under § 1.138(d), applicant may file a petition for express abandonment before an examination has been made of the application to obtain a refund of the search fee and excess claims fee paid in the application. The feedback received by the Office indicates that the examination fee is too low to provide any additional incentive for an applicant to withdraw from the examination process and seek a refund.

Comment 319: One comment suggested charging more money for voluminous IDS submissions, and additional surcharges for particular technologies where ''second pair of eyes'' review has had a significant impact on examination quality at an increased cost to the Office.

Response: The Office is addressing the problem of large IDS submissions in a separate rule making. *See Changes To Information Disclosure Statement Requirements and Other Related Matters*, 71 FR at 38812–16, 38820–22, 1309 *Off. Gaz. Pat. Office* at 27–31, 34–36. As for increasing fees for particular technologies where ''second pair of eyes'' review has had a significant impact on examination quality at an increased cost to the Office, Office funding is subject to appropriations by Congress, and charging additional fees will not necessarily provide more funding for the Office. *See Figueroa*, 466 F.3d at 1031, 80 U.S.P.Q.2d at 1442 (there is no requirement that the revenue resulting from patent fees be appropriated to fund the Office). Furthermore, the limitation currently facing the Office is not a lack of funds to hire new examiners, but rather the ability to hire and train new examiners in the numbers necessary to lower patent pendency while maintaining patent quality.

Comment 320: One comment suggested modifying the relevant statutes to bar a continuing application or request for continued examination after thirty months from the filing date (other than a divisional application, which would be given a different period). The comment also indicated that continuation-in-part applications filed more than thirty months after the initial application should be barred under 35 U.S.C. 102(b) based on the eighteen-month publication of the initial application.

Response: First, the statutes cannot be modified without legislative action by Congress. Further, this final rule provides applicant sufficient opportunities to present claims during the prosecution of the initial application, two continuing applications, and a request for continued examination without justification. The prosecution of these applications and the request for continued examination will most likely extend more than thirty months from the earliest claimed filing date, particularly in certain areas such as biotechnology. The changes as adopted in this final rule appropriately balance an applicant's need for opportunities to present claims and the Office's need to utilize its examining resources more efficiently to reduce the backlog of unexamined applications and improve quality.

Comment 321: One comment suggested developing a practice where new matter can be added to an existing application with a request for continued examination. The comment explained such a practice would eliminate the need to file continuation-in-part applications, would not take the application out of the examining queue, and would be more efficient because the same examiner, rather than different examiners, would examine the application, and would also avoid double patenting issues.

Response: A request for continued examination is not a new application, but is instead a means to continue examination of an existing application. Thus, such a change could not be made, because 35 U.S.C. 132(a) prohibits introduction of new matter into an application. Furthermore, even if 35 U.S.C. 132(a) did not prohibit such a practice, such a practice would create problems in determining the filing date of the new matter.

Comment 322: One comment suggested that the Office should seek the authority from Congress to limit the number of claims in any particular application.

Response: The Office is not seeking to limit the number of claims in an application. Instead, the Office aims to improve the quality of examination. The changes to § 1.75 in this final rule permit an applicant to present up to five independent claims and twenty-five total claims in the application without submitting an examination support document in compliance with § 1.265. The changes to § 1.75 in this final rule also permit an applicant to present more than five independent claims or more than twenty-five total claims if the applicant submits an examination support document in compliance with § 1.265. If an examination support document in compliance with § 1.265 is not filed before the issuance of a first Office action on the merits of the application, the application may not contain or be amended to contain more than five independent claims or more than twenty-five total claims. Thus, the changes being adopted in this final rule are not placing a limit on the number of claims.

Comment 323: One comment suggested that the Office should permit all claims to be filed in an application without any excess claims fees, and then after restrictions are made, calculate the needed fee for ''additional claims'' so applicants are not penalized by paying claims fees twice.

Response: An applicant can request a refund for excess claims canceled prior to a first action on the merits. *See* § 1.117. Thus, an applicant does not need to pay claim fees twice, if applicant cancels the non-elected claims in reply to a restriction requirement.

Comment 324: One comment suggested providing for the addition of dependent claims after allowance for a reduced fee with the requirement that applicant identify support for the claims in the specification.

Response: The comment did not provide an explanation as to how such a strategy would reduce pendency and promote quality. Even assuming

applicant would file less claims under this suggested practice, examination of the newly added claims after allowance would be required. Thus, it is not clear how the suggested strategy would serve these goals more effectively than the changes being adopted in this final rule.

Comment 325: One comment suggested to bar, by statute, more than three independent claims and ten total claims, provided that amendments may be made in the regular course of prosecution and after grant to end claim gaming. The comment further indicated that the proposed rule changes will be subject to administrative challenge, leading to several years of uncertainty and chaos.

Response: A number of comments indicated that there are situations in which more than three independent claims and more than ten total claims are needed. Thus, the Office recognizes that it would be inappropriate to seek such legislation to place an absolute limit on the number of claims at this juncture.

Comment 326: One comment suggested that reducing the filing and maintenance fees would reduce filings. The comment stated that the backlog has gotten so large due to the increases in excess claims fees, there has been a tendency among practitioners to segment applications into multiple related filings, each having twenty or so claims. This segmenting, the comment explains, has significantly increased the number of filings within the Office.

Response: It is unclear how reducing fees would reduce the number of filings. The experience of the Office is that reducing patent fees would not lead to reduced filings.

Comment 327: One comment suggested including a patent term reduction while an application remains pending.

Response: Section 1.704 currently provides for reduction of patent term adjustment for processing delays attributable to the applicant.

Comment 328: One comment suggested moving to a first-to-file system.

Response: As part of global patent law harmonization efforts, the Office has sought public comment on whether the first to invent (used in the United States) or the first inventor to file (used in the remainder of the world) standard in determining the right to a patent represented a ''best practice'' for a harmonized global patent system. *See Request for Comments on the International Effort to Harmonize the Substantive Requirements of Patent Laws*, 66 FR 15409 (Mar. 19, 2001) (request for comments). The Office is continuing to consider the issues related to the first to invent versus the first inventor to file standard in determining the right to a patent in the context of international harmonization efforts.

Comment 329: One comment suggested elimination of all forms of continuing applications except divisional applications.

Response: The changes to continuing application practice adopted in this final rule seek a balanced approach between the needs of applicants for patents and the goals of the Office to increase quality and decrease pendency.

Comment 330: One comment suggested reducing the shortened statutory period for an applicant's response to three months without any extension of time. One comment suggested implementing a thirty-day reply period for both the Office and applicants.

Response: The Office is considering whether it should change the shortened statutory period for Office actions on the merits to less than three months.

Comment 331: Several comments expressed support for publication of all applications. One comment suggested limiting secrecy of a patent application to one month. One comment suggested that some form of intervening rights legislation might better address the problem of repetitive filings. One comment suggested elimination of 35 U.S.C. 135(b). One comment suggested amending 35 U.S.C. 271 so that a variety of claim forms are not necessary for direct infringement to be found, arguing that current 35 U.S.C. 271 is the reason why software-based inventions require claims to different statutory classes, thus increasing the number of claims in an application. One comment suggested that the Office should work with Congress to legislatively overturn *Honeywell Int'l Inc.* v. *Hamilton Sundstrand Corp.*, 370 F.3d 1131, 71 U.S.P.Q.2d 1065 (Fed. Cir. 2004), to promote the use of dependent claims and not construe the rewriting of an objected to dependent claim in independent form narrowly under the doctrine of equivalents. One comment suggested granting rights to regulate the use of an Internet patent to the assignee and the enforcement of such regulation would be based on a fee and would not include the right to prevent others from using the invention.

Response: The changes suggested by the comments are beyond the scope of the proposed changes to the rules of practice. It is not clear, however, how the changes suggested by the comments would address the increased usage of continuing application practice or have an appreciable impact on quality or pendency.

L. Effective Date of the Changes in This Final Rule

Comment 332: One comment stated that the Office does not have any authority to promulgate retroactive rules because the Administrative Procedures Act does not confer such power on the Office. Several comments asserted that Congress never expressly authorized the Office to promulgate retroactive rules, citing *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994) and *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). A number of comments also suggested that the retroactive effect of proposed rule § 1.78 is contrary to judicial precedent, citing *Henriksen* and *Hogan*. Several comments argued that applying the changes to § 1.75 retroactively would be unfair to the applicants and a violation of due process because applicants were not given sufficient notice of the changes when they filed applications. Lastly, one comment argued that applying the rule changes to pending applications is an unconstitutional denial of due process.

Response: The Office is not engaging in retroactive rule making. This final rule has a prospective effect only. The Office's decision to grandfather only pending applications in which a first Office action on the merits was mailed before November 1, 2007 (the effective date of the changes in this final rule) with respect to the changes to § 1.75 does not constitute retroactive rule making. Likewise, the Office's decision to grandfather only continuing applications and requests for continued examination that were filed before the effective date of the final rule with respect to §§ 1.78 and 1.114 (with a provision that allows for at least ''one more'' continuation application or continuation-in-part application of an application filed before the publication date of this final rule) does not constitute retroactive rule making.

''A statute [or regulation] does not operate 'retroactively' merely because it is applied in a case arising from conduct antedating the statute's enactment.'' *Landgraf*, 511 U.S. at 255. Rather, a statute (or regulation) is retroactive if it takes away or impairs vested rights acquired under existing law, creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions already completed. *See Landgraf*, 511 U.S. at 269. The filing of an application for patent does not create a vested right or amount to a transaction already completed. *See Community TV, Inc.* v. *FCC*, 216 F.3d 1133, 1143 (D.C.

Cir. 2000) (the Federal Communications Commission is free to alter the criteria for consideration of pending ''upgrade'' applications because the mere filing of an application does not vest the applicant with a legally cognizable expectation interest); *Chadmore Communs.* v. *FCC*, 113 F.3d 235, 240–41 (D.C. Cir. 1997) (the mere filing of an application does not vest an applicant with a legally cognizable expectation interest). In addition, the Office is not changing the substantive criteria of patentability. The Office is simply revising the procedures an applicant must follow for presenting more than five independent claims or more than twenty-five total claims in an application, and for seeking continued examination of an application via a continuation application, continuation-in-part application, or a request for continued examination. *See Landgraf*, 511 U.S. at 275 (changes in procedural rules may generally be applied in actions arising before the change without raising retroactivity concerns).

Finally, this final rule does not raise constitutional due process concerns. This rule change does not preclude an applicant from filing an application or receiving a patent containing any number of claims. Rather, the changes to § 1.75 in this final rule simply revise the procedures for presenting more than five independent claims or more than twenty-five total claims. As for the changes to § 1.78 in this final rule, the filing of an application does not vest an applicant with a due process right to obtain continued examination via a continuation application, continuation-in-part application, or a request for continued examination for purposes of presenting amendments, arguments, or evidence that could have been submitted prior to close of prosecution in the initial application (or the prior-filed application).

Comment 333: A number of comments suggested that the Office should not retroactively affect any pending applications when adopting the changes to § 1.78. Specifically, the comments disagreed with the Office's decision to apply the changes to § 1.78 to any applications filed on or after the effective date of the final rule, which would result in an applicant being able to file only one continuation or continuation-in-part application (and not ''one more'' continuation or continuation-in-part application) on or after the effective date of the final rule without meeting the requirements specified in § 1.78(d)(1)(i) or (d)(1)(iii) or including a petition under § 1.78(d)(1). The comments argued that the changes would retroactively affect the prosecution of many pending applications, particularly those that are continued examination filings, precluding any opportunity for subsequent continued examination filings. A number of comments also argued that retroactively affecting the pending applications would be unfair to applicants because it would deprive applicants of timely notice of the rule changes and it would be a violation of due process. Several comments argued that retroactively affecting the pending applications would require applicants to review the pending applications to determine whether to file additional continuing applications to preserve the patent rights of unclaimed subject matter or restricted inventions and to file many continuing applications before the effective date. The comments further argued that this would increase the cost of prosecution and the Office's backlog of applications. One comment estimated the cost of reviewing the pending applications to be 180 million dollars based on 600,000 pending applications. A number of the comments suggested that the changes should be applicable only to claiming the benefit of applications filed on or after the effective date (*i.e.*, the changes should be applicable only to non-continuing applications filed on or after the effective date). One comment suggested that the changes to § 1.78 should apply to applications filed on or after the effective date with an exception for any applications that have a filing date earlier than one year from the effective date. One comment suggested that in the determination of the number of continued examination filings permitted without a petition and a showing, the Office should count only the continued examination filings filed on or after January 3, 2006. One comment suggested that the Office should permit applicants to file one more continued examination filing on or after the effective date.

Response: This final rule provides that an applicant is not required to meet the requirements set forth in § 1.78(d)(1) if: (1) The application claims the benefit under 35 U.S.C. 120, 121, or 365(c) only of nonprovisional applications or international applications filed before the publication date of this final rule in the **Federal Register**; and (2) there is no other application filed on or after the publication date of this final rule in the **Federal Register** that also claims the benefit under 35 U.S.C. 120, 121, or 365(c) of such prior-filed nonprovisional applications or international applications. This will provide applicants with ''one more'' continuation application or continuation-in-part application of an application that was filed prior to the publication date of this final rule in the **Federal Register** without a petition and showing. Thus, applicants are also permitted to file a divisional application in compliance with § 1.78(d)(1)(ii) of an application that was filed prior to the effective date of this final rule without a petition and showing.

The rules of practice currently provide that by presenting any paper (including any continuation application, continuation-in-part application, or request for continued examination) to the Office, the party presenting the paper is certifying that to the best of the party's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that the paper is not being presented for any improper purpose, such as to harass someone or to cause unnecessary delay or to needlessly increase the cost of prosecution before the Office. *See* § 10.18(b)(2)(i). Thus, as part of the reasonable inquiry, the Office expects a party to review applications to ensure that the desired amendments, arguments, or evidence that can be submitted during the prosecution of the prior-filed (or before the close of prosecution in the) application are submitted rather than waiting to make such submission in a later-filed continuation application. Therefore, it is unclear why the final rule would impose any significant additional cost on applicants.

Comment 334: Several comments suggested that if the Office adopts the proposed changes to § 1.78, the Office should publish the final rule well in advance of the effective date to provide sufficient time for applicants to adjust their prosecution strategies in any pending applications. A few comments further suggested a time period of six months to one year between the publication of the final rule and the effective date. Furthermore, a few comments suggested that the changes to § 1.78 should be implemented in phases. One of the comments provided an example that the changes would initially apply only to non-continuing applications filed on or after the effective date, and then six months after the effective date, the changes would apply to applications that have an effective filing date more than four years before the effective date.

Response: This final rule has been published well (more than sixty days) in advance of the November 1, 2007, effective date of the changes in this final rule. As previously discussed, this final rule permits applicants to file ''one

more'' continuation or continuation-in-part application of an application that was filed prior to the publication date of this final rule in the **Federal Register** without a petition and showing, and to file (at least) ''one more'' divisional application in compliance with § 1.78(d)(1)(ii) of an application that was filed prior to the effective date of this final rule without a petition and showing. The Office published the Continuing Applications Proposed Rule and the Claims Proposed Rule in the **Federal Register** on January 3, 2006, which set forth proposed changes to the practice for continued examination filings, patent applications containing patentably indistinct claims, and examination of claims in patent applications. Applicants have been provided with a time period of more than one and a half years from the publication date of the proposed rules to the effective date of this final rule, and a time period of more than sixty days from the publication of the final rule to the effective date. Therefore, applicants should have sufficient advance notice of the rule changes.

Comment 335: One comment suggested a transitional practice for divisional applications, permitting benefit claims to be added only to applications filed on or before the effective date in serial divisional applications.

Response: Section 1.78(d)(1)(ii) as adopted in this final rule permits an applicant to file a divisional application of an application for the claims to a non-elected invention that has not been examined if the application was subject to a requirement for restriction. The divisional application need not be filed during the pendency of the application subject to a requirement for restriction, as long as the copendency requirement of 35 U.S.C. 120 is met. Thus, applicant may file the divisional application during the pendency of the application that was subject to a requirement for restriction or the pendency of any continuing application of such an application.

Comment 336: A number of comments suggested that the changes to § 1.75 should apply only to applications filed on or after the effective date. A number of comments disagreed with the Office's decision to apply the changes to § 1.75 to applications filed before the effective date. Several comments further argued that the cost of ''retroactively'' applying the rule changes would be enormous to applicants, especially to small entities, because most applicants would be required to review their pending applications for compliance with the new requirement. Several comments estimated the cost to be 100 to 120 million dollars to designate representative claims in pending applications, and one comment estimated the cost to be 180 million dollars. Several comments argued that small entities are less able to absorb expenses associated with reviewing and revising pending applications. This could prevent small entities from prosecuting pending applications. Several comments argued that because applicants already paid the increased claims fees under the Consolidated Appropriations Act, 2005, in the pending applications for the Office to examine all of the claims, the new requirements would constitute a taking by the Federal Government. Several comments also argued that applicants did not anticipate the additional costs in reviewing and amending the applications for compliance with the new requirements.

Response: The Office has revised § 1.75 to provide that if an application contains more than five independent claims or more than twenty-five total claims, the applicant must submit an examination support document in compliance with § 1.265. Of the applications currently awaiting examination for which claim data is available in PALM (which is over ninety percent of the applications for which preexamination processing is complete), about thirty percent contain more than five independent claims or more than twenty-five total claims. Therefore, the Office's decision to grandfather only pending applications in which a first Office action on the merits was mailed before November 1, 2007 (the effective date of the changes in this final rule) with respect to the changes to § 1.75 will not affect the majority of applications that are currently pending before the Office. In addition, the changes in this final rule do not preclude an applicant from filing an application or obtaining a patent containing any number of claims, but simply changes the procedures for applications containing more than five independent claims or more than twenty-five total claims. Therefore, there is no support for the proposition that the changes in this final rule amount to a ''taking'' by the government. Additionally, § 1.117 as adopted in this final rule provides that if an amendment canceling a claim is filed before an examination on the merits has been made of the application, the applicant may request a refund of any excess claims fee paid on or after December 8, 2004 (fees paid under the Consolidated Appropriations Act), for such claim.

Comment 337: One comment suggested that if the changes to § 1.75 are retroactively applied to applications filed before the effective date, the Office should automatically consider certain claims as representative when applicant fails to designate claims within the time period set forth in a notice requiring the designation of representative claims. One comment inquired about requiring applicants to take action on applications in the backlog within the first month following enactment of the proposed rules. One comment suggested that the Office should send a notice giving applicant three months (extendable to six months) within which to designate the representative claims in each pending application and, if necessary, to file an examination support document.

Response: As discussed previously, this final rule does not adopt the ''representative claims'' examination approach. Under this final rule, applicant is permitted to present more than five independent claims or more than twenty-five total claims if applicant files an examination support document before a first Office action on the merits of an application. The Office does not expect that most applicants will need to take any action to comply with the changes to § 1.75 in this final rule within the first month following the effective date of this final rule because the majority of applications contain five or fewer independent claims and twenty-five or fewer total claims. The Office will provide an applicant who filed a nonprovisional application under 35 U.S.C. 111(a) before November 1, 2007, or a nonprovisional application that entered the national stage after compliance with 35 U.S.C. 37 before November 1, 2007, and who would be affected by the changes in the final rule, with an opportunity to submit: (1) An examination support document; (2) a new set of claims such that the application contains five or fewer independent claims and twenty-five or fewer total claims; or (3) a suggested restriction requirement. Specifically, the Office will issue a notice setting a two-month time period that is extendable under § 1.136(a) or (b) within which the applicant must exercise one of these options in order to avoid abandonment of the application. The Office, however, may combine such a notice with a requirement for restriction, in which case the applicant must make an election responsive to the restriction requirement and, if there are more than five independent claims or more than twenty-five total claims drawn to the elected invention, the applicant must

also: (1) File an examination support document in compliance with § 1.265; or (2) amend the application such that it contains five or fewer independent clams and twenty-five or fewer total claims drawn to the elected invention. Thus, if such a notice is combined with a requirement for restriction, the applicant does not have the option of replying to such notice with a suggested restriction requirement under § 1.142(c).

M. Miscellaneous

Comment 338: One comment suggested that the changes to § 1.78 are contrary to the purpose of the Bayh-Dole Act.

Response: The Bayh-Dole University and Small Business Patent Procedures Act (Pub. L. 96–517, 94 Stat. 3015–28 (codified at 35 U.S.C. 200 *et seq.*)), concerns patent rights in inventions made with federal assistance. Specifically, 35 U.S.C. 200 provides that:

> It is the policy and objective of the Congress to use the patent system to promote the utilization of inventions arising from federally supported research or development; to encourage maximum participation of small business firms in federally supported research and development efforts; to promote collaboration between commercial concerns and nonprofit organizations, including universities; to ensure that inventions made by nonprofit organizations and small business firms are used in a manner to promote free competition and enterprise without unduly encumbering future research and discovery; to promote the commercialization and public availability of inventions made in the United States by United States industry and labor; to ensure that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions; and to minimize the costs of administering policies in this area.

The changes to § 1.78 adopted in this final rule do not concern patent rights in inventions made with federal assistance and do not impinge upon any of the policies or objectives set forth in 35 U.S.C. 200. The changes in this final rule do not treat patent applications resulting from federally supported research differently from other patent applications. The policy objectives of the Bayh-Dole Act do not encourage or condone more favorable treatment of patent applications resulting from federally supported research. *See Univ. of Rochester* v. *G.D. Searle & Co.,* 358 F.3d 916, 929, 69 U.S.P.Q.2d 1886, 1896 (Fed. Cir. 2004) (none of the eight policy objectives of the Bayh-Dole Act encourages or condones less stringent application of the patent laws to universities than to other entities).

Comment 339: A number of comments suggested that to help reduce the backlog of pending applications the Office should provide a procedure under which an applicant may request deferral of examination of the application.

Response: The rules of practice currently have a procedure under which an applicant may request deferral of examination. Specifically, § 1.103(d) permits deferral of examination for up to three years from the earliest filing date for which a benefit is claimed under title 35, United States Code. The Office publishes any application in which a deferral of examination under § 1.103(d) is requested. The entire period of deferral is a reduction under § 1.704(c)(1) of any patent term adjustment.

Comment 340: A number of comments suggested variations of the deferral of examination procedure under § 1.103(d), including, *inter alia*, providing for automatic deferral of examination, extending the period of deferral, allowing third party requests for examination of deferred applications, eliminating any negative impact on patent term adjustment resulting from deferral, adopting deferral of examination procedures used in other countries such as Japan and Canada, tying the period of deferral to the actual filing date of the application rather than the claimed benefit date, and establishing deferral fees based on the length of deferral.

Response: The deferral of examination procedure set forth in § 1.103(d) was used in fewer than two hundred applications since November 29, 2000 (the effective date of § 1.103(d)). The Office did not propose any changes to the deferral of examination procedure in the notices of proposed rulemaking published on January 3, 2006, in the **Federal Register**. In view of the comments received on the deferral of examination procedure, the Office is studying whether changes (*e.g.*, the maximum deferral period, third party request for examination, and patent term adjustment) to the deferral of examination procedure would be appropriate.

Comment 341: Several comments opposed third party participation, but suggested that the Office could move toward providing a post-grant opposition period, similar to that currently offered in Europe, during which the public could oppose issued patents and make prior art submissions so the patent could receive a post-grant review.

Response: Legislation regarding post-grant opposition and related participation by third parties is currently pending before Congress. If enacted, the Office will implement the legislation accordingly.

Comment 342: A number of comments suggested expanding the opportunity under § 1.99 for third parties to submit prior art references in applications; for example, up to a first Office action.

Response: The Office has proposed changes to § 1.99 that would extend the period for submission of information from two months after pre-grant publication of the application to six months after pre-grant publication of the application, or mailing of a notice of allowance, whichever occurs first. *See Changes To Information Disclosure Statement Requirements and Other Related Matters,* 71 FR at 38816, 38822, 1309 *Off. Gaz. Pat. Office* at 31, 36.

Comment 343: One comment questioned applicant's recourse if a third party submission was filed in his or her application.

Response: Applicant's recourse would be the same as it currently is when a third party submits patents or publications pursuant to § 1.99 in a published patent application. Applicant will have an opportunity to comment on any patents or publications relied upon by the examiner in a rejection of applicant's claims. Note, however, 35 U.S.C. 122(c) prohibits third party protests.

Comment 344: Several comments suggested that prior art submissions by third parties should be required to conform to current information disclosure statement rules. These comments also suggested that either statements of relevance for each submitted document, or arguments why the claims are unpatentable in view of the cited documents, should accompany the submissions.

Response: Prior to the publication of a patent application, a third party may file prior art submissions in compliance with the requirements of § 1.291 in the application. After the publication of the application, § 1.99 only permits a third party to file up to ten patents or publications per submission. Section 1.99 does not permit the third party to file comments regarding the documents, or comments regarding the patentability of the claims in view of the documents. Additionally, permitting a third party to file an explanation of relevance would rise to the level of a protest, which is prohibited by 35 U.S.C. 122(c).

Comment 345: Several comments suggested allowing a third party to request examination of an application upon paying a fee during a time frame such as between thirty-six and forty-

eight months from the application filing date. One comment suggested permitting third parties to request accelerated examination of long-pending applications by submitting documents required for accelerated examination.

Response: Under the current patent laws and regulations, it is not proper for a third party to be involved in the examination of an application owned by another which includes seeking to accelerate the examination of an application that is properly awaiting its turn to be examined. Permitting a third party to advance prosecution of an application may be considered in the future for those instances in which an applicant has requested deferral of the examination. However, at this time, the Office has not elected to amend § 1.103(d) to permit such action, in order to further study the issue and to provide the public additional opportunity to comment.

Comment 346: One comment suggested the use of authorized third party prior art searches.

Response: Patents or publications filed by a third party in compliance with § 1.99 may be entered in the file of a published application. Examiners may use any of these references in a rejection, if appropriate.

Comment 347: Several comments were critical of the Office's position that the proposed changes to the practice for continuing applications, request for continued examination, and applications containing patentably indistinct claims will not create any additional work for the applicant.

Response: The changes being adopted in this final rule will not require any additional submissions for the majority of patent applications. Prosecution, however, may be more compact since the number of continuing applications and requests for continued examination permitted without any justification is being limited. Nevertheless, the changes being adopted in this final rule will result in more effective and efficient examination without any additional work on the part of the majority of applicants.

Comment 348: Several comments recommended that the Office should conduct a public hearing before adopting the rule changes. One comment suggested that the Office should issue a green paper or advance notice of proposed rule making to receive more input and perform a cost-benefit analysis on the rule changes. One comment recommended that the Office should form a patent practice advisory committee, consisting of volunteers from the patent bar, for the purpose of studying problems experienced by the Office and proposing solutions that would be tailored to address those problems. The comments recommended that the Office should bring together all the relevant parties, including the Office, patent practitioners, patentees, litigators, and judges, to arrive at a solution that benefits all parties in the patent system.

Response: 35 U.S.C. 2(b)(2)(B) directs the Office to follow the procedures set forth in 5 U.S.C. 553 in adopting changes to the rules of practice, and 35 U.S.C. 3(a)(2)(B) directs the Office to consult with the Patent Public Advisory Committee when proposing or adopting changes to the rules of practice that change user fees or are subject to notice and comment under 5 U.S.C. 553. The Office published notices of proposed rule making pursuant to 5 U.S.C. 553(b) in advance of this final rule, provided an extended comment period to give interested persons an opportunity to submit written data, views, or arguments pursuant to 5 U.S.C. 553(c), and has published this final rule at least thirty days in advance of its effective date pursuant to 5 U.S.C. 553(d). The Office also consulted with the Patent Public Advisory Committee prior to publishing the notices of proposed rule making and this final rule. The Office also conducted four public meetings to obtain feedback from the public on the proposed changes which resulted in the changes being adopted in this final rule: (1) The first in Chicago, Illinois, on February 1, 2006; (2) the second in Berkeley, California, on February 28, 2006; (3) the third in Houston, Texas, on March 22, 2006; and (4) the fourth in Alexandria, Virginia (at the Office's Carlyle campus) on April 25, 2006. The number of comments submitted in response to the notices of proposed rule making indicates that interested persons and organizations have been given ample opportunity to provide input on the changes being adopted in this final rule.

IV. Rule Making Considerations

A. Administrative Procedure Act

This notice adopts changes to the rules of practice that concern the process for applying for a patent, namely, continuing applications and requests for continued examination practices, the treatment of applications containing more than a set number of independent or total claims, and the treatment of multiple applications containing patentably indistinct claims. The changes being adopted in this notice do not change the substantive criteria of patentability and do not effectively foreclose the applicant's opportunity to make a case on the merits (*i.e.*, the changes being adopted in this final rule continue to provide patent applicants with numerous opportunities). Therefore, these rule changes involve interpretive rules, or rules of agency practice and procedure. *See Bachow Communs., Inc.* v. *FCC,* 237 F.3d 683, 690 (DC Cir. 2001) (rules governing an application process are ''rules of agency organization, procedure, or practice'' and exempt from the Administrative Procedure Act's notice and comment requirement); *see also Fressola* v. *Manbeck,* 36 USPQ2d 1211, 1215 (D.D.C. 1995) (''it is extremely doubtful whether any of the rules formulated to govern patent or trade-mark practice are other than 'interpretive rules, general statements of policy, * * * procedure, or practice.' '') (quoting C.W. Ooms, *The United States Patent Office and the Administrative Procedure Act,* 38 Trademark Rep. 149, 153 (1948)). Accordingly, prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553(b)(A) (or any other law), and thirty-day advance publication is not required pursuant to 5 U.S.C. 553(d) (or any other law). Nevertheless, the Office sought public comment on proposed changes to these rules of practice to obtain the benefit of such input prior to adopting the changes to the rules of practice in this final rule.

B. Regulatory Flexibility Act

As prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 (or any other law), neither a regulatory flexibility analysis nor a certification under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are required. *See* 5 U.S.C. 603. Nevertheless, the Office published notices of proposed rule making setting forth the factual basis for certification under the Regulatory Flexibility Act and sought public comment on that certification. *See Changes to Practice for the Examination of Claims in Patent Applications,* 71 FR at 66, 1302 *Off. Gaz. Pat. Office* at 1333, and *Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims,* 71 FR at 56–57, 1302 *Off. Gaz. Pat. Office* at 1325. For the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that the changes in this final rule will not have a significant economic impact on a

substantial number of small entities. *See* 5 U.S.C. 605(b).

This final rule provides that: (1) A third or subsequent continuation or continuation-in-part application or any second or subsequent request for continued examination must include a showing as to why the amendment, argument, or evidence sought to be entered could not have been submitted prior to the close of prosecution after a first and second continuation or continuation-in-part application and a request for continued examination; (2) any divisional application be the result of a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121 in the prior-filed application; (3) an application that contains or is amended to contain more than five independent claims or more than twenty-five total claims must include an examination support document under 37 CFR 1.265 that covers each claim (whether in independent or dependent form) before the first Office action on the merits; and (4) multiple applications that have the same claimed filing or priority date, substantial overlapping disclosure, a common inventor, and a common assignee include either an explanation as to how the claims are patentably distinct, or a terminal disclaimer and explanation as to why patentably indistinct claims have been filed in multiple applications.

In response to the Office's certification in the notices of proposed rule making, the Small Business Administration Office of Advocacy (SBA-Advocacy) submitted a comment contending that the proposed changes are likely to have a significant economic impact on a substantial number of small entities, including small businesses and small independent inventors. SBA-Advocacy recommended that the Office conduct a supplemental Initial Regulatory Flexibility Analysis before publishing a final rule.

The Office's analysis of the proposed rules indicated that the rules would not have a significant economic impact on a substantial number of small entities. The Office considered all public comments addressing small entities, including those submitted by SBA-Advocacy. In response to these comments, this final rule incorporates a number of revisions designed to further reduce the number of small entities affected by the changes and the impacts on small entities. These changes in this final rule vis-á-vis the proposed rules that reduce small entity impacts are as follows: (1) This final rule adopts an examination support document requirement threshold of five independent claims or twenty-five total claims, rather than ten representative claims; (2) this final rule provides that small entities as defined by the Regulatory Flexibility Act are exempt from the requirement that an examination support document must, for each cited reference, include an identification of all of the limitations of each of the claims that are disclosed by the reference; (3) this final rule adopts a continued examination filing petition threshold of two continuing applications (continuation or continuation-in-part applications), plus a request for continued examination in any one of the initial or two continuing applications, rather than one continuation application, continuation-in-part application, or request for continued examination; (4) this final rule does not require that a divisional application be filed during pendency of initial application; and (5) this final rule provides for at least ''one more'' continuation or continuation-in-part application after the effective date, regardless of the number of previous continued examination filings.

In addition, the Office commissioned a detailed analysis of the impacts of this final rule on small entities. The analysis concludes that this final rule is not expected to result in a significant economic impact on a substantial number of small entities. The analysis measured economic impact in terms of annualized incremental cost as a percentage of revenue. The analysis indicated that the incremental cost (not annualized) would be between $2,563 and $13,121 for an entity who would be required to file an examination support document, a petition for an additional continued examination filing, or both. The analysis presumed that an economic impact greater than three percent of annualized incremental cost as a percentage of revenue was a significant impact. The analysis indicated that no small entities fell into this category. The analysis also presumed that an economic impact greater than one percent of annualized incremental cost as a percentage of revenue was a more moderate impact. The analysis indicated that fewer than one percent of small entities fell into this category. The analysis also presumed that a substantial number of small entities are affected if more than twenty percent of small entities are impacted. The analysis indicated that about 1.0 percent of small entities would be affected by the requirement to submit an examination support document, that about 2.7 percent of small entities would be affected by the requirement to submit a petition for an additional continued examination filing, and that about 0.3 percent of small entities would be affected by both the requirement to submit an examination support document and the requirement to submit a petition for an additional continued examination filing. A copy of the report containing this analysis is available on the Office's Internet Web site at *http://www.uspto.gov.*

As a result of this analysis, the Office has determined that it is appropriate to make a certification that the changes being adopted in this final rule would not have a significant economic impact on a substantial number of small entities. The Office has revised the final rule requirements, as discussed previously, to further reduce economic impacts on small entities.

SBA-Advocacy commented that while the Office asserts that preparation of the examination support document should cost about $2,500, small entities contend that completing an examination support document will be more costly, time consuming and restrict their ability to prosecute patents vigorously. SBA-Advocacy also commented that small entity representatives have provided feedback that completion of an examination support document could cost from $25,000 to $30,000.

The Claims Proposed Rule referenced a $2,500 figure covering a patent novelty search, analysis, and opinion, as reported in a 2003 survey conducted by the American Intellectual Property Law Association (AIPLA). The Office agrees with the comments that this figure is probably less than the cost of an examination support document in most situations. Therefore, the Office has further analyzed costs based on the modified examination support document requirements applicable to small entities. The analysis models cost variability based on the number of claims the examination support document must address, and on whether or not a prior art search was conducted when the application was prepared. Based on this analysis, the Office estimates that the examination support document costs for small entities will range from $2,563 up to $13,121, although this latter figure assumes the examination support document must address as many as fifty independent claims or three hundred and fifty total claims. Only a small number of small entities, however, will be required to prepare an examination support document, and nearly all of these will incur costs towards the lower end of the range. Thus, the Office does not expect the final rule to result in a

significant impact on a substantial number of small entities.

SBA-Advocacy commented that small entity representatives have asserted that, taken together, the two proposed changes would increase the cost of application preparation and hinder the patent prosecution process.

As discussed previously, the Office commissioned a detailed analysis of the impact of the final rule on small entities. The analysis explicitly considered the combined cost of both proposed rules (which have been combined into a single final rule). The analysis concludes that the final rule is not expected to result in a significant economic impact on a substantial number of small entities.

SBA-Advocacy commented that small entity representatives have raised concerns that the proposed changes will significantly impact the most valuable and commercially viable patents because those types of patents typically involved a higher number of continuations.

The Office notes that there are studies espousing the position that many commercially valuable patents are the result of a continuing application, or of a second or subsequent continuing application. However, these studies do not support the position that the applicants could not have obtained these commercially valuable patents but for the availability of an unlimited number of continuing applications. That is, these studies do not show that these commercially valuable patents could not have been obtained via two or fewer continuing applications prosecuted with a reasonable amount of foresight and diligence. Thus, these studies do not demonstrate that these commercially valuable patents happen to be the result of a continuing application or of multiple continuing applications for any reason other than simply because the prosecution tactics employed in the applications underlying these patents were based upon the availability of an unlimited number of continuing applications.

The analysis commissioned by the Office specifically considered the claim that the most valuable and commercially viable patents are those types of patents that typically involved a higher number of continuations. The Office ultimately rejected the claim that this final rule will preclude applicants from being able to obtain a patent on the most valuable and commercially viable patents due to the speculative nature of the nexus drawn between the availability of an unlimited number of continuing applications and an applicant's ability to obtain these commercially valuable patents.

SBA-Advocacy commented that small entity representatives have indicated that limiting applicants to ten representative claims would make it very difficult to properly identify a potential patent, could create future liability concerns, and would weaken potential patents.

The final rule requirements apply to patent applications with more than five independent claims or more than twenty-five total claims, rather than ten representative claims. As discussed previously, applicants with more than five but less than fifteen independent claims, or more than twenty-five but less than seventy-five total claims, to an invention are able to prosecute their application in a manner that does not trigger the claims or continuations requirements. Specifically, an applicant may do this by submitting an initial application containing up to five independent claims and up to twenty-five total claims, and then adding a similar number of claims in each of two continuation applications (or two continuation-in-part applications, or one continuation application and one continuation-in-part application) permitted without a petition. Moreover, even for those applications that will require an examination support document, the requirement does not ''limit'' applicants to any particular number of claims. Applicants may continue to submit as many claims as necessary to appropriately claim their inventions, even if doing so required them to prepare and submit an examination support document.

SBA-Advocacy commented that small entity representatives have contended that limiting continuation applications and examinations would inhibit their ability to enhance their applications, significantly increase costs through new fees, and force small entities to seek review through the very expensive appeals process. Small entity representatives thus assert that limiting the number of continuations could severely weaken small entities' ability to protect their patents.

The Office analysis indicates that the continued examination filing requirements adopted in this final rule will not lead to significant cost increases nor will it have a significant economic impact on a substantial number of small entities. The requirements are necessary to ensure that patent applications are of reasonable quality and that applicants pursue their patents in good faith. The excessive use of continued examination filings has been a major factor in the growing backlog of unexamined applications. With respect to having to use the appeals process in place of additional continued examination filings, if an applicant disagrees with the examiner's rejections, the applicant should file an appeal rather than filing a continuation application or a request for continued examination, for reasons discussed in detail in the statement of considerations for the final rule. The Office believes that applicants should have sufficient opportunity to place the application in condition for appeal during the prosecution of the initial application, two continuing applications, and a request for continued examination. An applicant who considers this to be insufficient may file a third or subsequent continuing application or second or subsequent request for continued examination with a petition showing why the amendment, argument, or evidence sought to be entered could not have been previously submitted.

SBA-Advocacy commented that the proposed changes will affect a substantial number of small entities, and that the two proposed changes to the rules reshape the basic rights of any small entity that files a patent application.

The Office agrees that the final rule places new requirements on the current patent application process. However, the Office's analysis indicates that the rule will not have a significant economic impact on a substantial number of small entities. In fact, only a small proportion of small entities will be affected by the changes in this final rule.

SBA-Advocacy commented that small entity representatives have contended that the definition of small entity that the Office uses in its certification is for calculating filing fees and excludes any small entity that has a contractual arrangement involving the invention with a larger company. SBA-Advocacy commented that small entity representatives have further asserted that small business size standards for Regulatory Flexibility Act purposes do not include this restriction so the number of small businesses affected is likely to be larger than stated in the certification.

The Regulatory Flexibility Act permits an agency head to establish, for purposes of Regulatory Flexibility Act analysis and certification, one or more definitions of ''small business concern'' that are appropriate to the activities of the agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment. *See* 5

U.S.C. 601(3) and 13 CFR 121.903(c). Pursuant to this authority, the Office has established the following definition of small business concern for purposes of the Office conducting an analysis or making a certification under the Regulatory Flexibility Act for patent-related regulations: A small business concern for Regulatory Flexibility Act purposes for patent-related regulations is a business or other concern that: (1) Meets the Small Business Administration's definition of a ''business concern or concern'' set forth in 13 CFR 121.105; and (2) meets the size standards set forth in 13 CFR 121.802 for the purpose of paying reduced patent fees, namely, an entity: (a) Whose number of employees, including affiliates, does not exceed 500 persons; and (b) which has not assigned, granted, conveyed, or licensed (and is under no obligation to do so) any rights in the invention to any person who made it and could not be classified as an independent inventor, or to any concern which would not qualify as a non-profit organization or a small business concern under this definition. *See Business Size Standard for Purposes of United States Patent and Trademark Office Regulatory Flexibility Analysis for Patent-Related Regulations*, 71 FR 67109, 67112 (Nov. 20, 2006), 1313 *Off. Gaz. Pat. Office* 60, 63 (Dec. 12, 2006) (notice). Prior to establishing this definition of small business concern for purposes of the Office conducting an analysis or making a certification under the Regulatory Flexibility Act for patent-related regulations, the Office consulted with the Small Business Administration Office of Advocacy and published such a definition for public comment. *See Size Standard for Purposes of United States Patent and Trademark Office Regulatory Flexibility Analysis for Patent-Related Regulations*, 71 FR 38388 (Jul. 6, 2006), 1309 *Off. Gaz. Pat. Office* 37 (Aug. 1, 2006) (notice). The Small Business Administration small entity size standards set forth in 13 CFR 121.802 excludes any business concern that has assigned, granted, conveyed, or licensed any rights in the invention to an entity which would not qualify for small entity status.

Nevertheless, in analyzing the provisions of the final rule, the Office explicitly considered a sensitivity analysis that assumed all patent applicants qualified as small entities. Even under this sensitivity analysis, this final rule is not expected to result in a significant impact on a substantial number of small entities.

SBA-Advocacy suggested that with respect to the continued examination filing requirements, the Office should increase the number of permissible continuing applications.

The final rule changes the continued examination filing petition threshold from a single continuation application, continuation-in-part application, or request for continued examination as proposed to two continuing applications (continuation or continuation-in-part applications), and a single request for continued examination in any one of the initial or two continuing applications.

SBA-Advocacy suggested that with respect to the continued examination filing requirement, the Office should consider increasing the fees for additional continuation applications.

Currently, patent application and excess claims fees are set by statute (35 U.S.C. 41(a)). In 2002, the Office proposed a patent fee structure that included a graduated excess claims fees schedule and additional fees for continued examination filings. As discussed previously, however, the Office was unable to garner sufficient support from patent user groups for a patent fee structure including a graduated excess claims fees schedule or any additional fees for continued examination filings. Therefore, the Office did not pursue this alternative.

SBA-Advocacy suggested that with respect to the continued examination filing requirement, the Office should defer review of subsequent continuation applications.

The Office considered expanding the deferral of examination provisions to allow a longer deferral of examination period. The Office currently has a provision (37 CFR 1.103(d)) under which an applicant may request deferral of examination for up to three years from the earliest filing date for which a benefit is claimed. As discussed previously, the Office is studying whether changes (*e.g.*, the maximum deferral period, third party request for examination, and patent term adjustment) to the deferral of examination procedure would be appropriate.

SBA-Advocacy suggested that with respect to the claims requirements, the Office should expand the number of representative claims included in initial review.

The Office has revised the final rule to change the examination support document threshold from ten representative claims to five independent claims or twenty-five total claims. As discussed previously, however, applicants with more than five but less than fifteen independent claims, or more than twenty-five but less than seventy-five total claims, to an invention are able to prosecute their application in a manner that does not trigger the claims or continuations requirements.

SBA-Advocacy suggested that with respect to the claims requirements, the Office should provide expedited review of applications that contain ten or fewer representative claims. The Office has considered the suggestion to provide expedited examination to applications containing less than a set number of claims. As discussed previously, the Office currently has an accelerated examination program for applicants who limit the number of claims in their applications (to no more than three independent claims and no more than twenty total claims) and who also provide an accelerated examination support document. Therefore, the Office did not pursue this alternative in the final rule.

SBA-Advocacy suggested that with respect to the claims requirements, the Office should not apply the regulation to the backlog of pending unexamined applications.

The Office has considered not applying the claims requirement to pending applications that have not yet been examined to minimize the impact on small entities. The examination support document threshold being adopted in this final rule (*i.e.*, more than five independent claims or more than twenty-five total claims) means that most small entity applications will not be impacted by the final rule or the decision to apply the final rule to the backlog of unexamined applications. Given the current backlog of over 700,000 unexamined applications, a decision to not apply the changes to the backlog of unexamined applications would mean that it would be calendar year 2010 before the Office would see any benefit from the change, and that the Office (and applicants) would be in a transition state until late calendar year 2011. Therefore, this suggestion was not adopted in the final rule.

The Office also received a number of additional comments from the public generally asserting that the Office did not comply with the requirements of the Regulatory Flexibility Act in certifying that the changes in this rule making will not have a significant economic impact on a substantial number of small entities. The comments stated that: (1) In light of the fact that several large companies support the proposed changes it is questionable whether the rule changes are truly neutral towards small companies and that a bias in favor of large companies and against small entities could be in violation of the Regulatory Flexibility Act; (2) the Office's certification did not adequately

address the impact of the proposed rules on small entities, and the Office failed to provide a credible factual basis to justify its certification that the proposed rules would not have a significant economic impact on a substantial number of small entities in compliance with 5 U.S.C. 605(b); (3) the rule changes would have a significant economic impact on a substantial number of small entities seeking patents due to the additional costs associated with preparing an application, establishing the required showing under 37 CFR 1.78(d)(1)(vi) and 1.114(g), and supplying an examination support document in compliance with 37 CFR 1.265, and would hinder the abilities of small entities to enhance their applications and protect their inventions; (4) the definition of small entities used by the Office in its certification of the proposed rules is for the purpose of paying reduced patent fees and excludes any application from a small business that has assigned, granted, conveyed, or licensed any rights in the invention to an entity which would not qualify for small entity status; (5) the Office should prepare an initial Regulatory Flexibility Analysis and republish the proposed rules before issuing any final rule to enable the Office to closely examine the impact on the affected small entities, encourage small entities to comment on additional information provided by the analysis, identify viable regulatory alternatives to the proposed rules, and demonstrate the Office's compliance with the Regulatory Flexibility Act; (6) the Office did not describe any viable alternatives to the proposed rules to provide regulatory relief to small entities as required under 5 U.S.C. 603(c); (7) the rule changes would be invalid and vulnerable to challenges under 5 U.S.C. 611 if the Office fails to comply with the requirements of the Regulatory Flexibility Act; and (8) the Office should exempt small entities from complying with the proposed rules to avoid further scrutiny under the Regulatory Flexibility Act.

The Office has received comments from some large entities that the changes being adopted in this final rule have a bias against large entities, and has received comments from small entities that the changes being adopted in this final rule have a bias in favor of large entities. The changes being adopted in this final rule are neutral towards both small entities and large entities. That several large entities support the changes being adopted in this final rule is more likely indicative of a willingness to take a systemic view with respect to the need to take more significant steps to address patent quality and pendency.

As discussed previously, the Office commissioned a detailed analysis of the final rule's impact on small entities. As a result of this analysis, the Office has determined that it is appropriate to make a certification that the changes being adopted in this final rule would not have a significant economic impact on a substantial number of small entities. Therefore, the Office is not required to conduct a Regulatory Flexibility Analysis.

Pursuant to 5 U.S.C. 605(b), the requirements in 5 U.S.C. 603 and 604 for an initial and final Regulatory Flexibility Analysis (including identification of viable regulatory alternatives to the proposed rules) do not apply if the agency head certifies that the changes will not have a significant economic impact on a substantial number of small entities. In accordance with 5 U.S.C. 605(b), the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed changes would not have a significant economic impact on a substantial number of small entities.

The Office considers this rule making to be in compliance with the requirements of the Regulatory Flexibility Act. Thus, the possibility of legal action does not warrant a decision to delay proceeding with the changes being adopted in this final rule to allow for preparation of an initial and final Regulatory Flexibility Analysis, or to completely exempt small entities from complying with the changes being adopted in this final rule.

C. Executive Order 13132 (Federalism)

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

D. Executive Order 12866 (Regulatory Planning and Review)

This rule making has been determined to be significant for purposes of Executive Order 12866 (Sept. 30, 1993), as amended by Executive Order 13258 (Feb. 26, 2002) and Executive Order 13422 (Jan. 18, 2007).

E. Executive Order 13175 (Tribal Consultation)

This rule making will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

F. Executive Order 13211 (Energy Effects)

This rule making is not a significant energy action under Executive Order 13211 because this rule making is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

G. Executive Order 12988 (Civil Justice Reform)

This rule making meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

H. Executive Order 13045 (Protection of Children)

This rule making is not an economically significant rule and does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr, 21, 1997).

I. Executive Order 12630 (Taking of Private Property)

This rule making will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

J. Congressional Review Act

Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), the United States Patent and Trademark Office will submit a report containing this final rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the Government Accountability Office. The changes in this final rule will not result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States–based enterprises to compete with foreign–based enterprises in domestic and export markets. Therefore, this final rule is not a ''major rule'' as defined in 5 U.S.C. 804(2).

K. Unfunded Mandates Reform Act of 1995

The changes in this final rule will not result in the expenditure by State, local,

and tribal governments, in the aggregate, or by the private sector, of 100 million dollars or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

L. National Environmental Policy Act

This rule making will not have any effect on the quality of environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

M. National Technology Transfer and Advancement Act

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are inapplicable because this rule making does not contain provisions which involve the use of technical standards.

N. Paperwork Reduction Act

This final rule involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collection of information involved in this final rule has been reviewed and approved by OMB under OMB control number 0651–0031. This final rule provides that: (1) A third or subsequent continuation or continuation–in–part application or any second or subsequent request for continued examination must include a showing that the amendment, argument, or evidence sought to be entered could not have been submitted prior to the close of prosecution after a first and second continuation or continuation–in–part application and a request for continued examination; (2) an application that contains or is amended to contain more than five independent claims or more than twenty–five total claims must include an examination support document under 37 CFR 1.265 that covers each claim (whether in independent or dependent form) before the issuance of a first Office action on the merits; and (3) multiple applications that have the same claimed filing or priority date, substantial overlapping disclosure, a common inventor, and a common assignee must include either an explanation of how the claims are patentably distinct, or a terminal disclaimer and explanation of why patentably indistinct claims have been filed in multiple applications. The United States Patent and Trademark Office has resubmitted an information collection package to OMB for its review and approval because the changes in this notice do affect the information collection requirements associated with the information collection under OMB control number 0651–0031.

The title, description and respondent description of the information collection under OMB control number 0651–0031 is shown below with an estimate of the annual reporting burdens. Included in the estimate is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information.

OMB Number: 0651–0031.

Title: Patent Processing (Updating).

Form Numbers: PTO/SB/08, PTO/SB/17i, PTO/SB/17p, PTO/SB/21–27, PTO/SB/24B, PTO/SB/30–32, PTO/SB/35–39, PTO/SB/42–43, PTO/SB/61–64, PTO/SB/64a, PTO/SB/67–68, PTO/SB/91–92, PTO/SB/96–97, PTO–2053–A/B, PTO–2054–A/B, PTO–2055–A/B, PTOL–413A.

Type of Review: Approved through September of 2007.

Affected Public: Individuals or households, business or other for-profit institutions, not-for-profit institutions, farms, Federal Government and State, Local and Tribal Governments.

Estimated Number of Respondents: 2,508,139.

Estimated Time Per Response: 1 minute and 48 seconds to 24 hours.

Estimated Total Annual Burden Hours: 3,724,791 hours.

Needs and Uses: During the processing of an application for a patent, the applicant or applicant's representative may be required or desire to submit additional information to the United States Patent and Trademark Office concerning the examination of a specific application. The specific information required or which may be submitted includes: information disclosure statement and citation, examination support documents, requests for extensions of time, the establishment of small entity status, abandonment and revival of abandoned applications, disclaimers, appeals, petitions, expedited examination of design applications, transmittal forms, requests to inspect, copy and access patent applications, publication requests, and certificates of mailing, transmittals, and submission of priority documents and amendments.

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: (1) The Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Patent and Trademark Office; and (2) Robert A. Clarke, Director, Office of Patent Legal Administration, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450.

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 in 37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of Information, Inventions and patents, Reporting and recordkeeping requirements, Small Businesses.

■ For the reasons set forth in the preamble, 37 CFR part 1 is amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2).

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

§ 1.17 Patent application and reexamination processing fees.

* * * * *

(f) For filing a petition under one of the following sections which refers to this paragraph: $400.00

§ 1.36(a)—for revocation of a power of attorney by fewer than all of the applicants.

§ 1.53(e)—to accord a filing date.

§ 1.57(a)—to accord a filing date.

§ 1.78(d)(1)(vi)—for a continuing application not provided for in §§ 1.78(d)(1)(i) through (d)(1)(v).

§ 1.114(g)—for a request for continued examination not provided for in § 1.114(f).

§ 1.182—for decision on a question not specifically provided for.

§ 1.183—to suspend the rules.

§ 1.378(e)—for reconsideration of decision on petition refusing to accept

delayed payment of maintenance fee in an expired patent.

§ 1.741(b)—to accord a filing date to an application under § 1.740 for extension of a patent term.

* * * * *

■ 3. Section 1.26 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1.26 Refunds.

(a) The Director may refund any fee paid by mistake or in excess of that required. Except as provided in § 1.117 or § 1.138(d), a change of purpose after the payment of a fee, such as when a party desires to withdraw a patent filing for which the fee was paid, including an application, an appeal, or a request for an oral hearing, will not entitle a party to a refund of such fee. The Office will not refund amounts of twenty-five dollars or less unless a refund is specifically requested, and will not notify the payor of such amounts. If a party paying a fee or requesting a refund does not provide the banking information necessary for making refunds by electronic funds transfer (31 U.S.C. 3332 and 31 CFR part 208), or instruct the Office that refunds are to be credited to a deposit account, the Director may require such information, or use the banking information on the payment instrument to make a refund. Any refund of a fee paid by credit card will be by a credit to the credit card account to which the fee was charged.

(b) Any request for refund must be filed within two years from the date the fee was paid, except as otherwise provided in this paragraph, or in § 1.28(a), § 1.117(b), or § 1.138(d). If the Office charges a deposit account by an amount other than an amount specifically indicated in an authorization (§ 1.25(b)), any request for refund based upon such charge must be filed within two years from the date of the deposit account statement indicating such charge, and include a copy of that deposit account statement. The time periods set forth in this paragraph are not extendable.

* * * * *

■ 4. Section 1.52 is amended by revising paragraph (d)(2) to read as follows:

§ 1.52 Language, paper, writing, margins, compact disc specifications.

* * * * *

(d) * * *

(2) *Provisional application.* If a provisional application is filed in a language other than English and the benefit of such provisional application is claimed in a nonprovisional application, an English language translation of the non-English language provisional application will be required in the provisional application. *See* § 1.78(b).

* * * * *

■ 5. Section 1.53 is amended by revising paragraphs (b) and (c)(4) to read as follows:

§ 1.53 Application number, filing date, and completion of application.

* * * * *

(b) *Application filing requirements—Nonprovisional application.* The filing date of an application for patent filed under this section, except for a provisional application under paragraph (c) of this section or a continued prosecution application under paragraph (d) of this section, is the date on which a specification as prescribed by 35 U.S.C. 112 containing a description pursuant to § 1.71 and at least one claim pursuant to § 1.75, and any drawing required by § 1.81(a) are filed in the Patent and Trademark Office. No new matter may be introduced into an application after its filing date. A continuing application, which may be a continuation, divisional, or continuation-in-part application, may be filed under this section if the conditions specified in 35 U.S.C. 120, 121, or 365(c) and § 1.78 are met.

(1) A continuation or divisional application that names as inventors the same or fewer than all of the inventors named in the prior application may be filed under paragraph (b) or (d) of this section. A continuation or divisional application naming an inventor not named in the prior application must be filed under paragraph (b) of this section. See § 1.78(a)(2) for the definition of a divisional application and § 1.78(a)(3) for the definition of a continuation application.

(2) A continuation-in-part application must be filed under paragraph (b) of this section. See § 1.78(a)(4) for the definition of a continuation-in-part application.

(c) * * *

(4) A provisional application is not entitled to the right of priority under 35 U.S.C. 119 or 365(a) or § 1.55, or to the benefit of an earlier filing date under 35 U.S.C. 120, 121 or 365(c) or § 1.78 of any other application. No claim for priority under 35 U.S.C. 119(e) or § 1.78 may be made in a design application based on a provisional application. No request under § 1.293 for a statutory invention registration may be filed in a provisional application. The requirements of §§ 1.821 through 1.825 regarding application disclosures containing nucleotide and/or amino acid sequences are not mandatory for provisional applications.

* * * * *

■ 6. Section 1.75 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1.75 Claim(s).

* * * * *

(b) More than one claim may be presented provided they differ substantially from each other and are not unduly multiplied. One or more claims may be presented in dependent form, referring back to and further limiting another claim or claims in the same application. A dependent claim must contain a reference to a claim previously set forth in the same application, incorporate by reference all the limitations of the previous claim to which such dependent claim refers, and specify a further limitation of the subject matter of the previous claim.

(1) An applicant must file an examination support document in compliance with § 1.265 that covers each claim (whether in independent or dependent form) before the issuance of a first Office action on the merits of the application if the application contains or is amended to contain more than five independent claims or more than twenty-five total claims. An application may not contain or be amended to contain more than five independent claims or more than twenty-five total claims if an examination support document in compliance with § 1.265 has not been filed before the issuance of a first Office action on the merits of the application.

(2) A claim that refers to another claim but does not incorporate by reference all of the limitations of the claim to which such claim refers will be treated as an independent claim for fee calculation purposes under § 1.16 (or § 1.492) and for purposes of paragraph (b) of this section. A claim that refers to a claim of a different statutory class of invention will also be treated as an independent claim for fee calculation purposes under § 1.16 (or § 1.492) and for purposes of paragraph (b) of this section.

(3) The applicant will be notified if the application contains or is amended to contain more than five independent claims or more than twenty-five total claims but the applicant has not complied with the requirements set forth in paragraph (b)(1) or (b)(4) of this section. If the non-compliance appears to have been inadvertent, the notice will set a two-month time period that is not extendable under § 1.136(a) within which, to avoid abandonment of the application, the applicant must comply

with the requirements set forth in paragraph (b) of this section.

(4) If a nonprovisional application contains at least one claim that is patentably indistinct from at least one claim in one or more other pending nonprovisional applications, and if such one or more other nonprovisional applications and the first nonprovisional application are owned by the same person, or are subject to an obligation of assignment to the same person, the Office will treat the claims (whether in independent or dependent form) in the first nonprovisional application and in each of such other pending nonprovisional applications as present in each of the nonprovisional applications for purposes of paragraph (b) of this section.

(5) Claims withdrawn from consideration under §§ 1.141 through 1.146 or § 1.499 as drawn to a non-elected invention or inventions will not, unless they are reinstated or rejoined, be taken into account in determining whether an application exceeds the five independent claim and twenty-five total claim threshold set forth in paragraphs (b)(1), (b)(3), and (b)(4) of this section.

(c) Any dependent claim which refers to more than one other claim (''multiple dependent claim'') shall refer to such other claims in the alternative only. A multiple dependent claim shall not serve as a basis for any other multiple dependent claim. For fee calculation purposes under § 1.16 (or § 1.492) and for purposes of paragraph (b) of this section, a multiple dependent claim will be considered to be that number of claims to which direct reference is made therein. For fee calculation purposes under § 1.16 (or § 1.492) and for purposes of paragraph (b) of this section, any claim depending from a multiple dependent claim will be considered to be that number of claims to which direct reference is made in that multiple dependent claim. In addition to the other filing fees, any application which is filed with, or is amended to include, multiple dependent claims must have paid therein the fee set forth in § 1.16(j). A multiple dependent claim shall be construed to incorporate by reference all the limitations of each of the particular claims in relation to which it is being considered.

* * * * *

■ 7. Section 1.76 is amended by revising paragraph (b)(5) to read as follows:

§ 1.76 Application data sheet.

* * * * *

(b) * * *

(5) *Domestic priority information.* This information includes the application number, the filing date, and relationship of each application for which a benefit is claimed under 35 U.S.C. 120, 121, or 365(c). This information includes the application number and the filing date of each application for which a benefit is claimed under 35 U.S.C. 119(e). Providing this information in the application data sheet also constitutes the specific reference required by 35 U.S.C. 119(e) or 120, and § 1.78(b)(3) or § 1.78(d)(3), and need not otherwise be made part of the specification.

* * * * *

■ 8. Section 1.78 is revised to read as follows:

§ 1.78 Claiming benefit of earlier filing date and cross-references to other applications.

(a) *Definitions*—(1) *Continuing application.* A continuing application is a nonprovisional application or an international application designating the United States of America that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of a prior-filed nonprovisional application or international application designating the United States of America. An application that does not claim the benefit under 35 U.S.C. 120, 121, or 365(c) of a prior-filed application is not a continuing application even if the application claims the benefit under 35 U.S.C. 119(e) of a provisional application, claims priority under 35 U.S.C. 119(a)-(d) or 365(b) to a foreign application, or claims priority under 35 U.S.C. 365(a) or (b) to an international application designating at least one country other than the United States of America.

(2) *Divisional application.* A divisional application is a continuing application as defined in paragraph (a)(1) of this section that discloses and claims only an invention or inventions that were disclosed and claimed in a prior-filed application, but were subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121 in the prior-filed application, and were not elected for examination and were not examined in any prior-filed application.

(3) *Continuation application.* A continuation application is a continuing application as defined in paragraph (a)(1) of this section that discloses and claims only an invention or inventions that were disclosed in the prior-filed application.

(4) *Continuation-in-part application.* A continuation-in-part application is a continuing application as defined in paragraph (a)(1) of this section that discloses subject matter that was not disclosed in the prior-filed application.

(b) *Claims under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application.* A nonprovisional application, other than for a design patent, or an international application designating the United States of America may claim the benefit of one or more prior-filed provisional applications under the conditions set forth in 35 U.S.C. 119(e) and paragraph (b) of this section.

(1) The nonprovisional application or international application designating the United States of America must be filed not later than twelve months after the date on which the provisional application was filed. This twelve-month period is subject to 35 U.S.C. 21(b) and § 1.7(a).

(2) Each prior-filed provisional application must name as an inventor at least one inventor named in the later-filed application. In addition, each prior-filed provisional application must be entitled to a filing date as set forth in § 1.53(c) and the basic filing fee set forth in § 1.16(d) must have been paid for such provisional application within the time period set forth in § 1.53(g).

(3) Any nonprovisional application or international application designating the United States of America that claims the benefit of one or more prior-filed provisional applications must contain or be amended to contain a reference to each such prior-filed provisional application, identifying it by the provisional application number (consisting of series code and serial number). If the later-filed application is a nonprovisional application, the reference required by this paragraph must be included in an application data sheet (§ 1.76), or the specification must contain or be amended to contain such reference in the first sentence(s) following the title.

(4) The reference required by paragraph (b)(3) of this section must be submitted during the pendency of the later-filed application. If the later-filed application is an application filed under 35 U.S.C. 111(a), this reference must also be submitted within the later of four months from the actual filing date of the later-filed application or sixteen months from the filing date of the prior-filed provisional application. If the later-filed application is a nonprovisional application which entered the national stage from an international application after compliance with 35 U.S.C. 371, this reference must also be submitted within the later of four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in the later-filed international application or sixteen months from the filing date of the prior-

filed provisional application. Except as provided in paragraph (c) of this section, failure to timely submit the reference is considered a waiver of any benefit under 35 U.S.C. 119(e) of the prior-filed provisional application. The time periods in this paragraph do not apply if the later-filed application is:

(i) An application filed under 35 U.S.C. 111(a) before November 29, 2000; or

(ii) An international application filed under 35 U.S.C. 363 before November 29, 2000.

(5) If the prior-filed provisional application was filed in a language other than English and both an English-language translation of the prior-filed provisional application and a statement that the translation is accurate were not previously filed in the prior-filed provisional application, applicant will be notified and given a period of time within which to file the translation and the statement in the prior-filed provisional application. If the notice is mailed in a pending nonprovisional application, a timely reply to such a notice must include the filing in the nonprovisional application of either a confirmation that the translation and statement were filed in the provisional application, or an amendment or supplemental application data sheet withdrawing the benefit claim, or the nonprovisional application will be abandoned. The translation and statement may be filed in the provisional application, even if the provisional application has become abandoned.

(c) *Delayed claims under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application.* If the reference required by 35 U.S.C. 119(e) and paragraph (b)(3) of this section is presented in a nonprovisional application after the time period provided by paragraph (b)(4) of this section, the claim under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application may be accepted if submitted during the pendency of the later-filed application and if the reference identifying the prior-filed application by provisional application number was unintentionally delayed. A petition to accept an unintentionally delayed claim under 35 U.S.C. 119(e) for the benefit of a prior-filed provisional application must be accompanied by:

(1) The reference required by 35 U.S.C. 119(e) and paragraph (b)(3) of this section to the prior-filed provisional application, unless previously submitted;

(2) The surcharge set forth in § 1.17(t); and

(3) A statement that the entire delay between the date the claim was due under paragraph (b)(4) of this section and the date the claim was filed was unintentional. The Director may require additional information where there is a question whether the delay was unintentional.

(d) *Claims under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed nonprovisional or international application.* A nonprovisional application (including an international application that has entered the national stage after compliance with 35 U.S.C. 371) may claim the benefit of one or more prior-filed copending nonprovisional applications or international applications designating the United States of America under the conditions set forth in 35 U.S.C. 120 and paragraph (d) of this section.

(1) A nonprovisional application that claims the benefit of one or more prior-filed copending nonprovisional applications or international applications designating the United States of America must satisfy the conditions set forth in at least one of paragraphs (d)(1)(i) through (d)(1)(vi) of this section. The Office will refuse to enter, or will delete if present, any specific reference to a prior-filed application that is not permitted by at least one of paragraphs (d)(1)(i) through (d)(1)(vi) of this section. The Office's entry of, or failure to delete, a specific reference to a prior-filed application that is not permitted by at least one of paragraphs (d)(1)(i) through (d)(1)(vi) of this section does not constitute a waiver of the provisions of paragraph (d)(1) of this section.

(i)(A) The nonprovisional application is either a continuation application as defined in paragraph (a)(3) of this section or a continuation-in-part application as defined in paragraph (a)(4) of this section that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of no more than two prior-filed applications; and

(B) Any application whose benefit is claimed under 35 U.S.C. 120, 121, or 365(c) in such nonprovisional application has its benefit claimed in no more than one other nonprovisional application, not including any nonprovisional application that satisfies the conditions set forth in paragraph (d)(1)(ii), (d)(1)(iii) or (d)(1)(vi) of this section.

(ii)(A) The nonprovisional application is a divisional application as defined in paragraph (a)(2) of this section that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of a prior-filed application that was subject to a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121; and

(B) The divisional application contains only claims directed to an invention or inventions that were identified in such requirement to comply with the requirement of unity of invention or requirement for restriction but were not elected for examination and were not examined in the prior-filed application or in any other nonprovisional application, except for a nonprovisional application that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of such divisional application and satisfies the conditions set forth in paragraph (d)(1)(iii) or (d)(1)(vi) of this section.

(iii)(A) The nonprovisional application is a continuation application as defined in paragraph (a)(3) of this section that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of a divisional application that satisfies the conditions set forth in paragraph (d)(1)(ii) of this section;

(B) The nonprovisional application discloses and claims only an invention or inventions that were disclosed and claimed in such divisional application;

(C) The nonprovisional application claims the benefit under 35 U.S.C. 120, 121, or 365(c) of only the divisional application, any application to which such divisional application claims benefit under 35 U.S.C. 120, 121, or 365(c) in compliance with the conditions set forth in paragraph (d)(1)(ii) of this section, and no more than one intervening prior-filed nonprovisional application; and

(D) The divisional application whose benefit is claimed under 35 U.S.C. 120, 121, or 365(c) in such nonprovisional application has its benefit claimed in no more than one other nonprovisional application, not including any other divisional application that satisfies the conditions set forth in paragraph (d)(1)(ii) or any nonprovisional application that claims the benefit under 35 U.S.C. 120 or 365(c) of such other divisional application and satisfies the conditions set forth in paragraph (d)(1)(iii) or (d)(1)(vi) of this section.

(iv)(A) The nonprovisional application claims benefit under 35 U.S.C. 120 or 365(c) of a prior-filed international application designating the United States of America, and a Demand has not been filed and the basic national fee (§ 1.492(a)) has not been paid in the prior-filed international application and the prior-filed international application does not claim the benefit of any other nonprovisional application or international application

designating the United States of America;

(B) The nonprovisional application is either a continuation application as defined in paragraph (a)(3) of this section or a continuation-in-part application as defined in paragraph (a)(4) of this section that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of no more than three prior-filed applications; and

(C) Any application whose benefit is claimed under 35 U.S.C. 120, 121, or 365(c) in such nonprovisional application has its benefit claimed in no more than two other nonprovisional applications, not including any nonprovisional application that satisfies the conditions set forth in paragraph (d)(1)(ii), (d)(1)(iii) or (d)(1)(vi) of this section.

(v)(A) The nonprovisional application claims benefit under 35 U.S.C. 120 or 365(c) of a prior-filed nonprovisional application filed under 35 U.S.C. 111(a), and such nonprovisional application became abandoned due to the failure to timely reply to an Office notice issued under § 1.53(f) and does not claim the benefit of any other nonprovisional application or international application designating the United States of America;

(B) The nonprovisional application is either a continuation application as defined in paragraph (a)(3) of this section or a continuation-in-part application as defined in paragraph (a)(4) of this section that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of no more than three prior-filed applications; and

(C) Any application whose benefit is claimed under 35 U.S.C. 120, 121, or 365(c) in such nonprovisional application has its benefit claimed in no more than two other nonprovisional applications, not including any nonprovisional application that satisfies the conditions set forth in paragraph (d)(1)(ii), (d)(1)(iii) or (d)(1)(vi) of this section.

(vi) The nonprovisional application is a continuing application as defined in paragraph (a)(1) of this section that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of a prior-filed application, is filed to obtain consideration of an amendment, argument, or evidence that could not have been submitted during the prosecution of the prior-filed application, and does not satisfy the conditions set forth in any of paragraphs (d)(1)(i) through (d)(1)(v) of this section. A petition must be filed in such nonprovisional application that is accompanied by the fee set forth in § 1.17(f) and a showing that the amendment, argument, or evidence sought to be entered could not have been submitted during the prosecution of the prior-filed application. If the continuing application is an application filed under 35 U.S.C. 111(a), this petition must be submitted within four months from the actual filing date of the continuing application. If the continuing application is a nonprovisional application which entered the national stage from an international application after compliance with 35 U.S.C. 371, this petition must be submitted within four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in the international application.

(2) Each prior-filed application must name as an inventor at least one inventor named in the later-filed application. In addition, each prior-filed application must either be:

(i) An international application entitled to a filing date in accordance with PCT Article 11 and designating the United States of America; or

(ii) A nonprovisional application under 35 U.S.C. 111(a) that is entitled to a filing date as set forth in § 1.53(b) or § 1.53(d) for which the basic filing fee set forth in § 1.16 has been paid within the pendency of the application.

(3) Except for a continued prosecution application filed under § 1.53(d), any nonprovisional application, or international application designating the United States of America, that claims the benefit of one or more prior-filed nonprovisional applications or international applications designating the United States of America must contain or be amended to contain a reference to each such prior-filed application, identifying it by application number (consisting of the series code and serial number) or international application number and international filing date. The reference must also identify the relationship of the applications (*i.e.*, whether the later-filed application is a continuation, divisional, or continuation-in-part of the prior-filed nonprovisional application or international application). If an application is identified as a continuation-in-part application, the applicant must identify the claim or claims in the continuation-in-part application for which the subject matter is disclosed in the manner provided by the first paragraph of 35 U.S.C. 112 in the prior-filed application. If the later-filed application is a nonprovisional application, the reference required by this paragraph must be included in an application data sheet (§ 1.76), or the specification must contain or be amended to contain such reference in the first sentence(s) following the title.

(4) The reference required by 35 U.S.C. 120 and paragraph (d)(3) of this section must be submitted during the pendency of the later-filed application. If the later-filed application is an application filed under 35 U.S.C. 111(a), this reference must also be submitted within the later of four months from the actual filing date of the later-filed application or sixteen months from the filing date of the prior-filed application. If the later-filed application is a nonprovisional application which entered the national stage from an international application after compliance with 35 U.S.C. 371, this reference must also be submitted within the later of four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in the later-filed international application or sixteen months from the filing date of the prior-filed application. Except as provided in paragraph (e) of this section, failure to timely submit the reference required by 35 U.S.C. 120 and paragraph (d)(3) of this section is considered a waiver of any benefit under 35 U.S.C. 120, 121, or 365(c) to the prior-filed application. The time periods in this paragraph do not apply if the later-filed application is:

(i) An application for a design patent;

(ii) An application filed under 35 U.S.C. 111(a) before November 29, 2000; or

(iii) An international application filed under 35 U.S.C. 363 before November 29, 2000.

(5) The request for a continued prosecution application under § 1.53(d) is the specific reference required by 35 U.S.C. 120 to the prior-filed application. The identification of an application by application number under this section is the identification of every application assigned that application number necessary for a specific reference required by 35 U.S.C. 120 to every such application assigned that application number.

(6) Cross-references to other related applications may be made when appropriate. Cross-references to applications for which a benefit is not claimed under title 35, United States Code, must be located in a paragraph that is separate from the paragraph containing the references to applications for which a benefit is claimed under 35 U.S.C. 119(e), 120, 121, or 365(c) that is required by 35 U.S.C. 119(e) or 120 and this section.

(e) *Delayed claims under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed nonprovisional application or international application.* If the reference required by 35 U.S.C. 120 and

paragraph (d)(3) of this section is presented after the time period provided by paragraph (d)(4) of this section, the claim under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed copending nonprovisional application or international application designating the United States of America may be accepted if the reference identifying the prior-filed application by application number or international application number and international filing date was unintentionally delayed. A petition to accept an unintentionally delayed claim under 35 U.S.C. 120, 121, or 365(c) for the benefit of a prior-filed application must be accompanied by:

(1) The reference required by 35 U.S.C. 120 and paragraph (d)(3) of this section to the prior-filed application, unless previously submitted;

(2) The surcharge set forth in § 1.17(t); and

(3) A statement that the entire delay between the date the claim was due under paragraph (d)(4) of this section and the date the claim was filed was unintentional. The Director may require additional information where there is a question whether the delay was unintentional.

(f) *Applications and patents naming at least one inventor in common.* (1)(i) The applicant in a nonprovisional application that has not been allowed (§ 1.311) must identify by application number (*i.e.*, series code and serial number) and patent number (if applicable) each other pending or patented nonprovisional application, in a separate paper, for which the following conditions are met:

(A) The nonprovisional application has a filing date that is the same as or within two months of the filing date of the other pending or patented nonprovisional application, taking into account any filing date for which a benefit is sought under title 35, United States Code;

(B) The nonprovisional application names at least one inventor in common with the other pending or patented nonprovisional application; and

(C) The nonprovisional application is owned by the same person, or subject to an obligation of assignment to the same person, as the other pending or patented nonprovisional application.

(ii) The identification of such one or more other pending or patented nonprovisional applications if required by paragraph (f)(1)(i) of this section must be submitted within the later of:

(A) Four months from the actual filing date in a nonprovisional application filed under 35 U.S.C. 111(a);

(B) Four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in a nonprovisional application entering the national stage from an international application under 35 U.S.C. 371; or

(C) Two months from the mailing date of the initial filing receipt in such other nonprovisional application for which identification is required by paragraph (f)(1)(i) of this section.

(2)(i) A rebuttable presumption shall exist that a nonprovisional application contains at least one claim that is not patentably distinct from at least one of the claims in another pending or patented nonprovisional application if the following conditions are met:

(A) The nonprovisional application has a filing date that is the same as the filing date of the other pending or patented nonprovisional application, taking into account any filing date for which a benefit is sought under title 35, United States Code;

(B) The nonprovisional application names at least one inventor in common with the other pending or patented nonprovisional application;

(C) The nonprovisional application is owned by the same person, or subject to an obligation of assignment to the same person, as the other pending or patented nonprovisional application; and

(D) The nonprovisional application and the other pending or patented nonprovisional application contain substantial overlapping disclosure. Substantial overlapping disclosure exists if the other pending or patented nonprovisional application has written description support under the first paragraph of 35 U.S.C. 112 for at least one claim in the nonprovisional application.

(ii) If the conditions specified in paragraph (f)(2)(i) of this section exist, the applicant in the nonprovisional application must, unless the nonprovisional application has been allowed (§ 1.311), take one of the following actions within the time period specified in paragraph (f)(2)(iii) of this section:

(A) Rebut this presumption by explaining how the application contains only claims that are patentably distinct from the claims in each of such other pending nonprovisional applications or patents; or

(B) Submit a terminal disclaimer in accordance with § 1.321(c). In addition, where one or more other pending nonprovisional applications have been identified, the applicant must explain why there are two or more pending nonprovisional applications naming at least one inventor in common and owned by the same person, or subject to an obligation of assignment to the same person, which contain patentably indistinct claims.

(iii) If the conditions specified in paragraph (f)(2)(i) of this section exist, the applicant in the nonprovisional application must, unless the nonprovisional application has been allowed (§ 1.311), take one of the actions specified in paragraph (f)(2)(ii) of this section within the later of:

(A) Four months from the actual filing date of a nonprovisional application filed under 35 U.S.C. 111(a);

(B) Four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in a nonprovisional application entering the national stage from an international application under 35 U.S.C. 371;

(C) The date on which a claim that is not patentably distinct from at least one of the claims in the one or more other pending or patented nonprovisional applications is presented; or

(D) Two months from the mailing date of the initial filing receipt in the one or more other pending or patented nonprovisional applications.

(3) In the absence of good and sufficient reason for there being two or more pending nonprovisional applications owned by the same person, or subject to an obligation of assignment to the same person, which contain patentably indistinct claims, the Office may require elimination of the patentably indistinct claims from all but one of the applications.

(g) *Applications or patents under reexamination naming different inventors and containing patentably indistinct claims.* If an application or a patent under reexamination and at least one other application naming different inventors are owned by the same party and contain patentably indistinct claims, and there is no statement of record indicating that the claimed inventions were commonly owned or subject to an obligation of assignment to the same person at the time the later invention was made, the Office may require the assignee to state whether the claimed inventions were commonly owned or subject to an obligation of assignment to the same person at the time the later invention was made, and if not, indicate which named inventor is the prior inventor.

(h) *Parties to a joint research agreement.* If an application discloses or is amended to disclose the names of parties to a joint research agreement under 35 U.S.C. 103(c)(2)(C), the parties to the joint research agreement are considered to be the same person for purposes of this section. If the application is amended to disclose the names of parties to a joint research

agreement, the identification of such one or more other nonprovisional applications as required by paragraph (f)(1) of this section must be submitted with such amendment unless such identification is or has been submitted within the four-month period specified in paragraph (f)(1) of this section.

(i) *Time periods not extendable:* The time periods set forth in this section are not extendable.

■ 9. Section 1.104 is amended by revising paragraphs (a)(1) and (b) to read as follows:

§ 1.104 Nature of examination.

(a) *Examiner's action.* (1) On taking up an application for examination or a patent in a reexamination proceeding, the examiner shall make a thorough study thereof and shall make a thorough investigation of the available prior art relating to the subject matter of the claimed invention. The examination shall be complete with respect both to compliance of the application or patent under reexamination with the applicable statutes, rules, and other requirements, and to the patentability of the invention as claimed, as well as with respect to matters of form, unless otherwise indicated.

* * * * *

(b) *Completeness of examiner's action.* The examiner's action will be complete as to all matters, except that in appropriate circumstances, such as misjoinder of invention, fundamental defects in the application, and the like, the action of the examiner may be limited to such matters before further action is made.

* * * * *

■ 10. Section 1.105 is amended by adding a new paragraph (a)(1)(ix) to read as follows:

§ 1.105 Requirements for information.

(a)(1) * * *

(ix) *Support in the specification:* Where (by page and line or paragraph number) in the specification of the application, or any application the benefit of whose filing date is sought under title 35, United States Code, there is written description support for the invention as defined in the claims (whether in independent or dependent form), and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the invention, under the first paragraph of 35 U.S.C. 112.

* * * * *

■ 11. Section 1.110 is revised to read as follows:

§ 1.110 Inventorship and date of invention of the subject matter of individual claims.

When more than one inventor is named in an application or patent, the Office may require an applicant, patentee, or owner to identify the inventive entity of the subject matter of each claim in the application or patent when necessary for purposes of an Office proceeding. Where appropriate, the invention dates of the subject matter of each claim and the ownership of the subject matter on the date of invention may be required of the applicant, patentee or owner. *See also* §§ 1.78 and 1.130.

■ 12. Section 1.114 is amended by revising paragraphs (a) and (d), and by adding new paragraphs (f), (g), and (h), to read as follows:

§ 1.114 Request for continued examination.

(a) If prosecution in an application is closed, an applicant may, subject to the conditions of this section, file a request for continued examination of the application accompanied by a submission, the fee set forth in § 1.17(e), and if required, a petition under paragraph (g) of this section accompanied by the fee set forth in § 1.17(f), prior to the earliest of:

(1) Payment of the issue fee, unless a petition under § 1.313 is granted;

(2) Abandonment of the application; or

(3) The filing of a notice of appeal to the U.S. Court of Appeals for the Federal Circuit under 35 U.S.C. 141, or the commencement of a civil action under 35 U.S.C. 145 or 146, unless the appeal or civil action is terminated.

* * * * *

(d) If an applicant files a request for continued examination under this section after appeal, but prior to a decision on the appeal, the request for continued examination will also be treated as a request to withdraw the appeal and to reopen prosecution of the application before the examiner. An appeal brief (§ 41.37 of this title), a reply brief (§ 41.41 of this title), or related papers will not be considered a submission under this section.

* * * * *

(f) An applicant may file a request for continued examination under this section in an application without a petition under paragraph (g) of this section if the conditions set forth in at least one of paragraphs (f)(1), (f)(2), or (f)(3) of this section are satisfied:

(1) A request for continued examination under this section has not previously been filed in any of:

(i) The application;

(ii) Any application whose benefit is claimed under 35 U.S.C. 120, 121, or 365(c) in such application; and

(iii) Any application that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of such application, not including any nonprovisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii), (d)(1)(iii) or (d)(1)(vi).

(2) The application is a divisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii), and a request for continued examination under this section has not previously been filed in any of:

(i) The divisional application; and

(ii) Any application that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of such divisional application, not including any nonprovisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii), (d)(1)(iii) or (d)(1)(vi).

(3) The application is a continuation application that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of a divisional application and satisfies the conditions set forth in § 1.78(d)(1)(iii), and a request for continued examination under this section has not been filed in any of:

(i) The continuation application;

(ii) The divisional application; and

(iii) Any other application that claims the benefit under 35 U.S.C. 120, 121, or 365(c) of such divisional application, not including any nonprovisional application that satisfies the conditions set forth in § 1.78(d)(1)(ii), (d)(1)(iii) or (d)(1)(vi).

(g) A request for continued examination must include a petition accompanied by the fee set forth in § 1.17(f) and a showing that the amendment, argument, or evidence sought to be entered could not have been submitted prior to the close of prosecution in the application, except as otherwise provided in paragraph (f) of this section.

(h) The filing of an improper request for continued examination, including a request for continued examination with a petition under paragraph (g) of this section that is not grantable, will not stay any period for reply that may be running against the application, nor act as a stay of other proceedings.

■ 13. Section 1.117 is added to read as follows:

§ 1.117 Refund due to cancellation of claim.

(a) If an amendment canceling a claim is filed before an examination on the merits has been made of the application, the applicant may request a refund of any fee under § 1.16(h), (i), or (j) or under § 1.492(d), (e), or (f) paid on or after December 8, 2004, for such claim. If an amendment adding one or more claims is also filed before the application has been taken up for examination on the merits, the Office may apply any refund under § 1.117 to any excess claims fees due as a result of such an amendment. The date indicated on any certificate of mailing or transmission under § 1.8 will not be taken into account in determining whether an amendment canceling a claim was filed before an examination on the merits has been made of the application.

(b) If a request for refund under this section is not filed within two months from the date on which the claim was canceled, the Office may retain the excess claims fee paid in the application. This two-month period is not extendable. If an amendment canceling a claim is not filed before an examination on the merits has been made of the application, the Office will not refund any part of the excess claims fee paid in the application except as provided in § 1.26.

■ 14. Section 1.136 is amended by revising paragraph (a)(1) to read as follows:

§ 1.136 Extensions of time.

(a)(1) If an applicant is required to reply within a nonstatutory or shortened statutory time period, applicant may extend the time period for reply up to the earlier of the expiration of any maximum period set by statute or five months after the time period set for reply, if a petition for an extension of time and the fee set in § 1.17(a) are filed, unless:

(i) Applicant is notified otherwise in an Office action;

(ii) The reply is to a notice requiring compliance with § 1.75(b) or § 1.265;

(iii) The reply is a reply brief submitted pursuant to § 41.41 of this title;

(iv) The reply is a request for an oral hearing submitted pursuant to § 41.47(a) of this title;

(v) The reply is to a decision by the Board of Patent Appeals and Interferences pursuant to § 1.304 or to § 41.50 or § 41.52 of this title; or

(vi) The application is involved in a contested case (§ 41.101(a) of this title).

* * * * *

■ 15. Section 1.142 is amended by revising paragraph (a) and adding new paragraph (c) to read as follows:

§ 1.142 Requirement for restriction.

(a) If two or more independent and distinct inventions are claimed in a single application, the examiner in an Office action may require the applicant in the reply to that action to elect an invention to which the claims will be restricted, this official action being called a requirement for restriction (also known as a requirement for division). Such requirement will normally be made before any action on the merits; however, it may be made at any time before final action.

* * * * *

(c) If two or more independent and distinct inventions are claimed in a single application, the applicant may file a suggested requirement for restriction under this paragraph. Any suggested requirement for restriction must be filed prior to the earlier of the first Office action on the merits or an Office action that contains a requirement to comply with the requirement of unity of invention under PCT Rule 13 or a requirement for restriction under 35 U.S.C. 121 in the application. Any suggested requirement for restriction must also be accompanied by an election without traverse of an invention to which there are no more than five independent claims and no more than twenty-five total claims, and must identify the claims to the elected invention. If the suggested requirement for restriction is accepted, the applicant will be notified in an Office action that will contain a requirement for restriction under paragraph (a) of this section. Any claim to the non-elected invention or inventions, if not canceled, is by the election withdrawn from further consideration.

■ 16. Section 1.145 is revised to read as follows:

§ 1.145 Subsequent presentation of claims for different invention.

If, after an Office action on the merits on an application, the applicant presents claims directed to an invention distinct from and independent of the invention previously claimed, the applicant may be required to restrict the claims to the invention previously claimed if the amendment is entered, subject to reconsideration and review as provided in §§ 1.143 and 1.144.

■ 17. Section 1.265 is added to read as follows:

§ 1.265 Examination support document.

(a) An examination support document as used in this part means a document that includes the following:

(1) A statement that a preexamination search in compliance with paragraph (b) of this section was conducted, including an identification of the field of search by United States class and subclass and the date of the search, where applicable, and, for database searches, the search logic or chemical structure or sequence used as a query, the name of the file or files searched and the database service, and the date of the search;

(2) A listing of the reference or references deemed most closely related to the subject matter of each of the claims (whether in independent or dependent form) in compliance with paragraph (c) of this section;

(3) For each reference cited, an identification of all of the limitations of each of the claims (whether in independent or dependent form) that are disclosed by the reference;

(4) A detailed explanation particularly pointing out how each of the independent claims is patentable over the cited references; and

(5) A showing of where each limitation of each of the claims (whether in independent or dependent form) finds support under the first paragraph of 35 U.S.C. 112 in the written description of the specification. If the application claims the benefit of one or more applications under title 35, United States Code, the showing must also include where each limitation of each of the claims finds support under the first paragraph of 35 U.S.C. 112 in each such priority or benefit application in which such support exists.

(b) The preexamination search referred to in paragraph (a)(1) of this section must involve U.S. patents and patent application publications, foreign patent documents, and non-patent literature, unless the applicant justifies with reasonable certainty that no references more pertinent than those already identified are likely to be found in the eliminated source and includes such a justification with the statement required by paragraph (a)(1) of this section. The preexamination search referred to in paragraph (a)(1) of this section must be directed to the claimed invention and encompass all of the limitations of each of the claims (whether in independent or dependent form), giving the claims the broadest reasonable interpretation.

(c) The listing of references required under paragraph (a)(2) of this section as part of an examination support document must include a list identifying each of the cited references

in compliance with paragraphs (c)(1) and (c)(2) of this section, a copy of each reference if required by paragraph (c)(3) of this section, and each English language translation if required by paragraph (c)(4) of this section.

(1) The list of cited references must itemize U.S. patents and U.S. patent application publications (including international applications designating the U.S.) in a section separate from the list of other references. Each page of the list of the cited references must include:

(i) The application number, if known, of the application in which the examination support document is being filed;

(ii) A column that provides a space next to each cited reference for the examiner's initials; and

(iii) A heading that clearly indicates that the list is part of an examination support document listing of references.

(2) The list of cited references must identify each cited reference as follows:

(i) Each U.S. patent must be identified by first named patentee, patent number, and issue date.

(ii) Each U.S. patent application publication must be identified by applicant, patent application publication number, and publication date.

(iii) Each U.S. application must be identified by the applicant, application number, and filing date.

(iv) Each foreign patent or published foreign patent application must be identified by the country or patent office which issued the patent or published the application, an appropriate document number, and the publication date indicated on the patent or published application.

(v) Each publication must be identified by publisher (*e.g.*, name of journal), author (if any), title, relevant pages of the publication, date, and place of publication.

(3) The listing of references required under paragraph (a)(2) of this section must also be accompanied by a legible copy of each cited reference, except for references that are U.S. patents or U.S. patent application publications.

(4) If a non-English language document is being cited in the listing of references required under paragraph (a)(2) of this section as part of an examination support document, any existing English language translation of the non-English language document must also be submitted if the translation is within the possession, custody, or control of, or is readily available to any individual identified in § 1.56(c).

(d) If an information disclosure statement is filed in an application in which an examination support document is required and has been filed, the applicant must also file a supplemental examination support document addressing the reference or references in the manner required under paragraphs (a)(3) and (a)(4) of this section unless the information disclosure statement cites only references that are less closely related to the subject matter of one or more claims (whether in independent or dependent form) than the references cited in the examination support document listing of references under paragraph (a)(2) of this section.

(e) If an examination support document is required, but the examination support document or preexamination search is deemed to be insufficient, or the claims have been amended such that the examination support document no longer covers each of the claims, applicant will be notified and given a two-month time period that is not extendable under § 1.136(a) within which, to avoid abandonment of the application, the applicant must:

(1) File a corrected or supplemental examination support document in compliance with this section that covers each of the claims (whether in independent or dependent form); or

(2) Amend the application such that it contains no more than five independent claims and no more than twenty-five total claims.

(f) An examination support document, or a corrected or supplemental examination support document, is not required to comply with the requirements set forth in paragraph (a)(3) of this section if the examination support document is accompanied by a certification that any rights in the application have not been assigned, granted, conveyed, or licensed, and there is no obligation under contract or law to assign, grant, convey, or license any rights in the application, other than a security interest that has not been defaulted upon, to any entity other than:

(1) A business or other concern:

(i) Whose number of employees, including affiliates, does not exceed 500 persons; and

(ii) Which has not assigned, granted, conveyed, or licensed (and is under no obligation to do so) any rights in the invention to any person who made it and could not be classified as an independent inventor, or to any concern which would not qualify as a non-profit organization or a small business concern under paragraph (f)(1)(i) of this section.

(2) A not-for-profit enterprise which is independently owned and operated and is not dominant in its field; or

(3) A government of a city, county, town, township, village, school district, or special district, with a population of less than fifty thousand.

■ 18. Section 1.495 is amended by revising paragraph (g) to read as follows:

§ 1.495 Entering the national stage in the United States of America.

* * * * *

(g) The documents and fees submitted under paragraphs (b) and (c) of this section must be clearly identified as a submission to enter the national stage under 35 U.S.C. 371. If the documents and fees contain conflicting indications as between an application under 35 U.S.C. 111 and a submission to enter the national stage under 35 U.S.C. 371, the documents and fees will be treated as a submission to enter the national stage under 35 U.S.C. 371.

* * * * *

■ 19. Section 1.704 is amended by redesignating paragraph (c)(11) as (c)(12) and adding new paragraph (c)(11) to read as follows:

§ 1.704 Reduction of period of adjustment of patent term.

* * * * *

(c) * * *

(11) Failure to comply with § 1.75(b), in which case the period of adjustment set forth in § 1.703 shall be reduced by the number of days, if any, beginning on the day after the date that is the later of the filing date of the amendment resulting in the non-compliance with § 1.75(b), or four months from the filing date of the application in an application under 35 U.S.C. 111(a) or from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) in an application which entered the national stage from an international application after compliance with 35 U.S.C. 371, and ending on the date that an examination support document in compliance with § 1.265, an election in reply to a requirement under § 1.142(a), 1.146 or 1.499 resulting in compliance with § 1.75(b), an amendment resulting in compliance with § 1.75(b), or a suggested restriction requirement in compliance with § 1.142(c), was filed;

* * * * *

Dated: August 2, 2007.

Jon W. Dudas,

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

[FR Doc. E7–15565 Filed 8–20–07; 8:45 am]

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 216

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 070703226–7461–02; I.D. 062206A]

RIN 0648–AT80

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar

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

ACTION: Final rule.

SUMMARY: NMFS, upon application from the U.S. Navy, is issuing regulations to govern the unintentional taking of marine mammals incidental to Navy operation of the Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) Sonar. Issuance of regulations, and Letters of Authorization issued under these regulations, is required by the Marine Mammal Protection Act (MMPA) when the Secretary of Commerce (Secretary), after notice and opportunity for comment, finds, as here, that such takes will have a negligible impact on the affected species or stocks of marine mammals and will not have an unmitigable adverse impact on their availability for taking for subsistence uses. These regulations set forth the permissible methods of take and other means of effecting the least practicable adverse impact on the affected species or stocks of marine mammals and their habitat.

DATES: Effective from August 16, 2007, through August 15, 2012.

ADDRESSES: A copy of the application, containing a list of references used in this document, and other documents cited herein, may be obtained by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225, by telephoning one of the contacts listed under **FOR FURTHER INFORMATION CONTACT**, or at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

A copy of the Navy's Final Supplemental Environmental Impact Statement (Final SEIS) and the Final Environmental Impact Statement (Final EIS) can be downloaded at: *http://www.surtass-lfa-eis.com.* Documents cited in this rule may also be viewed, by appointment, during regular business hours at this address.

FOR FURTHER INFORMATION CONTACT: Kenneth Hollingshead, NMFS, at 301–713–2289, ext 128.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*) (MMPA) directs the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a military readiness activity if certain findings are made and regulations are issued.

The MMPA directs the Secretary to allow the requested incidental taking during periods of not more than 5 consecutive years each if the Secretary finds that the total taking will have a negligible impact on the affected species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses. The Secretary must also issue regulations setting forth the permissible methods of taking and other means of effecting the least practicable adverse impact, including a consideration of personnel safety, the practicality of implementation of any mitigation, and the impact on the effectiveness of the subject military readiness activity, and the requirements pertaining to the monitoring and reporting of such taking. These regulations do not themselves authorize the taking of marine mammals. NMFS authorizes the incidental take through ''letters of authorization'' (LOAs) (50 CFR 216.106). Prior to issuance of an LOA, NMFS conducts a review of the activity and its impact on marine mammals (via the required monitoring, reporting and research) to ensure that the MMPA findings continue to be valid.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' For the purposes of ''military readiness activities'' harassment is defined as:

(i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B harassment].

The term ''military readiness activity'' is defined in Public Law 107–314 (16 U.S.C. 703 note) to include all training and operations of the Armed Forces that relate to combat; and the adequate and realistic testing of military equipment, vehicles, weapons and sensors for proper operation and suitability for combat use. The term expressly does not include the routine operation of installation operating support functions, such as military offices, military exchanges, commissaries, water treatment facilities, storage facilities, schools, housing, motor pools, laundries, morale, welfare and recreation activities, shops, and mess halls; the operation of industrial activities; or the construction or demolition of facilities used for a military readiness activity.

Summary of Request

On May 12, 2006, NMFS received an application from the U.S. Navy requesting an authorization under section 101(a)(5)(A) of the MMPA for the taking of marine mammals by Level A and Level B harassment, incidental to deploying the SURTASS LFA sonar system for military readiness activities to include training, testing and routine military operations within the world's oceans (except for Arctic and Antarctic waters, coastal regions as specified in this rule, and offshore biologically important areas (OBIAs)) for a period of time not to exceed 5 years. According to the Navy's application, the Navy planned to operate the SURTASS LFA sonar system on a maximum of 4 ships in areas potentially including the Pacific, Atlantic, and Indian oceans and the Mediterranean Sea.

SURTASS LFA sonar provides the Navy with a reliable and dependable system for long-range detection of quieter, harder-to-find submarines. Low-frequency (LF) sound travels in seawater for greater distances than higher frequency sound used by most other active sonars. According to the Navy, the SURTASS LFA sonar system would meet the Navy's need for improved detection and tracking of new-generation submarines at a longer range. This would maximize the opportunity for U.S. armed forces to safely react to, and defend against, potential submarine threats while remaining a safe distance beyond a submarine's effective weapons range.

NMFS and the Navy have determined that the Navy's use of SURTASS LFA

sonar testing, training, and routine military operations constitute a military readiness activity because those activities constitute ''training and operations of the Armed Forces that relate to combat'' and constitute ''adequate and realistic testing of military equipment, vehicles, weapons and sensors for proper operation and suitability for combat use.''

NMFS' current regulations governing takings incidental to SURTASS LFA sonar activities and the current LOA extends through August 15, 2007.

On September 28, 2006 (71 FR 56965), NMFS published a Notice of Receipt of Application on the U.S. Navy application and invited interested persons to submit comments, information, and suggestions concerning the application and the structure and contents of regulations. These comments were considered in the development of the proposed and final rules.

Prior Litigation, Involving LFA Sonar

On August 7, 2002, the Natural Resources Defense Council, the U.S. Humane Society and four other plaintiffs filed suit against the Navy and NMFS over SURTASS LFA sonar use and permitting. The U.S. District Court for the Northern District of California (Court) issued its Opinion and Order on the parties' motions for summary judgment in the SURTASS LFA sonar litigation on August 26, 2003. The Court found deficiencies in Navy and NMFS compliance with the MMPA, Endangered Species Act (ESA), and National Environmental Policy Act (NEPA). The Court determined that an injunction was warranted but did not order a complete ban on the use of SURTASS LFA sonar. Specifically, the Court found that a total ban on the employment of SURTASS LFA sonar would interfere with the Navy's ability to ensure military readiness and to protect those serving in the military against the threat posed by hostile submarines. The Court directed the parties to meet and confer on the scope of a tailored permanent injunction, which would allow for continued operation of the system with additional mitigation measures. The parties entered into a Stipulation Regarding Permanent Injunction that allowed the Navy to operate SURTASS LFA sonar from both *R/V Cory Chouest* and USNS IMPECCABLE (T–AGOS 23) in stipulated portions of the Northwest Pacific/Philippine Sea, Sea of Japan, East China Sea, and South China Sea with certain year-round and seasonal restrictions. The Court entered the Stipulation as an Order on October 14, 2003. On July 7, 2005, following mediation by the parties, the Court amended the injunction at Navy's request to expand the potential areas of operation based on real-world contingencies. The Navy began work on an SEIS, in response to the Court's ruling on the motion for preliminary injunction. The Navy's Final SEIS, which was completed in April 2007, not only addresses, the concerns identified by the Court in its ruling on the merits of the parties' summary judgment motions, but it also provides additional information regarding the environment that could potentially be affected by the SURTASS LFA sonar systems, and additional information related to mitigation.

A detailed description of the operations is contained in the Navy's application (DON, 2006) and the Final SEIS (DON, 2007) which are available upon request (see **ADDRESSES**).

Description of the Activity

The SURTASS LFA sonar system is a long-range, LF sonar (between 100 and 500 Hertz (Hz)) that has both active and passive components. It does not have to rely on detection of noise generated by the target. The active component of the system is a set of up to 18 LF acoustic transmitting source elements (called projectors) suspended from a cable underneath a ship. The projectors are devices that transform electrical energy to mechanical energy by setting up vibrations, or pressure disturbances, with the water to produce the pulse or ping. The SURTASS LFA sonar acoustic transmission is an omnidirectional (full 360 degrees) beam in the horizontal. A narrow vertical beamwidth can be steered above or below the horizontal. The source level (SL) of an individual projector in the SURTASS LFA sonar array is approximately 215 decibels (dB), and because of the physics involved in beam forming and transmission loss processes, the array can never have a sound pressure level (SPL) higher than the SPL of an individual projector. The expected water depth at the center of the array is 400 ft (122 m) and the expected minimum water depth at which the SURTASS LFA sonar vessel will operate is 200 m (656.2 ft).

The typical SURTASS LFA sonar signal is not a constant tone, but rather a transmission of various signal types that vary in frequency and duration (including continuous wave (CW) and frequency-modulated (FM) signals). A complete sequence of sound transmissions is referred to by the Navy as a ''ping'' and can last as short as 6 seconds (sec) to as long as 100 sec, normally with no more than 10 sec at any single frequency. The time between pings is typically from 6 to 15 minutes. Average duty cycle (ratio of sound ''on'' time to total time) is less than 20 percent; however, the duty cycle, based on historical operating parameters, is normally 7.5 percent.

The passive, or listening, component of the system is SURTASS, which detects returning echoes from submerged objects, such as submarines, through the use of hydrophones. The hydrophones are mounted on a horizontal array that is towed behind the ship. The SURTASS LFA sonar ship maintains a minimum speed of 3.0 knots (5.6 km/hr; 3.4 mi/hr) in order to keep the array deployed.

Because of uncertainties in the world's political climate, a detailed account of future operating locations and conditions cannot be predicted. However, for analytical purposes, a nominal annual deployment schedule and operational concept have been developed, based on current LFA sonar operations since January 2003 and projected Fleet requirements. The Navy anticipates that a normal SURTASS LFA sonar deployment schedule for a single vessel would involve about 294 days/year at sea. A normal at-sea mission would occur over a 49-day period, with 40 days of operations and 9 days transit. Based on a 7.5-percent duty cycle, the system would actually be transmitting for a maximum of 72 hours per 49-day mission and 432 hours per year for each SURTASS LFA sonar system in operation. (In actuality however, the combined number of transmission hours for LFA sonar employed on both the *R/V Cory Chouest* and the USNS IMPECCABLE (TAGOS 23) did not exceed 174 hours annually between August 16, 2002, and August 15, 2006 (Table 4 in the Navy's Final Comprehensive Report (Navy, 2007)).

Annually, each vessel will be expected to spend approximately 54 days in transit and 240 days performing active operations. Between missions, an estimated 71 days will be spent in port for upkeep and repair. The nominal SURTASS LFA Sonar annual and 49-day deployment schedule for a single ship can be seen in Table 2–1 of the Final SEIS.

The two existing operational LFA sonar systems are installed on the SURTASS vessels: *R/V Cory Chouest* and USNS IMPECCABLE (T–AGOS 23). To meet future undersea warfare requirements, the Navy is working to develop and introduce a compact active system deployable from existing, smaller SURTASS Swath-P ships. This smaller system is known as Compact

LFA, or CLFA sonar. CLFA sonar consists of smaller, lighter-weight source elements than the current LFA sonar system, and will be compact enough to be installed on the existing SURTASS platforms, VICTORIOUS Class (T–AGOS 19) vessels. The Navy indicates that the operational characteristics of the compact system are comparable to the existing LFA sonar systems as presented in Subchapter 2.1 of the Final EIS and Final SEIS. Consequently, the potential impacts from CLFA sonar will be similar to the effects from the existing SURTASS LFA sonar systems. Three CLFA sonar systems are planned for installation on T–AGOS 20, 21, and 22. With the *R/V Cory Chouest* retiring in FY 2008, the Navy estimates that there will be two systems in operation in FY 2008 and FY 2009, 3 in FY 2010 and 4 systems in FY 2011 and FY 2012. At no point are there expected to be more than four systems in use, and thus this rule analyzes the impacts on marine mammals due to the deployment of up to three LFA sonar systems through FY 2010 and four systems in FY 2011 and FY 2012.

The SURTASS LFA sonar vessel will operate independently of, or in conjunction with, other naval air, surface or submarine assets. The vessel will generally travel in straight lines or racetrack patterns depending on the operational scenario.

Description of Acoustic Propagation

The following is a very basic and generic description of the propagation of LFA sonar signals in the ocean and is provided to facilitate understanding of this action. However, because the actual physics governing the propagation of SURTASS LFA sound signals is extremely complex and dependent on numerous in-situ environmental factors, the following is for illustrative purposes only.

In actual SURTASS LFA sonar operations, the crew of the SURTASS LFA sonar platform will measure oceanic conditions (such as sea water temperature and salinity versus depth) prior to and during transmissions and at least every 12 hours, but more frequently when meteorological or oceanographic conditions change. These technicians will then use U.S. Navy sonar propagation models to predict and/or update sound propagation characteristics. The short time periods between actual environmental observations and the subsequent model runs further enhance the accuracy of these predictions. Fundamentally, these models are used to determine what path the LF signal will take as it travels through the ocean and how strong the sound signal will be at given ranges along a particular transmission path.

Accurately determining the speed at which sound travels through the water is critical to predicting the path that sound will take. The speed of sound in seawater varies directly with depth, temperature, and salinity. Thus, an increase in depth or temperature or, to a lesser degree, salinity, will increase the speed of sound in seawater. However, the oceans are not homogeneous, and the contribution of each of these individual factors is extremely complex and interrelated. The physical characteristics that determine sound speed change with depth, and in the case of temperature and salinity, season, geographic location, and locally, with time of day. After accurately measuring these factors, mathematical formulas or models can be used to generate a plot of sound speed versus water depth. This type of plot is generally referred to as a sound speed profile (SSP).

Near the surface (variable within the top 1000 ft (305 m)), ocean near-surface water mixing results in a fairly constant temperature and salinity. Below the mixed layer, sea temperature drops rapidly in an area referred to as the thermocline. In this region, temperature influences the SSP, and speed decreases with depth because of the large decrease in temperature (sound speed decreases with decreasing temperature). Finally, beneath the thermocline, the temperature becomes fairly uniform and increasing pressure causes the SSP to increase with depth.

One way to envision sound traveling through the sea is to think of the sound as ''rays.'' As these rays travel through the sea, their direction of travel changes as a result of speed changes, bending, or refracting, toward areas of lower speed and away from areas of higher speed. Depending on environmental conditions, refraction can either be toward or away from the surface. Additionally, the rays can be reflected or absorbed when they encounter the surface or the bottom. For example, under certain environmental conditions, near-surface sound rays can repeatedly be refracted upward and reflected off the surface and thus become trapped in a duct.

Some of the more prevalent acoustic propagation paths in the ocean include: acoustic ducting; convergence zone (CZ); bottom interaction; and shallow-water propagation.

Acoustic Ducting

There are two types of acoustic ducting: surface ducts and sound channels.

Surface Ducts

As previously discussed, the top layer of the ocean is normally well mixed and has relatively constant temperature and salinity. Because of the effect of depth (pressure), surface layers exhibit a slightly positive sound speed gradient (that is, sound speed increases with depth). Thus, sound transmitted within this layer is refracted upward toward the surface. If sufficient energy is subsequently reflected downward from the surface, the sound can become ''trapped'' by a series of repeated upward refractions and downward reflections. Under these conditions, a surface duct, or surface channel, is said to exist. Sound trapped in a surface duct can travel for relatively long distances with its maximum range of propagation dependent on the specifics of the SSP, the frequency of the sound (e.g., there is a low-frequency cutoff dependent on the thickness of the duct), and the reflective characteristics of the surface. As a general rule, surface duct propagation will improve as the temperature uniformity and depth of the layer increase. For example, transmission is improved when cloudy, windy conditions create a well-mixed surface layer or in high-latitude midwinter conditions where the mixed layer extends to several hundred feet deep.

Sound Channels

Variation of sound speed, or velocity, with depth causes sound to travel in curved paths. A sound channel is a region in the water column where sound speed first decreases with depth to a minimum value, and then increases. Above the depth of minimum value, sound is refracted downward; below the depth of minimum value, sound is refracted upward. Thus, much of the sound starting in the channel is trapped, and any sound entering the channel from outside its boundaries is also trapped. This mode of propagation is called sound channel propagation. This propagation mode experiences the least transmission loss along the path, thus resulting in long-range transmission.

At low and middle latitudes, the deep sound channel axis varies from 1,970 to 3,940 ft (600 to 1,200 m) below the surface. It is deepest in the subtropics and comes to the surface in the high latitudes, where sound propagates in the surface layer. Because propagating sound waves do not interact with either the sea surface or seafloor, sound

propagation in sound channels does not attenuate as rapidly as bottom- or surface-interacting paths. The most common sound channels used by SURTASS LFA sonar are convergence zones (CZs).

Convergence Zones

CZs are special cases of the sound-channel effect. When the surface layer is narrow or when sound rays are refracted downward, regions are created at or near the ocean surface where sound rays are focused, resulting in elevated sound levels. The existence of CZs depends on the SSP and the depth of the water. Due to downward refraction at shorter ranges, sound rays leaving the near-surface region are refracted back to the surface because of the positive sound speed gradient produced by the greater pressure at deep ocean depths. These deep-refracted rays often become concentrated at or near the surface at some distance from the sound source through the combined effects of downward and upward refraction, thus causing a CZ. CZs may exist whenever the sound speed at the ocean bottom, or at a specific depth, exceeds the sound speed at the source depth. Depth excess, also called sound speed excess, is the difference between the bottom depth and the limiting, or critical depth.

CZs vary in range from approximately 18 to 36 nautical miles (nm) (33 to 67 km), depending upon the SSP. The width of the CZ is a result of complex interrelationships and cannot be correlated with any specific factor. In practice, however, the width of the CZ is usually on the order of 5 to 10 percent of the range. For optimum tactical performance, CZ propagation of SURTASS LFA sonar signals is desired and expected in deep open ocean conditions.

Bottom Interaction

Reflections from the ocean bottom and refraction within the bottom can extend propagation ranges. For mid- to high-level frequency sonars (greater than 1,000 Hz), only minimal energy enters into the bottom; thus reflection is the predominant mechanism for energy return. However, at low frequencies, such as those used by the SURTASS LFA sonar source, significant sound energy can penetrate the ocean floor, and refraction within the seafloor, not reflection, dominates the energy return. Regardless of the actual transmission mode (reflection from the bottom or refraction within the bottom), this interaction is generally referred to as ''bottom-bounce'' transmission.

Major factors affecting bottom-bounce transmission include the sound frequency, water depth, angle of incidence, bottom composition (e.g., sediments), and bottom roughness. A flat ocean bottom produces the greatest accuracy in estimating range and bearing in the bottom-bounce mode.

For SURTASS LFA sonar transmissions between 100 and 500 Hz, bottom interaction would generally occur in areas of the ocean where depths are between approximately 200 m (660 ft) (average minimum water depth for SURTASS LFA sonar deployment) and 2,000 m (6,600 ft).

Shallow Water Propagation

In shallow water, propagation is usually characterized by multiple reflection paths off the sea floor and sea surface. Thus, most of the water column tends to become ensonified by these overlapping reflection paths. As LFA sonar signals approach the shoreline, they will be affected by shoaling, experiencing high transmission losses through bottom and surface interactions. Therefore, LFA sonar would be less effective in shallow, coastal waters.

In summary, for the SURTASS LFA sonar signal in low- and mid-latitudes, the dominant propagation paths for LFA sonar signals are CZ and bottom interaction (at depths less than 2000 m (6,600 ft)). In high-latitudes, surface ducting provides the best propagation. In most open ocean water, CZ propagation will be most prominent. The SURTASS LFA sonar signals will interact with the bottom, but due to high bottom and surface losses, SURTASS LFA sonar signals will not penetrate coastal waters with appreciable signal strengths.

Comments and Responses

On September 28, 2006 (71 FR 56965), NMFS published a Notice of Receipt of Application on the U.S. Navy SURTASS LFA sonar MMPA application and invited interested persons to submit comments, information, and suggestions concerning the application and the structure and contents of regulations. Those comments were considered in the development of the proposed rule. A proposed rule for renewal of the regulations governing SURTASS LFA sonar MMPA authorization was published on July 9, 2007 (72 FR 37404) with a 15-day public comment period. During the two comment periods, comments were received from a large number of organizations and individuals. Those organizations include the Marine Mammal Commission (Commission), the Natural Resources Defense Council (NRDC), Earth Island Institute (EII), Acoustic Ecology Institute (AEI), Animal Welfare Society (AWI), Cetacean Society Institute (CSI), Seaflow, International Ocean Noise Coalition, Olympic Coast Alliance, Citizens Opposing Active Sonar Threats, Ocean Care, Gesselschaft zur Rettung der Delphine, SBOOHER, Ocean Conservation Research, Friends of the San Juans, World Society for the Protection of Animals. We have addressed all comments on the proposed rule. We also responded to comments that appear to be directed solely at the draft SEIS, although we did not address comments strictly related to non-marine mammal issues. See the Navy's Final SEIS, which NMFS has adopted under NEPA.

Activity Concerns

Comment 1: The U.S. Navy seeks a blanket exemption to do harm to all marine animals in 80 percent of the world oceans with only minor mitigation measures taken. Expanding the SURTASS program into 80 percent of the world's oceans would make the task of monitoring the impacts impossible. An LOA granted would not meet the ''negligible impact'' condition and would violate the ''unmitigable adverse impact'' constraints indicated in the MMPA LOA process.

Response: The Navy is not seeking a ''blanket exemption'' from the MMPA, but rather is requesting that NMFS issue regulations to govern the incidental take of marine mammals under Section 101(a)(5)(A) of the MMPA. Under these regulations the Navy must apply annually for a letter of authorization (LOA) that would exempt the taking of marine mammals incidental to the Navy's use of SURTASS LFA sonar from the MMPA's general moratorium on the taking of marine mammals for that year, as long as the sonar use was consistent with these regulations and the terms of the LOA. In its LOA application, the Navy must specify where it will operate SURTASS LFA sonar for that year and take authorization would be limited to that area. Under the regulations, the total area that would be available for SURTASS LFA sonar operations over the five-year period is about 70–75 percent of the world's oceans. This in no way equates to LFA sonar operations affecting even close to 70–75 percent of the world's ocean area at any given time. Each year, based on its projected operational needs, the Navy will identify for which particular geographic areas, out of the total available area, it is requesting take authorization through an LOA. The first authorization is for only two SURTASS LFA sonar vessels both operating in the Western Pacific Ocean. Eventually, the Navy plans to have 4 vessels in operation, but even if

all 4 vessels operated in 4 different oceans, the area ensonified would come nowhere close to 70–75 percent of the world's ocean area. Therefore, SURTASS LFA sonar sound will not simultaneously affect 70–75 percent of the world's oceans. In addition, NMFS has determined that incidental harassment takings by SURTASS LFA sonar operations during the effective time period (1 year) of any LOA issued to the Navy pursuant to these regulations must not exceed 12 percent of any marine mammal stock.

The sound pressure level (SPL) that is capable of potentially causing injury to an animal is within approximately 1 km (0.54 nm) of the ship. For the purposes of analyses using the Acoustic Integration Model (AIM) and the risk continuum, there is a 50 percent risk of significant change in a biologically important behavior for a marine mammal exposed to a received level (RL) of 165 dB RMS. The range from the SURTASS LFA sonar vessel for this received level, which could cause behavioral disruption but not injury, could extend to 25 to 65 km (13.5 to 35.1 nm). The received level at the surface along any straight path away from the ship would not decline logarithmically over distance, as would be expected if the sound spread by spherical spreading alone. The reason is that, for CZ propagation, the sound moves in an undulating path with turning points near the surface and near the bottom, where sound is refracted either downward (near surface) or upward (near bottom). Turning points near the surface, termed caustics, occur approximately every 30 nm (56 km). The received level at the surface would be high at the caustics but low in between them because most of the sound energy there would be found at great depth. While the regulations permit the Navy to seek authorization through an LOA to take marine mammals while operating SURTASS LFA sonar in many of the world's oceans and SURTASS LFA sonar signal can be detected at several hundred miles using sophisticated listening gear, SURTASS LFA sonar's potential to cause injury or affect behavior is limited to relatively close to the ship. Thus, the impact of SURTASS LFA sonar is not global in scope. Moreover, monitoring to ensure that marine mammals are not injured is not impossible, as the commenter suggests, given the limited area around the vessel that is ensonified at decibel levels up to 180 dB, and the demonstrated effectiveness of the Navy's tripartite (visual, acoustic, and HF/M3) monitoring scheme.

Since the SURTASS LFA sonar will not operate in Arctic waters, there will not be an unmitigable adverse impact on relevant subsistence uses of marine mammals. That determination is provided later in this document. NMFS also believes the negligible impact standard has been met, as described in this final rule.

Comment 2: The Navy is proposing to expand the use of LFA sonar, both through expansion of use areas geographically throughout the world's oceans and through doubling the number of LFA sonar array ships. The Navy is also admitting to the use of CLFA sonar in ''shallow littoral ocean regions'' and do not discuss the characteristics of CLFA sonar in the Final SEIS.

Response: While the number of SURTASS LFA sonar vessels will increase from 2 to 4 vessels over the course of the five-year rule, the Navy is not increasing the number of SURTASS LFA sonar systems beyond what was analyzed in the January 2001 Final EIS. That document analyzed the potential impacts of up to four SURTASS LFA sonar systems. As stated in the Navy's Record of Decision (ROD) (67 FR 48145, July 23, 2002), the Navy determined that only two of the four systems would be operational during the timeframe of the 2002–2007 regulations governing the taking of marine mammals incidental to LFA sonar testing and training. For that reason, NMFS addressed taking marine mammals incidental to operation of only two systems under the initial five year Final Rule in 2002. Installation and deployment of the third and fourth LFA sonar systems were postponed until after FY 2007. Because of this delay, the decision in the Navy Record of Decision (ROD) and NMFS' MMPA determinations covered the employment of only two SURTASS LFA sonar systems. Therefore, the use of SURTASS LFA sonar, analyzed here, does not exceed the originally analyzed four systems during the timeframe of the requested second five year set of MMPA regulations.

In addition, the Navy's proposal to deploy SURTASS LFA sonar in a number of oceans is not new. The Navy's Final EIS proposed, and NMFS original Final Rule and regulations addressed, deployment of SURTASS LFA sonar throughout most of the world's oceans. As stated in the Final SEIS, these systems will be employed as required for security operations in the oceanic areas as presented in Figure 1–1 of the Final EIS. Potential operations could occur in the Pacific, Atlantic, and Indian Oceans, and the Mediterranean Sea. Large oceanic areas are restricted from operations, including the Arctic and Antarctic Ocean areas, as are all offshore areas within 12 nm (22 km) of land, and OBIAs (Table 2–4 of the SEIS). The limitation of SURTASS LFA operation to the Western Pacific Ocean was a product of the parties' negotiations over the Stipulated Permanent Injunction.

Nevertheless, while the number of systems may increase under this Final Rule and the Navy may seek authorization to use SURTASS LFA sonar in more places than it could under the terms of the permanent injunction, the maximum permissible impact to any particular species or stock remains the same, since the Navy's overall use of SURTASS LFA sonar can have no more than a negligible impact on marine mammal species and stocks. Consistent with its findings in the original rule, NMFS has determined that takings by SURTASS LFA sonar operations during the effective time period (1 year) of any LOA issued to the Navy pursuant to these regulations must not exceed 12 percent of any marine mammal stock.

As stated in the Final SEIS Subchapter 1.2.3 and 2.1, compact LFA sonar (CLFA sonar) sonar is an upgrade and modification to the SURTASS LFA sonar system necessary to install and operate on the smaller VICTORIOUS Class T–AGOS 19 Class ocean surveillance ships. The operational characteristics of the active system components installed, or to be installed, on the *R/V Cory Chouest,* USNS IMPECCABLE, and VICTORIOUS Class vessels are provided in Final SEIS Subchapter 2.1.1. The characteristics of LFA sonar and the upgrade and modifications for the T–AGOS 19 installations are essentially the same. The frequency requirements for the CLFA to be installed onboard the VICTORIOUS Class (T–AGOS 19 Class) vessels are within the 100 to 500 Hz range for LFA sonar and the transmit array also consists of 18 transducers with a similar source level.

Subchapter 1.1.3 of the Final SEIS provides a definition of the term ''littoral'' as used by the U.S. Navy and explains the ways in which the use of the term as a tactical designation differs from its use as a geographic term. The littoral operating environment does not necessarily include or exclude any waters because of depth; it can include both deep and shallow water. However, under any of the alternatives analyzed in the Final SEIS, LFA sonar would not operate inside of 12 nm (22 km) from any coastline. The use of SURTASS LFA sonar in coastal environments was discussed in Response to Comments (RTCs) 1–1.4 and 3–2.8 in the Final EIS.

Comment 3: With regard to noise-producing activities, NMFS must describe source levels, frequency ranges, duty cycles, and other technical parameters relevant to determining the potential impacts of an MMPA authorization.

Response: The NMFS action is the issuance of regulations and LOAs to the Navy for taking marine mammals incidental to SURTASS LFA sonar operations and determining whether SURTASS LFA sonar is having a negligible impact on affected marine mammal species and stocks, not whether LFA sonar operations and other noise producing activities are having a negligible impact on affected species and stocks of marine mammals (and species/stocks not affected by LFA sonar, but potentially by other noise-producing activities). In that regard, all technical parameters relevant to the impact analysis, including those listed by the commenter, were provided in the project descriptions for SURTASS LFA sonar in both the Final EIS (DON, 2001) Subchapters 2.1.1 and 2.3.2.2 and in RTCs 2–1.1 and 2–1.2a; and in the Final SEIS Subchapter 2.1.1.

Comment 4: There are at least five Navy SWATH vessels already built and outfitted with operational LFA sonars.

Response: Four VICTORIOUS class Ocean Surveillance ships were built between 1991 and 1993. As stated in the SEIS Subchapter 2.1, there are no LFA sonar systems deployed on these vessels at this time. The projected LFA sonar/CLFA sonar system availabilities are shown in the Final SEIS Figure 2–2, which includes future installations onboard the VICTORIOUS Class vessels.

Comment 5: It is only a matter of time before many other industrialized nations follow suit and the oceans become a cacophony of LFA sonar systems using loud noise to try and find each other in an increasingly loud environment. The U.S. should re-examine this ''need'' and come up with a better way to find these quiet submarines.

Response: This comment is beyond the scope of this rulemaking. As explained in the Final EIS, subchapter 1.2.1, the Navy has considered other alternatives and determined that SURTASS LFA sonar best addresses its need for reliable long-range detection of potentially hostile quiet submarines.

Comment 6: At peak power, the Navy's LFA sonar system sends out pulses of sound underwater at least the equivalent of standing five feet away from the Saturn rocket on liftoff.

Response: While an accurate source level of the Saturn V is not known, the comparison of this, or any other rocket, to LFA sonar is inappropriate. The sound generated by a Saturn V rocket, or any rocket in general, is broadband and generates a different frequency spectrum than that of LFA sonar, and travels in a significantly different transmission pattern. The Saturn C 1 rocket (a predecessor to the Saturn I rocket, which had about 1,600,000 lbs of thrust) was projected to have produced acoustic levels as high as 205 dB (in air) from a distance of 305 meters. Some sources suggest that the sound levels produced by the Saturn V (during the launch of Apollo 15, the first stage of the Saturn V generated 7,823,000 lbs of liftoff thrust) may have been as high as 220 dB (in air) (Benson and Faherty, 1978). As sound is perceived differently underwater than it is in air, sound propagation and transmission losses in each case are subject to differing factors, including terrain, wind, and air temperature, and in the case of LFA, water salinity, temperature and depth. Furthermore, sound levels are typically provided with a reference level, which depends on whether the sound is in air (reference of 20 microPascals) or water (reference of 1 microPascal). Despite it being inappropriate to compare a sound level in air with that in water (or vice versa), some simplified conversion or correction factors are available to provide a very generic comparison. Therefore, when corrected to the equivalent sound levels in water (based on pressure and impedance differences of the two media), the above acoustic levels of 205 dB in air and 220 dB in air would be approximately 266.5 and 281.5 dB in water, respectively (Please see Final EIS Appendix B, Subchapter B.3.2). These sound levels are 100 to 10,000 times louder than the LFA sonar source.

Comment 7: NMFS should require that the U.S. Navy avoid or eliminate triangulation of sonar whether they are doing exercises with other U.S. Navy ships or with those from other nations.

Response: Triangulation is only necessary for passive acoustics. Triangulation is not necessary for active acoustics because it gives the operator range and bearing. However, the focus of the comment seems to be on the use of multiple LFA sonar ships, which is discussed in the Final SEIS, (Subchapters 4.4.4 and 4.6.1.2) and in the Final EIS (Subchapter 4.2.7.4). The Final EIS states that the vast majority of operations will involve only one ship. This is due to the limited number of ships of SURTASS LFA sonar systems planned to be built and the limited operational conditions that could warrant the use of two sources in proximity to each other. The remote possibility exists that operational requirements or training exercises could require two sources simultaneously in one geographic region, for example the Northwest Pacific Ocean where LFA sonar vessels have been operating. The effect of the presence of two sources transmitting in one area can be conservatively approximated by doubling the single source potential effects provided for that site. An example of these effects can be seen in Table 4–2.13 of the Final EIS. However, even if more than one source operates in a single geographic area, impacts to marine mammals remain capped by the negligible impact requirement. To ensure that SURTASS LFA sonar operations have no more than a negligible impact over five years, not more than 12 percent of any marine mammal stock may be taken, by harassment, in a single year, regardless of how many SURTASS LFA sonar sources are operating in the area.

Comment 8: There are plenty of safe alternatives to active sonar that the Navy could pursue, such as passive sonar, non-acoustic sensors, and Integrated Sensory Networks.

Response: The comment is beyond the scope of NMFS' rulemaking for this action. Non-acoustic alternative underwater detection technologies are discussed in the Final EIS, Subchapter 1.2.1.

MMPA Concerns

Comment 9: NMFS should consolidate all necessary and relevant information from the multiple existing sources of information describing the proposed actions in the proposed rule.

Response: NMFS does not consider it necessary to consolidate all necessary and relevant information on LFA sonar and its impacts on marine mammals into the proposed and/or final rules. In the proposed and final rules, NMFS has continued and updated the information contained in the preamble to the 2002 final rule. NMFS believes that this information provides the necessary level of detail needed for it to make the determinations required under the MMPA and for the public to review this information. This document also reflects the findings of the Final EIS, with the data and findings of the Final SEIS. These documents and others, which are available on the Navy SURTASS LFA sonar homepage (see ADDRESSES) provide the ''consolidated information'' that the commenter requested.

Comment 10: The Commission states that any regulations proposing to issue an incidental taking authorization should include information on specified geographic locations where sonar is

expected to be deployed and the species and number of marine mammals that may be taken in each of those locations.

Response: While the NDAA removed references to the specified geographical region and small numbers requirements for military readiness activities, NMFS still needs to know where activities would take place and the estimated level of take to inform its negligible impact determination. In order to do so, NMFS considered ''worst-case'' estimates for purposes of the negligible impact determination as well as an annual 12 percent per-stock ''cap'' for marine mammals regardless of where and when LFA sonar will be operating (or even how many LFA sonar systems are in operation annually). This rulemaking also considered the oceans and areas where LFA sonar may and may not operate. The rule does not specify the specific location where LFA sonar will be deployed and the number of marine mammals that may be taken in those locations because these are determined annually through various inputs such as mission duration and season of operation [which are calculated in the annual applications for LOAs].

Comment 11: The Commission recommends the existing annual review process for LOAs should be expanded to include public review and comment. The NRDC believes issuance of LOAs without notice and comment violates MMPA section 101(a)(5)(A) because, it says, each year's authorization will involve new take and negligible impact analyses and potentially new exercise areas that are not modeled in the Navy's SEIS.

Response: NMFS does not agree. Under section 101(a)(5)(A), notice and opportunity for public comment must be afforded before the Secretary authorizes the incidental take of marine mammals, makes a negligible impact determination, and issues the required regulations. NMFS published the proposed regulations on July 9, 2007 (72 FR 37404), providing the required notice and opportunity for public comment. That proposed rule contained NMFS' negligible impact determination for the five-year period and proposed mitigation, monitoring, and reporting requirements. It also considered the Navy's estimates of take for the five-year rule period. Section 101(a)(5)(A) of the MMPA does not require the regulations to specify the number of marine mammals that may be taken, only the permissible methods of taking and means of effecting the least practicable adverse impact.

As stated in the proposed rule and the Navy's Final EIS, estimates were derived based on modeling sites, since it was not practical to model all areas where the system might be operated. Final EIS p. 4.2–1. These sites represented the upper bound of impacts expected from operation of SURTASS LFA sonar. Final EIS p. 4.2–3; see Final EIS tables 4.2–1, 4.2–4, 4.2–10, 4.2–11, and 4.2–12. If LFA sonar operations occur in a non-modeled area, the take estimates would most likely be less than those obtained from the most similar site that was modeled. Final EIS p. 4.2–3. As stated in the SEIS, the assumptions of the Final EIS are still valid and have been incorporated by reference into the SEIS p. 4–39, 40. Moreover there are no new data that contradict the assumptions or conclusions made in subchapter 4.2 of the FEIS. Thus, it was not necessary to reanalyze potential acoustic impacts in the SEIS.

The risk assessment for each planned mission site for each vessel is performed annually and is part of the Navy's annual mission intention (LOA application) letter. In its annual LOA applications, the Navy must project where it intends to operate during the period of the annual LOAs and provide NMFS with reasonable and realistic risk estimates of the marine mammal stocks in the proposed areas of operations. This process utilizes the best available data and is detailed in the SEIS including a case study. SEIS pp. 4–37 to 4–51. During the initial steps of the risk analysis process, if the take estimates exceed those required under the regulations (including the annual 12 percent per-stock cap), than the mission areas are changed or refined and the analysis is reinitiated. After receipt of an LOA application, NMFS reviews the activity (and previous annual reports) to ensure it remains within the parameters of the rule and the negligible impact assessment.

NMFS' general implementing regulations for section 101(a)(5)(A) of the MMPA, which have been in effect since 1982 and which governed the last rulemaking for SURTASS LFA sonar incidental take, set up the framework under which NMFS issues LOAs that an applicant must obtain before any incidental take is authorized. 50 CFR 216.106(a). The purpose of the requirement for obtaining LOAs is to ensure the authorized taking will be consistent with the original findings. See 47 FR 21248, 21251 (May 18, 1982). Therefore, issuance of an LOA is based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under the specific regulations for the specified activity. 50 CFR 216.106(b). The reporting requirements under these specific SURTASS LFA sonar regulations and LOAs require the Navy to provide both quarterly and annual reports to NMFS. In these reports, the Navy must provide estimated percentages of marine mammal species/stocks potentially affected for each quarter and annually. NMFS' general implementing regulations do not require the agency to provide notice and comment for LOAs. However, if NMFS were to obtain information that calls into question the validity of its determinations in this rule, the agency could withdraw or suspend authorization to take marine mammals if the Secretary, through the Assistant Administrator for Fisheries, finds, after notice and opportunity for public comment, that the regulations are not being substantially complied with, or the taking allowed pursuant to the regulations is having or may have more than a negligible impact on marine mammal species or stocks. 50 CFR 216.106(e). The requirement for notice and comment does not apply if an emergency exists that poses a significant risk to the wellbeing of the species or stocks of marine mammals concerned. 50 CFR 216.106(f).

Comment 12: The Commission states that NMFS should address the requirement of the NDAA that personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity be considered in making a ''least practicable adverse impact'' determination in the proposed rulemaking.

Response: NMFS agrees with the Commission and added a discussion of the NDAA in the proposed and final rules.

Comment 13: The NRDC states the Navy fails to present evidence of negligible impact. Agencies must make every attempt to obtain and disclose data necessary to their analysis. This is important when the program's impacts depend on newly emerging data. The Navy fails to take account of significant new information that has emerged since January 2001 concerning marine mammal thresholds of injury, hearing loss, and significant behavioral change.

Response: NMFS believes the MMPA requires a determination of negligible impact to be based on the best available data. NMFS believes the best available data were used in the Final SEIS, NMFS' 2002 final rule, the Navy 2006 MMPA application and this final rule, to estimate the potential impacts on the environment. Information that the commenter (and others) believe

contradict this determination by NMFS is addressed throughout this document.

Comment 14: A number of commenters were of the opinion that a 15-day comment period for the proposed rule is too short to review the material and not in compliance with the Administrative Procedure Act (APA).

Response: The 15-day comment period on the proposed rule provided an adquate opportunity for public comment. In addition to the comment period on the proposed rule, members of the public had a 30-day public comment period on the Navy's application for renewal of NMFS' regulations (71 FR 56965, September 28, 2006) and a 92-day public comment period (including three public hearings) for the Navy's Draft SEIS on SURTASS LFA sonar (which contains much of the underlying analysis for this proposed rule, affording significant opportunity for public participation). In addition, the proposed rule is substantially similar to the 2002–2007 rule, which underwent a 75-day public comment period, including public hearings in Los Angeles, CA, Honolulu, HI, and Silver Spring, MD. There have been no significant scientific advancements or other developments since the previous rule that would necessitate a longer period for public comment.

Comment 15: It is well-established that mid-frequency (MF) sonar negatively impacts marine mammals, even resulting in fatalities, with the U.S. Navy having admitted direct responsibility for past beachings. The effects of LF sonar appear to be less understood at this time, but the enormous range of ocean impacted by sonar makes it incumbent upon us to fully understand its effects before authorizing its widescale use. The Precautionary Principle should be applied before issuing a permit.

Response: NMFS used conservative assumptions for identifying and analyzing potential impacts to the environment, including marine mammals. SURTASS LFA sonar has been operating under NMFS regulations for the last five years without any reports of Level A harassment. The evidence to date, including recent scientific reports, supports the conclusion that operation of the U.S. Navy's LFA sonar does not result in marine mammal strandings. For further information on strandings and MF sonar, please see comments 8, 32, 33, 47, and 49 for further analyses on strandings.

Comment 16: I request a moratorium on any use of this technology in the oceans, at the levels currently used, until further tests are conducted on the foundational species in the food chain of the marine environment.

Response: Research using LFA sonar technology has been conducted on several species in the food chain, including whales (blue, fin, grey, and humpback whales) and on fish (catfish, a hearing specialist, and trout; reference species for salmon and a hearing generalist). This research is discussed later in this document (see Research Concerns). NMFS believes the data are sufficient to go forward, recognizing that more research would be valuable.

Marine Mammal Impact Concerns

Comment 17: The NRDC states that the Navy sets its threshold for hearing loss or ''threshold shift'' at 180 dB re: 1 microPa (RMS) for a single 100-second ''ping'' of exposure. The analysis is based on data from humans and other terrestrial mammals and relies on a limited set of data on marine mammals. The Navy has established a sliding scale for behavioral impacts. The Final SEIS fails to incorporate several recent studies on the effects of low-frequency sound on various marine mammal species. Also, the Navy's standard fails to take proper account of chronic impacts, from behavioral changes as well as from certain non-auditory physiological impacts such as stress. The Final SEIS and MMPA application disregard recent evidence indicated the potential for masking to interfere with long-distance mating behavior in mysticetes. The Navy standard is out of step with how the potential for behavioral impacts has been assessed in other contexts. Last, the Navy does not consider the impact that behavioral changes in species such as fish may have on marine mammals foraging.

Response: NMFS believes that the latest information on impacts of underwater sounds on marine mammals and fish is contained in the Navy's Draft and Final SEIS, and summarized in the Navy's application. NMFS addresses the masking issue in comment 19 and elsewhere in this document.

As stated in the Final EIS, the 180-dB criterion for the purpose of SURTASS LFA sonar analysis is that all marine animals exposed to received levels (RLs) greater than 180-dB rms are evaluated as if they are injured. In its 2002 Final Rule for SURTASS LFA sonar, NMFS stated that temporary threshold shift (TTS) is not an injury. Since the boundary line between TTS and permanent threshold shift (PTS) is neither clear, definitive, nor predictable for marine mammals, NMFS has adopted (as a conservative estimate) 20 dB of TTS to define the onset of PTS (i.e., a temporary shift of 20 dB in hearing threshold) (67 FR 46711, July 16, 2002). As noted in Schlundt *et al.* (2000), bottlenose dolphins and belugas exposed to 1-sec signals at 400 Hz did not exhibit TTS after exposures to maximum RLs of 193-dB sound exposure level (SEL)) (which would be equivalent to a received level of 193 dB re: 1 microPascal (RMS) since the duration is 1-sec). The point must be made that while dolphins and belugas responses at 400 Hz are valid for those species, these results probably do not generalize to large whales (e.g., baleen whales).

In the Schlundt *et al.* (2000) research, dolphins and belugas did not have TTS in response to 400 Hz at RLs of 193 dB SEL, but they did have TTS in response to higher frequencies (where they are more sensitive) at the same level. It is reasonable to assume that the TTS threshold value from odontocetes at their frequency of highest sensitivity is applicable to larger animals and lower frequencies that are in the range of their best hearing sensitivity. This extrapolation is based on the fundamental similarity of cochlear structure between odontocetes and mysticetes. As a result, if it were assumed that 193 dB SEL was the onset of TTS (a conservative assumption because TTS was not observed at an RL of 193 dB SEL), then onset of PTS would be 20 dB above that, at 213 dB RL (SEL). This number is based on a signal of one second in duration. Using a 10 Log (T/Ti) where Ti is 1 second, then for a maximum 100-sec LFA sonar signal, a 20-dB adjustment must be made, meaning that the onset of PTS would be 193 dB RL (SEL). This value is above the conservative LFA sonar criterion of 180 dB for injury. A more detailed discussion is provided in the Final EIS RTCs 4–6.13 and 4–6.38 and the 2002 Final Rule RTCs MMIC8, MMIC9, SIC40, SIC58, and SIC59.

In addition, recent data on critical ratios (CRs) in pinnipeds is discussed in the Final SEIS Subchapter 4.3.5. A CR is the difference between sound level for a barely audible tone and the spectrum level of background noise at nearby frequencies (Richardson *et al.*, 1995). These data indicate that the CRs for pinnipeds are lower in magnitude than for terrestrial animals (Southall *et al.* 2003). Southall *et al.* (2003), in describing their CR results, state that ''It is reasonable to speculate that acoustic signal production and reception in typically noisy marine environments have led to selection for enhanced ability to detect signals in noise.'' Therefore these new CR data indicate that pinnipeds may be pre-adapted for detecting biologically important signals in high noise environments.

Furthermore, the lower critical bandwidths of the pinniped auditory filters has the effect of decreasing the probability of masking of signals by noise at a different frequency (Southall *et al.*, 2000). Nevertheless, NMFS believes pinnipeds remain as susceptible as any species to masking of signals by noise in the same frequency band.

The Final SEIS also considered recent studies on LF sound and injury. In regard to injury, the issue of resonance is addressed in the Final SEIS (RTC 2.5.2). The analysis by the Navy (Cudahy and Ellison, 2002), reports on two workshops on acoustic impacts (DOC, 2002: Cox, *et al.* 2006), and the National Research Council (NRC) Ocean Studies Board (NRC, 2003) support the conclusion that resonance from LFA sonar operations is not a ''reasonably foreseeable'' impact. Cox *et al.* (2006) stated that gas-bubble disease, induced in supersaturated tissues by a behavioral response to acoustic exposure, is a plausible pathologic mechanism for the morbidity and mortality seen in cetaceans associated with MF sonar exposure. They also stated that it is premature to judge acoustically mediated bubble growth as a potential mechanism and recommended further studies to investigate the possibility.

The NRC Report (2003) discusses acoustically-induced stress in marine mammals. The NRC stated that sounds resulting from one-time exposure are less likely to have population-level effects than sounds that animals are exposed to repeatedly over extended periods of time. The NRC also cited controlled laboratory investigations of the response of cetaceans to noise that have shown cardiac responses (Miksis *et al.*, 2001 IN: NRC, 2003) but have not shown any evidence of physiological effects in the blood chemistry parameters measured. Beluga whales exposed for 30 minutes to 134–153 dB received level (RL) playbacks of noise with a synthesized spectrum matching that of a semisubmersible oil platform (Thomas *et al.*, 1990b IN: NRC, 2003) showed no short-term behavioral responses and no changes in standard blood chemistry parameters or in catecholamines. Preliminary results from exposure of a beluga whale and bottlenose dolphin to a seismic watergun with peak pressure of 226 dB source level (SL) showed no changes in catecholamines, neuroendocrine hormones, serum chemistries, lymphoid cell subsets, or immune function (Romano *et al.*, 2001 IN: NRC, 2003).

The NRC Report (2003) also stated that although techniques are being developed to identify indicators of stress in natural populations, determining the contribution of noise exposure to those stress indicators will be very difficult, but important, to pursue in the future when the techniques are fully refined. There are scientific data gaps regarding the potential for LFA sonar to cause stress in marine animals. Even though an animal's exposure to LFA sonar may be more than one time, the intermittent nature of the LFA sonar signal, its low duty cycle, and the fact that both the vessel and animal are moving, means that there is a very small chance that LFA sonar exposure for individual animals and stocks would be repeated over extended periods of time, such as those caused by shipping noise. There is sufficient information available to permit analysis and decision making. Therefore, impacts from stress are not a reasonably foreseeable significant adverse impact on marine mammals from exposure to LFA sonar.

In studying potential alerting stimuli for North Atlantic right whales, Nowacek *et al.* (2003) found that underwater sounds with an acoustic structure similar to their alert stimulus at RLs of 133–148 dB are likely to disrupt feeding behavior for the duration of the sound exposure, with return to normal behavior within minutes of when the sound was turned off. Their results are consistent with those of the LFS Scientific Research Program (SRP), which exposed baleen whales to RLs ranging from 120 to 155 dB, detecting only minor, short-term behavioral responses (please see Final EIS, Subchapter 4.2.4.3 for more information). The LFA sonar risk function is based on the LFS SRP results.

Concern that the LFA sonar signal may cause right whales to surface and thus be more vulnerable to ship strikes is not well founded because the vessels only move at about 5.6 km/hr (3 knots) (significantly lower than normal ship speeds) and LFA sonar mitigation measures will detect any large whales well before they enter the LFA sonar zone, at which time LFA sonar operations would be suspended.

Comment 18: A number of incidents of whales becoming stranded and dying have occurred around the world linked with the use of very loud military sonars. To date, none of the many incidents involve LFA sonar, although (1) LFA sonar has not been used in close proximity to whale populations and (2) the Navy continues to deny that any military sonar impacts marine life. EII believes LFA sonar may have more lethal impact over longer distances due to the nature of low frequency sound transmission underwater. The Draft SEIS claims that the association between marine mammal stranding events and military sonar is an issue of ''public perception'' and specifically that ''[a]lthough much of the public have the impression that military sonar usage is a principle cause of marine mammal strandings, the facts that are available indicate otherwise.'' While this might be true for mass stranding events of a non-anthropogenic origin, it is a grossly misleading statement. The Navy ignores the scientific record.

Response: Data indicate that the area in which LFA sonar has been operating (Northwestern Pacific Ocean) has relatively abundant populations of marine mammals, as presented in the SEIS as shown in Tables 4.4–2 to 4.4–10. During the LFS SRP in 1997 and 1998, LFA sonar sources were operated in proximity to marine mammals with only minor behavioral effects. As detailed in SEIS RTC 4.3.1 and later in this document, LFA sonar is not known to have caused any marine mammal strandings or injuries.

The ''public perception'' referred to in the Draft SEIS (p. 4–55) was one that views LFA sonar the same as any other sonar. The intent of the statement was that there is a public perception that the effects of LFA sonar are the same as any other naval, or loud, sonars. As noted in the discussion in the Final SEIS RTC 4.3.1, the potential for impacts from LFA sonar differs from that of mid-frequency active sonar. The best available scientific evidence to date does not indicate that LFA sonar has the potential to cause strandings based on analyses of existing strandings (ICES, 2005; Cox *et al.*, 2006). This paragraph was rewritten in the Final SEIS based on the latest available scientific data (see SEIS RTC 4.4.13).

Comment 19: Given the relatively long duration of SURTASS LFA sonar ''pings'' masking may be more of an issue than it is with impulsive noise sources. While the average signal length is 60 seconds—which is a very long time—for an extremely loud noise each can be up to 90 seconds long and can occur as often as every six minutes. This also does not take into account reverberation which can significantly increase the duty cycles and could result in a near continuous signal. Even temporary masking can be significant as it can compromise an animal's ability to avoid predators, communicate, track and catch food, and avoid dangerous environments such as areas of high intensity noise.

Response: The masking effects of the SURTASS LFA sonar signal are expected to be limited for a number of

reasons. First, the frequency range (bandwidth) of the system is limited to about 30 Hz, and the instantaneous bandwidth at any given time of the signal is small, on the order of 10 Hz. Second, the average duty cycle is always less than 20 percent and based on past LFA sonar operational parameters (2003 to 2007) is nominally 7.5 to 10 percent, as stated in Chapter 2 of the Final SEIS. Also, given the average maximum pulse length (60 seconds), and the fact that the signals vary and do not remain at a single frequency for more than 10 seconds, SURTASS LFA sonar is not likely to cause significant masking. An analysis of marine mammal hearing and masking are in Subchapter 4.6.1.2 of the Final SEIS. In other words, the LFA sonar transmissions are coherent, narrow bandwidth signals of 6 to 100 seconds in length followed by a quiet period of 6 to 15 minutes. Therefore, the effect of masking will be limited because animals that use this frequency range typically use broader bandwidth signals. As a result, the chances of an LFA sonar sound actually overlapping whale calls at levels that would interfere with their detection and recognition would be extremely low.

It is also unlikely that reverberation will significantly increase the duty cycles and result in a continuous signal. As a general rule, reverberation ''dies off'' or decreases with distance from the source as an exponent of time after sound transmission. However, this is not instantaneous and, depending on propagation and ocean boundary conditions, reverberation can linger in an area for seconds or minutes after a sound transmission, but at greatly reduced SPLs until it fades into background noise. In special cases (i.e., locations with the correct bathymetry, propagation conditions and signal repetition rates), the reverberation may not completely die off before the next transmission. Generally, however, the reverberation levels several seconds after transmission are so much less than the original signal, (i.e., approaching ambient noise levels) that they do not ''add to the duty cycle.'' LFA sonar signals have sufficient time to significantly decrease to levels much less than 120 dB in the vicinity of the source, prior to the transmission of the next signal. Additionally, reverberation away from the source's location starts at an even lower level than near the source and generally decreases faster than in proximity of the source, so it is always less than near the source (see Final SEIS comment 4.3.39).

Comment 20: The Draft SEIS sets a threshold SPL of 145 dB for diving and recreational sites, which is an attempt to be precautionary to humans. This is over 1,000 times less intense than the threshold set for marine mammals. It is irrational to assume that marine mammals are less sensitive to sound in water than humans are. It would make far better sense to adopt a 145 dB as the threshold for all animals, including humans. Human exposure guidelines ''were established based on psychological aversion testing,'' exposure limits for cetaceans are based on avoiding only physiological injury (TTS) or the most dramatic behavioral responses. What basis justifies providing more protection to humans engaging in recreational diving than to native inhabitants of the sea?

Response: These values represent different criteria: psychological aversion (a behavioral reaction) from direct measurements using human divers (Technical Report #3 of the Final EIS), and the exposure level at or above an RL of 180 dB, for which all marine mammals are evaluated as if they are injured (Final EIS Subchapter 1.4). However, humans are performing in a foreign medium compared to marine mammals. This suggests that the risk to marine mammals for a psychological response would be less than for humans. Furthermore, data cited in the Final EIS suggest that when operating in the presence of a biological imperative such as feeding, migrating or mating, such sound levels are insufficient to make the marine mammal discontinue their behavior (Technical Report #1 LFS SRP). Behavioral responses for marine mammals utilizing the risk continuum (see Final EIS Subchapter 4.2.3) demonstrate the potential for significant biologically important behavioral reactions from RLs from 120 to 179 dB, but with fewer significant behavioral responses at levels around 145 dB. Therefore, NMFS believes the 145-dB criterion for divers is consistent with the estimates of behavioral reactions to marine mammals, but at this time, it is unnecessary to consider this SPL as being warranted for marine mammals since the LFS SRP indicated that there were no significant behavioral reactions at these low levels and no indication that marine mammals might be seriously injured or killed by LFA sonar.

Comment 21: The Draft SEIS minimizes impacts by emphasizing the small number of SURTASS LFA sonar systems to be employed and the narrow bandwidth of the active sonar signal. It is the intensity and pervasiveness of the SURTASS LFA sonar systems that is important in the discussion of impacts. The fact that there is more than one system merely compounds the problem. To declare that the low number and narrow bandwidth are mitigation measures is ludicrous.

Response: Even though the source level of SURTASS LFA sonar is similar in intensity to many anthropogenic underwater sound sources, such as air gun arrays and other military sonars, there are significant differences in their operational characteristics. Table 1 illustrates these differences. Also, please see the Final SEIS RTC 4.3.1 for more information.

In a recent analysis for the Policy on Sound and Marine Mammals: An International Workshop sponsored by the Marine Mammal Commission (U.S.) and the Joint Nature Conservation Committee (UK) in 2004, Dr. John Hildebrand provided a comparison of anthropogenic underwater sound sources by their annual energy output. Dr. Hildebrand reported that the most energetic regularly operated sound sources are seismic air gun arrays from approximately 90 vessels with typically 12 to 48 individual guns per array, firing about every 10 seconds. There are approximately 11,000 super tankers worldwide, each operating 300 days per year, producing constant LF noise at source levels of 198 dB (SEL) (Hildebrand, 2005). Conversely, LFA sonar signals are transmitted for a maximum of 432 hours (18 days) per vessel per year. The signal length is between 6 to 100 seconds with 6 to 15 minutes between transmissions with individual elements source levels of 215 dB. Therefore, LFA sonar contributes less acoustic energy to the oceans than other sources. For more detailed discussions on Hildebrand's (2004) analysis, please see SEIS RTCs 4.6.4 and 4.6.5.

Even though LFA sonar signals are long range, LFA sonar cannot be considered to be pervasive (pervasive means to permeate or be present throughout) because of the nominal 7.5 to 10 percent duty cycle, meaning that during any given mission LFA sonar is not transmitting 90 to 92.5 percent of the time. Moreover, impacts to marine mammals species and stocks must remain negligible and, in that regard, taking by behavioral harassment may not exceed 12 percent of a marine mammal stock in any given year.

Comment 22: Throughout the document, the Draft SEIS claims that impacts will be negligible because there is no contradictory data. The absence of evidence does not equate to evidence of absence. In the absence of data, precaution should prevail.

Response: The absence of evidence regarding effects of these actions on marine mammals does not mean we can assume they have not occurred, and will

not occur in the future. However, we are not relying solely on absence of evidence. The agencies used the best information currently available to analyze the impacts to marine mammals as shown in this document and in more detail in Chapter 4.0 of the Final SEIS. Some of the new information used by NMFS to make its determinations under the MMPA are discussed and summarized in this **Federal Register** notice. That evidence includes a 5-year track record of using SURTASS LFA in an area rich in marine life without incident. In addition, NMFS requires the Navy to conduct mitigation and monitoring, including research to further clarify impacts on marine mammals from LFA sonar.

Comment 23: Throughout the Draft SEIS, the Navy states that the SURTASS LFA sonar ships move in two dimensions, whereas marine animals move in three dimensions. It uses this logic to state that the amount of time that an animal would be in the sonar transit beam is very low. A ship does move in two dimensions, so if ship strikes were the only concern, then this rationale would work. However, sound propagates in three dimensions so the logic is flawed.

Response: The Navy has clarified the intent of this statement in the Final SEIS. The statement now reads: ''[A] Slowly moving ship, coupled with low system duty cycle, would mean that fish and sea turtles would spend less time in the LFA sonar mitigation zone (180 dB sound field); therefore, with a ship speed of less than 5 knots, the potential for animals being in the sonar transmit beam during the estimated 7.5 to 10 percent of the time the sonar is actually transmitting is very low.''

Comment 24: In its discussion of acoustic impacts, the Draft SEIS is flawed because it centers its entire analysis on a questionable premise, an SPL threshold of 180 dB RL for marine animal impact.

Response: The SPL threshold of 180 dB RL was only for potential injury impacts and not for other impacts, such as significant behavioral modifications. Please see Final SEIS Comment 4.0.1 for more information.

Comment 25: In its discussion of acoustic impacts the Draft SEIS is flawed because it chooses to base its entire evaluation of the potential acoustic impacts to marine mammals on selective data, while ignoring more timely, widely accepted and peer reviewed science, including applicability of actual stranding events. In its discussion of acoustic impacts the Draft SEIS is flawed because it chooses to dismiss evidence suggesting behavioral reaction to sound can produce Level ''A'' harassment.

Response: The scientific evidence supporting findings that marine mammals will not be injured at received levels less than 180 dB by SURTASS LFA sonar is provided in the Final SEIS (RTCs 4.0.3, 4.3.1, and 4.3.7 through 4.3.15). LFA sonar has not been implicated in any known marine mammal strandings as discussed elsewhere in this **Federal Register** notice and in the Final SEIS RTC 4.4.9 through 4.4.26. NMFS and the Navy have determined that the potential for injury to marine mammals by exposure to LFA sonar signals at received levels below 180 dB is unlikely.

Even though there is the potential for the LFA sonar signal to injure marine mammals at RLs greater than 180 dB, that possibility is highly unlikely given the reliability of the Navy's tripartite monitoring scheme and, in particular, the demonstrated effectiveness of the HF/M3. NMFS does not dismiss the possibility that behavioral reactions to sound can possibly produce Level A harassment; however, the best available scientific evidence strongly suggests that this is a concern primarily for certain species of odontocetes when exposed under particular conditions to mid-frequency sonar. The results of the LFS-SRP strongly indicate that the behavioral reactions of baleen whales, which hear best in the low frequency range, when exposed to SURTASS LFA sonar are minimal. Although there is no evidence that LF sound can cause biologically significant behavioral responses in odontocetes, and several factors including the inability of such species to hear well in the low frequency range contraindicate such responses, NMFS presumes that, while unlikely, it has the potential to occur. As a result, the Navy is presently planning its 2007–2008 field research for deep diving marine mammal behavioral response studies in an attempt to scientifically address this issue for LFA sonar, MFA, and seismic sources. This is discussed later in this document (see Research).

Comment 26: The ''Determination of Risk Function,'' suggests that there is a continuum of severity of behavioral responses to SURTASS LFA sonar signals, ranging from 95 percent of those exposed to 180 dB having significant (if temporary) change in biologically important behavior, down to the first evidence of ''significant'' change occurring at 119 dB. If SURTASS LFA sonar signals are arriving at the 22-km (12-nm) offshore line at a level of just under 180 dB, then it is likely that near shore areas will be experiencing sound levels significantly above 120 dB. It would be helpful in making more biologically sound decisions if NMFS or the Navy clarified the radius within which received levels could be expected to be 120 dB, 145 dB, and/or 160 dB. The AEI suggests these radii not because these numbers have special or well defined significance, but to suggest that such information would give regulators and researchers a better sense of the likely zones of influence within which behavioral responses might be expected to increase or decrease in severity. At the least, AEI would suggest a lower allowable threshold of received levels at 22 km from shore, to protect these biologically important areas from behavioral disruptions in response to moderate noise levels.

Response: The AEI is correct that the risk continuum provides a method to determine effects from sound exposure based on the fact that various animals will react differently to LFA sonar signals. The data from the LFS SRP support a linear dose response function, also known as the LFA sonar risk continuum, for sound exposure and the potential for significant behavioral effects. This risk continuum was an integral part of the analysis in the Final EIS and 2002 Final Rule of the potential for SURTASS LFA sonar operations to cause significant behavioral effects in marine mammals. The ranges to RL isopleths and the ocean volumes they would encompass vary under different oceanographic conditions and were analyzed in the Final EIS. Detailed results of these analyses are presented in Subchapter 4.2 of the Final EIS and in Technical Report #2 (Acoustic Modeling Results). Figures B–1 through B–31 of TR 2 provide the parabolic equation (PE) transmission loss (TL) plots for each of the 31 sites. These plots provide TL as a function of depth and range from the source. The analysis determined that there is the potential for marine mammals to be affected by SURTASS LFA sonar.

However, an analysis summarized in Final SEIS Subchapter 4.7.6 indicates that, while increasing the coastal standoff range from 12 nm (22 km) to 25 nm (46 km) decreases exposure to higher RLs for marine animals closest to the shore (shelf species), it does so at the expense of increasing exposure levels for shelf break species and pelagic species.

As a result of the Final EIS analysis, mitigation protocols were developed to prevent injury to marine mammals. Mitigation protocols were not deemed necessary or practical for other than Level A harassment (injury) takes. Results from operations under the initial

5-year set of regulations for LFA sonar are presented in the SURTASS LFA sonar Final Comprehensive Report (see **ADDRESSES** for availability) and indicate that the Level B harassment take numbers for individual stocks of marine mammals in the areas of operations are within the values from the Final EIS analyses.

Comment 27: The association between anthropogenic ocean noise and its impacts on marine mammals is well documented although there is still scientific uncertainty over the actual causal mechanisms of impacts. It is generally accepted that impacts can range from altered behavior through temporary injury to mortality. Altered behavior can include a startle response and can affect an animal's ability to: feed, find mates, stay on a migration path, communicate, stay at or return to a favored feeding area, nurse, care for young, catch prey and escape predators. Mortality can result directly from exposure to sound or indirectly as a consequence of altered behavior or temporary injury.

Response: While NMFS agrees with the statement, it cautions that it does not necessarily mean that all loud anthropogenic sounds will cause the stated reactions. NMFS details the relationship between events and LFA sonar throughout this document.

Comment 28: The Draft SEIS states that ''the operation of SURTASS LFA sonar with monitoring and mitigation will result in no lethal takes.'' The evidence obtained from actual mortality incidents associated with anthropogenic noise suggests that the mechanisms by which animals are impacted by noise are far less straightforward than the Draft SEIS suggests. There is now increasing evidence that non-auditory injury or permanent loss of hearing are not the only mechanisms by which mortality can result from exposure to noise. For example, an alteration of behavior (Level B) such as a startle response leading to breaching can result in death whereas a gash injury (Level A) can heal and have no long term impact. The Draft SEIS should concede that the knowledge base surrounding the causal mechanisms of marine mammal impacts is too scant to be so readily compartmentalized.

Response: See responses to Comments 24, 25 and 27. As related to LFA sonar, the Navy performed extensive research to determine the potential for LF transmissions to cause significant behavioral effects in whales (the LFS SRP). There is no indication during these tests that whales surfaced rapidly or dove prematurely in response to LFA sonar source transmissions. The mechanisms to cause such events are based on the theory that MF-naval sonar can cause rapid surfacing and diving, thus resulting in acoustically mediated bubble growth. Also please see the discussion in the Final SEIS (RTCs 4.0.3, 4.3.7, and 4.3.12).

Comment 29: The Draft SEIS uses 180-dB RL as the threshold for impacts to marine animals and persistently reminds the reader that this is a conservative figure. Field data suggest that this figure is much too high. In the Bahamas multi species mass stranding incident of 2000 estimates of the average sound exposure level that caused those animals to strand was around 140 dB re: 1 microPa. The Draft SEIS dismisses the Bahamas stranding event saying that the hemorrhaging in the stranded animals could have been caused by factors other than acoustic trauma. This is not consistent with the actual findings published in the Interim Report on the event which states ''all evidence points to acoustic or impulse trauma'' and identifies ''mid-range tactical Navy sonars operating in the area as the most plausible source of the acoustic or impulse trauma.''

Response: First, the Bahamas 2000 stranding event did not involve LFA sonar. Based on the best information available at this time, NMFS believes LFA sonar operations will not cause injury to marine mammals at received levels below 180 dB. Second, the commenter's statement regarding the mid-frequency sonar decibel levels to which the stranded animals were exposed is incorrect. No one knows to what maximum decibel level the animals that ultimately stranded were exposed. Estimates were based on prior near-shore sightings of beaked whales at the locations where those whales were sighted, but they do not reflect the actual maximum received decibel levels of the particular animals that stranded. Third, the Bahamas interim report and further subsequent analysis of the event indicate that the strandings were likely caused by mid-frequency sonar in combination with a list of other contributing factors. The list of contributing factors is generally supported by the workshop on understanding the impacts of anthropogenic sound on beaked whales convened by the U.S. Marine Mammal Commission in 2004 (Cox *et al.*, 2006) and the analysis by D'Spain *et al.* (2006). Whether or not surface ducts, one of the listed contributing factors, occurred during other reported strandings is not relevant to LFA sonar operations. The LFA sonar signals are initially transmitted substantially below 10 m (32.8 ft) water depth and are not likely to have signal strength above 180 dB in the surface duct. To ensure a thorough environmental analysis, however, surface ducting conditions were analyzed in the Final EIS at a number of the 31 model sites. Therefore, with LFA sonar mitigation, no marine mammals, in waters either with or without a surface duct, are expected to be exposed to injurious levels by LFA sonar signals.

Comment 30: Since the FEIS was completed in January 2001, there have been at least five mass stranding incidents associated with ocean noise and several studies and papers related to the range of impacts of noise on marine mammals. To claim that none of this new data contradicts the assumptions or conclusions in the FEIS is questionable. There is more compelling evidence that: (1) The mechanisms by which animals strand as a result of a noise event are very complex; (2) different mechanisms can be involved and different impacts can result depending on the species and the circumstances; (3) the noise intensities at which animals strand are likely lower than those previously assumed; and (4) tissue injury is not necessary to cause animals to strand and die.

Response: The issue is not whether anthropogenic sound causes marine mammal strandings, but rather does LFA sonar cause marine mammal strandings. The evidence to date, supported by recent scientific reports, supports the conclusion that the U.S. Navy's LFA sonar is not likely to cause marine mammal strandings. However, an ad hoc committee of international experts under the auspices of the ICES has reviewed the impacts of sonar on cetaceans and fish. They concluded, ''No stranding, injury, or major behavioral change has yet been associated with the exclusive use of low frequency sonar'' (ICES, 2005). This is further supported by 36 scientists in their recently published paper which arose from the Marine Mammal Commission workshop on the impacts of anthropogenic noise on beaked whales (Cox *et al.*, 2006). Therefore, the statement that there are no new data contradicting the assumptions or conclusions in the Final EIS and Final SEIS remain correct. Moreover, five years of SURTASS LFA sonar use without evidence of strandings, injury, or other major behavioral changes support the conclusions of the Final OEIS/EIS and the Final Rule 2002. However, NMFS continues to view this issue seriously and does not dismiss it simply because a stranding has not been observed. For more detailed information, please see the Final SEIS

(RTCs 4.0.3, 4.3.1, 4.3.2, 4.3.7, 4.3.8, 4.3.9, and 4.3.12).

Comment 31: The Draft SEIS mentions only three noise related marine mammal stranding events under the heading ''Strandings potentially related to anthropogenic sound.'' There is irrefutable evidence that anthropogenic sound causes marine mammal strandings. What is not known with any scientific certainty is the actual causal mechanisms. In listing only three marine mammal stranding incidents potentially related to anthropogenic sound, the Draft SEIS is being disingenuous. Not only are there many more strandings, but when all atypical mass strandings are tabulated, the overwhelming majority is associated with naval maneuvers, and likely sonar usage. (The commenter also provided the table from the ICES (2005) Report of the Ad hoc Group on the Impact of Sonar on Cetaceans and Fish).

Response: The Navy's intention was to examine three of the more studied stranding events in which naval sonars were implicated as a potential cause. This subchapter has been expanded in the Final SEIS based on stranding event information cited in more recent reports, such as ICES AGISC Report (ICES, 2005), and reports on the potential causes presented by ICES (2005), Cox *et al.* (2006), and D'Spain *et al.* (2006). NMFS believes that this revision is adequate as related to the potential for SURTASS LFA sonar to cause strandings because LFA sonar was not considered causative in any of these events and, indeed, low frequency sonar has never been implicated in any stranding, with the possible exception of the Greece stranding in 1996, during which mid-frequency sonar was also employed.

Comment 32: The Navy has not reported any marine mammal stranding incident that has occurred in the vicinity of its activities. The Draft SEIS claims that SURTASS LFA sonar has not been implicated in any stranding event. This is not accurate. An LFA sonar system was implicated in the mass stranding of twelve Cuvier's beaked whales in 1996 in Greece though as the Draft SEIS states, the inner ears were not examined. This does not mean that LFA sonar use did not cause the animals to strand. The usage of LFA sonar has also been far more restricted than mid frequency sonar for which there are more associated mass stranding events.

Response: The Draft SEIS was correct. SURTASS LFA sonar have never been implicated in a stranding. While there was a LF component of the sonar potentially related to the Greek strandings in 1996, only MF components were implicated in the strandings in the Bahamas in 2000, Madeira 2002, and Canaries in 2002. This suggests that the LF component in the Greek strandings was not causative (Cox *et al.*, 2006; ICES, 2005). In its discussion of the Bahamas stranding, Cox *et al.* (2006) stated, ''The event raised the question of whether the mid-frequency component of the sonar in Greece in 1996 was implicated in the stranding, rather than the low frequency component proposed by Frantzis (1998).'' The ICES in its ''Report of the Ad Hoc Group on the Impacts of Sonar on Cetaceans and Fish'' is in agreement with Cox *et al.* (2006) stating that the association of MF sonar in the Bahamas, Madeira, and Canary Island strandings suggest that it was not the LF component in the NATO sonar that triggered the Greece stranding of 1996, but rather the MF component (ICES, 2005). The ICES (2005) report also concluded that no strandings, injury, or major behavioral change have yet to be associated with the exclusive use of LF sonar.

Since October 14, 2003, SURTASS LFA sonar use has been restricted under a permanent injunction to limited areas in the western Pacific Ocean (see Final SEIS, Subchapter 1–2.1, Figures 1–1 and 4–4.2). Since commencing operations in 2003, the *R/V Cory Chouest* and USNS IMPECCABLE have completed 40 missions from January 2003 to August 2006 under the first four LOAs (DON, 2007). The general areas are known to the public because they are based on the Court Order, published in the Draft and Final SEIS, and incorporated into the subsequent NMFS LOAs. The locations and times of LFA sonar active operations are reported to NMFS quarterly (classified report) as required in the Final Rule and annual LOAs. These operations, with mitigation, have produced no known Level A takes on marine mammals as reported in the Annual Reports (DON, 2003a; 2004a; 2005a; 2006a) and the Final Comprehensive Report (DON, 2007). Reviews of stranding reports in the LFA sonar operating area showed that there were a total of 19 strandings reported in Asia (four in Taiwan, nine throughout the Philippines, two in Thailand, two in Indonesia, and two in China) (The Cetacean Stranding Database, accessed: 11/28/2006). None of these strandings were coincident either temporally or spatially with LFA sonar operations.

Moreover, the Northwestern Pacific Ocean areas where SURTASS LFA sonar is presently operating are some of the most heavily populated areas in the world and cannot be considered ''remote.''

As to the possibility of unreported strandings, the NMFS and the Navy do not consider that this is a very likely scenario for LFA sonar operations. Even though a visual observer onboard the vessel will be unable to see an animal that strands on the shoreline due to operations being greater than 12 nm (22 km) from land, this is not relevant because LFA sonar is unlikely to cause injury beyond the 180-dB mitigation zone (normally 1 km (0.5 nm) radius). Level A (injury) harassments are determined based on actual observations/detections within the LFA sonar mitigation zone. With passive and active acoustic detection, the probability of detection within this zone is over 95 percent for a single marine mammal (see Final EIS, Subchapters 2.3.2.2 and 4.2.7.1.). For multiple animals, the value is nearly 100 percent. The area of the northwestern Pacific Ocean, where LFA sonar vessels are currently operating, is not a remote area and there are stranding networks in the region. A review of reported strandings in the area does not show any correlations to LFA sonar operations either spatially or temporally (see discussion later in this document on strandings in Taiwan).

Comment 33: The Draft SEIS states that no Level A harassment incidents have been reported in the area of usage; however, it does not relate the effort undertaken to search for such incidents or mention reports of Level ''B'' harassment incidents.

Response: See Comment 32.

Comment 34: The association between mid frequency sonar usage and strandings was not realized until decades after its introduction.

Response: NMFS agrees, noting that Balcomb and Claridge (2001) reported that beaked whale strandings have increased since the use of MF sonar in the 1960s. However, the association between MF-sonar and strandings appears limited to a confluence of factors. Stranding networks weren't active until much later than the 1960's, but have been active since SURTASS LFA sonar came into use. Certainly, SURTASS LFA sonar has received great scrutiny with respect to the potential for strandings and none have been observed.

Comment 35: The Draft SEIS appears to be only concerned about impacts producing Level A harassment which it claims will be negligible. The impacts from behavioral alteration to individual animals are dismissed as inconsequential. Behavioral impacts can not only produce level A harassment, but impacts to individuals are

significant especially for endangered populations, and can have population level consequences no matter what the status of the species.

Response: There are several types of Level B harassment that can result from anthropogenic sounds. Two types of behavioral effects that have potential for population level effects are masking and stress. These will be addressed here. (also see the Final SEIS RTCs 4.0.3 and 4.3.12 in Comment 1, SEIS RTC 4.3.17 in Comment 5, SEIS RTC 4.3.2 in Comment 6, and SEIS RTC 4.3.33 in Comment 7). Other potential Level B harassment effects are addressed elsewhere in this rulemaking document. Also, please see the Biological Opinion issued under section 7 of the ESA for this action by NMFS (see ESA later in this document).

In regard to masking, the commenter is confusing the avoidance response of migrating gray whales and bowhead whales with masking. There was no evidence of masking in any of the research on these two species. Certainly in the gray whale case, the interpretation by the scientists who conducted the research was that the whales responded but responses were not interpreted as having a significant behavioral impact. Furthermore, a received level of 120 dB for LFA sonar would not mask the species-specific sounds of any low frequency mysticete, although under certain, rare circumstances it might interfere with species recognition. The masking effects of the SURTASS LFA sonar signal are expected to be limited for a number of reasons. First, the frequency range (bandwidth) of the system is limited to about 30 Hz, and the instantaneous bandwidth at any given time of the signal is small, on the order of 10 Hz. Second, the LFA sonar signal is active (or on) only about 7.5 percent of the time (i.e., low duty cycle based on historical LFA sonar operations, but may be on for up to 20 percent of the time) and limited to periods during actual missions. Therefore, the effect of masking will be limited because animals that use this frequency region typically use broader bandwidth signals. As a result, the chances of an LFA sonar sound actually overlapping whale calls at levels that would interfere with their detection and recognition would be extremely low.

Regarding stress, stress can be defined as a threat to homeostasis (Fair and Becker, 2000) and is frequently measured with changes in blood chemistry (Thomas *et al.*, 1990; Romano *et al.*, 2004; Smith *et al.*, 2004a). Thomas *et al.* (1990) exposed captive belugas to recorded industrial noise for 30 minutes at a time, with a total exposure of 4.5 hours over 13 days with a source level of 153 dB. Catecholamine blood levels were checked both before and after noise exposure; however, no significant differences in blood chemistry were observed. Another experiment that measured blood chemistry, but also varied the sound level is described in Romano *et al.* (2004). In this experiment, a beluga whale was exposed to varying levels of an impulsive signal produced by a watergun. The levels of three stress related blood hormones (norepinephrine, epinephrine and dopamine) were measured after control, low level sound (171–181 dB SEL) exposure and high level (184–187 dB SEL) sound exposure. There were no significant differences between low level sound exposure and control, while the high level sound exposure did produce elevated levels for all three hormones. Furthermore, regression analysis demonstrated a linear trend for increased hormone level with sound level.

Less relevant to marine mammals, but still informative, Smith *et al.* (2004a) exposed goldfish (a hearing specialist fish) to continuous background noise of 160–170 dB RL. There was a ''transient spike'' in blood cortisol levels within 10 minutes of the onset of noise that was loud enough to cause TTS. However, this cortisol spike did not persist and there was no long term physiological stress reaction in the animals.

These data support a linear dose response function (like the LFA sonar risk continuum) for sound exposure and the onset of stress, with only high levels of sound leading to a stress reaction. The extrapolation of the response thresholds from the Romano *et al.* (2004) experiment to the LFA sonar situation is tenuous because of the differences in the signals, but the relationship between sound level and stress is supported by several studies. As mentioned elsewhere, there are some recent data (e.g., Evans, 2003) implicating synergistic effects from multiple stressors, including noise. Although there are no data to support synergistic effects, similar impacts might occur with marine mammals, given the multiple stressors that often occur in their environment. This indicates to NMFS that while stress in marine animals could possibly be caused by operation of the LFA sonar source, it is likely to be constrained to an area much smaller than the zone of audibility, probably closer in size to the mitigation zone around the vessel.

Comment 36: The LFS SRP Phase II conducted by the Navy to determine LFA sonar impacts on migrating whales found that when the source was located in the whales' migratory path (approximately 1 km (0.54 nm) from shore), gray whales avoided levels below 150 dB. The SRP showed negligible avoidance by the whales when the source was located over 2 km (1.1 nm) from shore. From the results of the LFS SRP Phase II, the Navy concluded no biologically significant response. Perhaps in actuality more sensitive individuals or mother calf pairings tend to hug the coast during migration. For some groups, the most sensitive animals may be crucial to a group's survival as these may be the first individuals to become aware of predators or of dangerous situations. To lose sensitive animals or nursing mothers from a group could have population level consequences.

Response: NMFS believes the characterization of the Navy's conclusion is out of context. See the Final EIS Subchapter 4.2.4.3. NMFS does not believe that some whales ''hugged'' the coast of California during the LFS SRP. For this phase of the SRP, the sound source was moored offshore of the central California coast, near Point Buchon. Shore-based observers tracked whales using methods that provided highly sensitive measures for avoidance responses. These observers would have sighted whales along the coast line. Also, observers on the playback vessel also carefully monitored marine mammals in order to stop broadcasting in case of worrisome behavioral reactions or if any marine mammals were sighted at close enough range that the sound level to which they were exposed might exceed the maximum planned exposure level (155 dB).

The issue of potential calf strandings during the LFS SRP in Hawaii was addressed in the Final EIS RTC 4 5.25 where it was concluded that these events were not related to LFA sonar testing. Masking of communications could potentially affect the mother calf bond; however, masking effects from the SURTASS LFA sonar signal are extremely unlikely and are expected to be negligible considering the short duty cycle and other factors discussed in this document. The rationale for this is discussed in Final SEIS RTCs 4.3.23 and 4.3.36. Thus, LFA sonar signals are not expected to disrupt the mother calf bond.

Comment 37: An aversion response can occur many tens of miles from the source, and father away if it is in the direct path of the beam-formed or ducted signal.

Response: Given that the LFA sonar sound source can be detected at moderate to low levels over large areas of the ocean, the Navy (and NMFS) had concerns at the initiation of the NEPA process in 1996 that there was the potential for large percentages of species/stocks to be exposed; if animals would be disturbed at these moderate-to-low exposure levels such that they experience a significant change in a biologically important behavior, then such exposures could potentially have an impact on rates of reproduction or survival. Knowing that cetacean responses to LF sound signals needed to be better defined using controlled experiments, the Navy helped develop and supported the independent three-year LFS SRP beginning in 1997. The study analyzed the behavioral responses of whale species that have the greatest sensitivity to low frequency sounds and thus were believed to be the most vulnerable, potentially, to LFA sound. This field research program was designed to address three important behavioral contexts for baleen whales: (1) Blue and fin whales feeding in the southern California Bight, (2) gray whales migrating past the central California coast, and (3) humpback whales breeding off Hawaii. Taken together, the results from the three phases of the LFS SRP do not support the hypothesis that most baleen whales exposed to RLs near 140 dB would exhibit disturbance behavior and avoid the area. These experiments, which exposed baleen whales to RLs ranging from 120 to about 155 dB, detected only minor, short-term behavioral responses. Short-term behavioral responses do not necessarily constitute significant changes in biologically important behaviors.

These results have been supported by recent, peer-reviewed papers. Croll *et al.* (2001a) studied the effects of anthropogenic LF noise (SURTASS LFA sonar) on the foraging ecology of blue and fin whales off San Nicolas Island, California. Overall, the whale encounter rates and diving behavior appeared to be more strongly linked to changes in prey abundance associated with ocean parameters than to LFA sonar transmissions. In some cases, whale vocal behavior was significantly different between experimental and non-experimental periods. However, these differences were not consistent and did not appear to be related to LF sound transmissions. At the spatial and temporal scales examined, Croll *et al.* (2001a) stated that they found no obvious responses of whales to a loud, anthropogenic, LF sound.

Both Miller *et al.* (2000) and Fristrup *et al.* (2003) published on the results of tests conducted with male humpback singers off Hawaii in which they evaluated variation in song length as a function of exposure to LF sounds. In spite of methodological differences, the results of both studies indicated that humpback whales slightly increased their songs in response to LF broadcasts. Fristrup *et al.* (2003) found that the fraction of variation in song length that could be attributed to LF broadcast was low and concluded that the effects of LF broadcast did not impose a risk of dramatic changes in humpback whale singing behavior that would have demographic consequences. For more information please also see SEIS RTC 4.3.30.

Comment 38: SURTASS LFA sonar impacts the vocalizations and other behavior of humpback whales.

Response: NMFS does not disagree with the potential impacts of LFA sonar on vocalization and other behavior. The justification for the conclusion that the potential effects on the stocks of marine mammals from behavioral changes would be minimal is discussed in the Final SEIS in RTC 4.3.29. The potential effects of masking are discussed in the Final SEIS RTCs 4.3.1 and 4.3.23. The Miller *et al.* (2000) article ''Whale songs lengthen in response to sonar'' concerning observations of male humpback whales during Phase III of the LFS SRP was addressed in the Final EIS RTC 4–5.19 and in the NMFS Final Rule RTC SIC16 and SIC17. Fistrup *et al.* (2003) used a larger data set from Phase III to describe song length variability and to explain song length variation in relation to LF broadcasts. In spite of methodological and sample size differences, the results of the two analyses were generally in agreement, and both studies indicated that humpback whales tend to lengthen their songs in response to LF broadcasts.

Fristrup *et al.* (2003) provides a detailed picture of short-term response as compared to behavioral variation observed in the absence of stimuli. These responses were relatively brief in duration, with all observed effects occurring within 2 hours of the last LFA sonar source transmission. It should be noted that these effects were not salient to the acoustic observers on the scene, but were revealed by careful statistical analyses (Fistrup *et al.*, 2003). Aside from the delayed responses, other measures failed to indicate cumulative effects from LF broadcasts, with song-length response being dependent solely on the most recently LF transmission, and not the immediate transmission history. The modeled seasonal factors (changes in surface social activities) did not show trends that could be plausibly explained by cumulative exposure. Increases in song length from early morning to afternoon were the same on days with and without LF transmissions, and the fraction of variation in song length that could be attributed to LF broadcast was low. Fistrup *et al.* (2003) found high levels of natural variability in humpback song length and interpreted the whales' responses to LF broadcasts to indicate that exposure to LFA sonar would not impose a risk of dramatic changes in humpback whale singing behavior that would have demographic consequences.

Comment 39: It is impossible to comment fully on the Acoustic Integration Model (AIM), the program used by the Navy to calculate the system's impacts, because that model has not been released to the public. Disclosure of the model must occur for public comment to be meaningful under NEPA and the Administrative Procedure Act (APA) to be met.

Response: The Acoustic Integration Model (AIM) contains proprietary programming that prevents its release to the public. As a result, in response to a different incidental take application (Draft EIS for Gulf of Mexico Seismic Surveys), AIM recently underwent an independent scientific review by the NMFS-sponsored Center for Independent Experts (CIE). The CIE review took place September 25–27, 2006. A report from that review is publicly available on the NMFS Web site (*http://www.nmfs.noaa.gov/pr/permits/incidental.htm*). Additional documentation can be found on the SURTASS LFA sonar Web site (see **ADDRESSES**).

Comment 40: Models used by the Navy in its applications for LOAs to assess its actual work in the Pacific, and in its Final EIS to estimate impacts in sample coastal areas, in large part assume a fairly even distribution of marine mammals across a wide area of ocean, failing to take the possibility that certain animals, like beaked whales and sperm whales, may be concentrated in particular habitats. Specifically, the Navy has not conducted research on beaked whale habitat preferences. In the limited modeling we have seen, the Navy frequently assumes that populations of marine mammals are relatively unstructured, such that individual animals are improbably considered part of region-wide, basin-wide, or even worldwide stocks. The Navy's stock assessments in its LOA applications are based on incomplete and out-of-date information, leading to

a significant underestimation of species abundance and therefore impacts.

Response: When there is no specific data on marine mammal distribution, impact prediction modeling uses an even distribution over the ocean area, since offshore concentrations of animals are not fixed in space or time. Nearshore concentrations can be relatively fixed in time or space, due to physical forcing from the steep bathymetry and seasonal variations (*e.g.*, Monterey Canyon or Hudson Canyon). However, LFA sonar operates in deeper, offshore waters where the concentrations are fluid due to changing water mass conditions. Therefore an even distribution of animals is the one with the least assumptions. Basically, the model assumes that individuals of the species can occur anywhere within their ranges with equal probability over a long time. On any given day, the distribution of any given species is likely to be highly non-uniform. Over a long period of time the fluctuations in density are likely to even out. Therefore, assuming an even distribution for the purposes of assessing potential impacts is reasonable and appropriate.

NMFS believes that the latest information available is used by NMFS and the Navy when assessing impacts on marine mammals by LFA sonar. Regarding beaked whale research, NMFS notes that the Office of Naval Research (ONR) and SERDP (Strategic Environmental Research and Development Program) has funded the following beaked whale research:

MacLeod, C. D., and G. Mitchell. 2006. Key areas for beaked whales worldwide. J. Cetacean Res. Manage. 7(3):309–322.

MacLeod, C. D., W. F. Perrin, R. Pitman, J. Barlow, L. Balance, A. D'Amico, T. Gerrodette, G. Joyce, K. D. Mullin, D. L. Palka, and G. T. Waring. 2006. Known and inferred distributions of beaked whale species (Cetacea: Ziphiidae). J. Cetacean Res. Manage. 7(3):271–286.

Redfern, J. V., M. C. Ferguson, E. A. Becker, K. D. Hyrenbach, C. Good, J. Barlow, K. Kaschner, M. F. Baumgartner, K. A. Forney, L. T. Ballance, P. Fauchald, P. Halpin, T. Hamazaki, A. J. Pershing, S. S. Qian, A. Read, S. B. Reilly, L. Torres, and F. Werner. 2006. Techniques for cetacean-habitat modeling. MEPS 310:271–295.

Ferguson, M. C., J. Barlow, B., S. B. Reilly, and T. Gerrodette. 2006. Predicting Cuvier's (Ziphius cavirostris) and Mesoplodon beaked whale population density from habitat characteristics in the Eastern Tropical Pacific Ocean. JCRM 7(3):287–299.

In addition, ONR and SERDP have funded the development and fieldwork for the sound-and-orientation recording tag (DTAG), which has been successfully attached with suction cups to beaked whales (Tyack *et al.*, 2006). These data are providing critically valuable information on the movement and diving behaviors of beaked whales, both of which are important to know in order to understand the acoustic exposure that the animals may receive.

As stated in the Final SEIS Subchapter 2.7, the NMFS initial LOA under Condition 7(d) required the Navy to conduct research in accordance with 50 CFR § 216.185(e). The SURTASS LFA sonar LTM Program has been budgeted by the Navy at a level of approximately $1M per year for five years, starting with the issuance of the first LOA. The status of this research was summarized in Table 2–5 of the Final SEIS. Finally, planning has commenced for a 2007–2008 deep-diving odontocetes behavioral response study (BRS) to determine the potential effects of LFA sonar, MFA, and seismic sources on beaked whales and other deep diving odontocetes at an estimated cost of $3M per year. The BRS study is discussed later in this document.

Regarding stock assessment data, the modeling analysis considers the total amount of risk for each marine mammal species by summing a particular species' risk estimate within that stock, across areas of operation for each mission. This methodology does not assume that populations are unstructured, but includes the best information available on the reproductive behavior of each species at each mission site in order to determine stock affiliation and the total risk to the sustainability of each stock. Stock assessment data within U.S. waters are required to be updated annually under the MMPA, with new stock assessments being published when new data are available. The best available data were used in all instances of the modeling analysis for determining stock abundance and distribution.

The Navy states that it performs regular reviews of the latest research, including updating stock and density data. The Navy's applications for SURTASS LFA sonar LOAs are submitted after conducting a thorough review of the latest data on the marine animals present in the potential operating areas.

The Final EIS states, ''The model runs are designed to portray high potential effects for each site. For example, seasons were selected based on the potential for maximum LF-sensitive animal abundance.'' (Please see FOEIS/EIS Subchapters 4.2.1 and 4.2.2.2, and RTCs 4–3.8, 4–3.9, and 4–3.11.)

Comment 41: The Navy incorrectly claims that significant impacts on stocks and populations, as modeled for its LOA applications, would necessarily occur at percentages lower than those assumed in the Navy's modeling of coastal area and NMFS Final Rule, even disregarding the underestimates of take resulting from the other errors described. The Navy's approach to modeling behavioral impacts from multiple exposures is not conservative.

Response: NMFS disagrees with the commenter's statement regarding the Navy's approach to modeling behavioral impacts from multiple exposures not being conservative. Subchapter 4.2.3.1 of the Final EIS provides details on how the Navy derived the $L + 5 \log_{10}(N)$ formula for a single ping equivalent (SPE). The SPE concept is related to widely accepted methods for comparing sounds of different durations. It is universally acknowledged that increased exposure duration increases the severity of potential impact. The SPE calculation is conservative in assuming that the increase in potential effects observed by extending the duration of a continuous sound stimulus applies to a sequence of SURTASS LFA sonar pings, even though the transmissions are separated by many minutes when the system is off. This applies to SURTASS LFA sonar-type signals, not continuous sound. In this process, an SPE received level is larger than the maximum RL of any single ping in sequence. Also, the SPE for a sequence consisting of a single loud ping and a long series of much softer pings is almost the same as the level of a single loud ping. A ping duration (length) of 60 seconds was assumed in the modeling and risk assessment calculations using SPE. The adoption of 60 seconds and 20 percent as the standard ping duration and duty cycle, respectively, for calculations in the Final EIS, provides a reasonable estimate of the potential for effects from real-world SURTASS LFA sonar operations without sacrificing the conservative nature of the analysis process.

Comment 42: There is an unknown history of exposure of animals in an area where active sonar is regularly used.

Response: The adequacy of scientific information on marine animals is discussed in Subchapter 1.4.2 of the Final EIS. It states that there is an urgent need for better methods for measuring and estimating potential risk. These data gaps have necessitated the use of various models and extrapolations in order to provide a rational basis for the assessment of potential risk from exposure to LF sounds. To address some of these gaps, the Navy performed underwater acoustic modeling and supported the LFS SRP to study the

potential effect of LF sound on free-ranging marine mammals. This research did not specifically address the issue of LF impact on marine mammal hearing; rather, it focused on the behavioral responses of baleen whales to controlled exposure from SURTASS LFA sonar-like signals. In general, understanding the mechanics of hearing and the biological functions of sounds for marine mammals has improved considerably over the past decade. Specific information on the effects of most types of human-made underwater noise on marine animals is incomplete, but has also increased in recent years. However, as the environmental evaluation of the SURTASS LFA sonar system progressed, the Navy recognized that additional research was required in several areas to address some basic gaps in scientific knowledge. This included development of a scientifically reasonable estimate of the underwater sound exposure levels that may cause injury to marine mammals, and research on the potential effects of LF sound on marine mammal behavior. While recognizing that not all of the questions on the potential for LF sound to affect marine life are answered, and may not be answered in the foreseeable future, NMFS believes the Navy has combined scientific methodology with a prudent approach throughout the Final EIS and SEIS to protect the marine environment. Although there are recognized areas of insufficient knowledge that must be accounted for when estimating the potential direct and indirect effects on marine life from SURTASS LFA sonar, the present level of understanding is adequate to place reasonable bounds on potential impacts. Therefore, though data on specific exposure of anthropogenic sounds, particularly sonar, on the marine environment is limited, the Navy and NMFS have taken this into account during their analyses. Moreover, we know much more about the impacts of different types of sonar in the marine environment today than we knew five years ago, when SURTASS LFA went through the environmental compliance process the first time, and the best scientific data that we have indicates that SURTASS LFA can be operated safely with the prescribed mitigation, in a manner that has no more than a negligible impact on marine mammal species and stocks.

Comment 43: There is a low level of accuracy with which the exposed individuals can be monitored in real time.

Response: Sound field limits are estimated using near-real-time environmental data and underwater acoustic performance models. These models are an integral part of the SURTASS LFA sonar processing system. The acoustic models help determine the sound field by predicting the SPLs, or RLs, at various distances from the SURTASS LFA sonar source location. Acoustic model updates are nominally made every 12 hours, or more frequently when meteorological or oceanographic conditions change. For further information, please see the Final SEIS, RTC 5.1.1. Though individuals cannot be effectively monitored beyond the reach of the HF/M3, the sound field is monitored in near-real-time.

Comment 44: The intense sound generated by military active sonar can induce a range of adverse effects in whales and other species, from significant behavioral changes to stranding and death. In a 2004 symposium at the International Whaling Commission (IWC), more than 100 whale biologists concluded that the association between sonar and beaked whale deaths is very convincing and appears overwhelming. Mass mortalities, though an obvious focus of much reporting and concern, are likely only the tip of the iceberg of sonar's harmful effects. Marine mammals are believed to depend on sound to navigate, find food, locate mates, avoid predators, and communicate with each other. Flooding their habitat with man-made, high-intensity noise interferes with these other functions.

In addition to strandings and non-auditory injuries, the harmful effects of high-intensity sonar include (1) temporary or permanent loss of hearing; (2) avoidance behavior; (3) disruption of biologically important behaviors such as mating, feeding, nursing, or migration, or loss of efficiency in conducting those behaviors; (4) aggressive (or agonistic) behavior; (5) masking of biologically meaningful sounds; (6) chronic stress; (7) habituation; and (8) declines in the availability and viability of prey species, such as fish and shrimp.

Response: The use of the term ''sonar'' does not reflect what Annex K of the IWC 2004 Scientific Committee Report actually stated. The Report does not implicate LFA sonar in the stranding of beaked whales. The full text of the quoted statement is: ''The weight of accumulated evidence now associates mid-frequency, military sonar with atypical beaked whale mass strandings. This evidence is very convincing and appears overwhelming.''

There are different types of anthropogenic sounds associated with possible impacts to and strandings of marine mammals. There are naval sonar and seismic airgun arrays, each with different characteristics and purposes. Many lump these types together. Accordingly, when there is a stranding that may be associated with the use of one type of sonar or sound source, all sources are implicated—a premise that does not stand up to scientific scrutiny in the marine bio-acoustics community. A wide range of naval sonars are used to detect, localize and classify underwater targets. For the purposes of the SURTASS LFA sonar Final SEIS, the MMPA application, and this Final Rule, these systems are categorized as LFA sonar (less than 1000 Hz) and MFA sonar (1 to 10 kHz). Table 1 in this document provides pertinent information on different types of LFA sonar and MFA sonar. General information is also provided on airgun arrays. (We also note that sonar signals are generally coherent while air guns are impulsive.)

TABLE 1.—COMPARISON OF UNDERWATER ACOUSTIC SOURCE PROPERTIES

Source type	SURTASS LFA sonar	AN/SQS 53C (MF)	AN/SQS 56 (MF)	Air gun array (LF)
Source Level	215 dB per element	235 dB	223 dB	260 dB.
Pulse Duration	Variable 6 to 100s. Never longer than 10s at single freq.	1–2 s	1–2 s	0.02 s.
Inter-pulse Time	6 to 15 min	24 s	24 s	9–14 s.
Center Frequency	100–500 Hz	2.6 & 3.3 kHz	6.8, 7.5, & 8.2 kHz	Broadband.
Bandwidth	30 Hz	100 Hz	100 Hz	Wideband.
Source Depth	Array 87 to 157 m. Center 122 m	8 m	6 m	6–10 m.
Beamwidth	Omni-directional in horizontal	40 degrees	30 degrees	Function of freq.

TABLE 1.—COMPARISON OF UNDERWATER ACOUSTIC SOURCE PROPERTIES—Continued

Source type	SURTASS LFA sonar	AN/SQS 53C (MF)	AN/SQS 56 (MF)	Air gun array (LF)
Beam Direction	Horizontal	3 degrees down from horizontal.	Horizontal	Vertical.

MF = mid frequency; LF = low frequency.
Source: D'Spain *et al.* (2006); DON (2001).

Cox *et al.* (2006) provides a summary of common features shared by the strandings events in Greece (1996), Bahamas (2000), and Canary Islands (2002). In addition to use of MF sonar, these included deep water close to land (such as offshore canyons), presence of an acoustic waveguide (surface duct conditions), and periodic sequences of transient pulses (i.e., rapid onset and decay times) generated at depths less than 10 m (32.8 ft) by sound sources moving at speeds of 2.6 m/s (5.1 knots) or more during sonar operations (D'Spain *et al.*, 2006). A number of these features do not relate to LFA sonar operations. First, the SURTASS LFA sonar vessel operates with a horizontal line array (SURTASS: a passive listening system) of 1,500 m (4,921 ft) length at depths below 150 m (492 ft) and a vertical line array (LFA sonar source) at depths greater than 100 m. Second, operations are limited by mitigation protocols to at least 22 km (12 nm) offshore. Therefore, for these reasons SURTASS LFA sonar cannot be operated in deep water that is close to land. Finally, the LFA sonar signal is transmitted at depths well below 10 m (32.8 ft), and the vessel has a slow speed of advance of 1.5 m/s (3 knots).

While there was a LF component to the sonar potentially related to the Greek stranding in 1996, only mid-frequency components were present in the strandings in the Bahamas in 2000, Madeira in 2002, and Canaries in 2002. This supports the logical conclusion that the LF component in the Greek stranding was not causative (ICES, 2005; Cox *et al.*, 2006). In its discussion of the Bahamas stranding, Cox *et al.* (2006) stated, ''The event raised the question of whether the mid-frequency component of the sonar in Greece in 1996 was implicated in the stranding, rather than the low-frequency component proposed by Frantzis (1998).'' The ICES in its ''Report of the Ad-Hoc Group on the Impacts of Sonar on Cetaceans and Fish'' raised the same issue as Cox *et al.*, stating that the consistent association of MF sonar in the Bahamas, Madeira, and Canary Islands strandings suggest that it was the MF component, not the LF component, in the NATO sonar that triggered the Greek stranding of 1996 (ICES, 2005).

Most odontocetes, such as beaked whales, have relatively sharply decreasing hearing sensitivity below 2 kHz. If a cetacean cannot hear a sound of a particular frequency or hears it poorly, then it is unlikely to have a significant behavioral impact (Ketten, 2001). Therefore, it is unlikely that LF transmissions from LFA sonar would induce behavioral reactions from animals that have poor LF hearing, e.g. beaked whales, bottlenose dolphins, striped dolphins, harbor porpoise, belugas, and orcas (summarized in: Nedwell *et al.*, 2004).

New data describing potential mechanisms of harm to marine mammals from sonar are concerned with acoustically mediated bubble growth and resonance. Cox *et al.* (2006) stated that it is premature to judge acoustically mediated bubble growth as a potential mechanism and recommended further studies to investigate the possibility. The analysis by the Navy (Cudahy and Ellison, 2002) and reports from two workshops on acoustic impacts (DOC, 2002; Cox *et al.*, 2006) support the conclusion that resonance from LFA sonar operations is not a ''reasonably foreseeable'' impact. The ICES (2005) report concluded that no strandings, injury, or major behavioral change has yet to be associated with the exclusive use of LF sonar. Please see Final SEIS RTCs 2.5.2 and 4.0.3 for additional discussions.

Therefore, the numerous scientists, who participated in the 2004 Workshop convened by the U.S. Marine Mammal Commission (Cox *et al.*, 2006), and the ICES AGISC (2005), support the logical conclusion that LFA sonar is not related to marine mammal strandings.

The masking effect of the SURTASS–LFA sonar signal will be limited for a number of reasons. First, the bandwidth of the system is limited (30 Hz), and the instantaneous bandwidth at any given time of the signal is small, on the order of 10 Hz. Therefore, within the frequency range in which masking is possible, the effect will be limited because animals that use this frequency range typically use signals with greater bandwidth. Thus, only a portion of the animal's signal would be masked by LFA sonar. Furthermore, the average duty cycle when LFA sonar is in operation, is always less than 20 percent, and based on past LFA sonar operational parameters (2003 to 2007) is nominally 7.5 to 10 percent (as stated in Chapter 2 of the Final SEIS) which means that for 80–92.5 percent of the time there is no risk of animal signals being masked by the LFA sonar signal when LFA sonar is operating. Therefore, within the area in which masking is possible, the effect will be limited because animals that use this frequency region typically use broader bandwidth signals. As a result, the chances of an LFA sonar sound actually overlapping whale calls at levels that would interfere with their detection and recognition would be extremely low. The potential effects of masking are discussed in the Final SEIS RTCs 4.3.1 and 4.3.23.

In regards to biologically significant behaviors, the risk continuum explicitly represents the potential for significant change in a biologically important behavior within the 119 to 180 dB RL range. For additional information, please see the previous discussion on this issue and also the Final EIS (RTCs 4–5.2, 4–5.6, 4–5.12, 4–5.22, 4–6.2, 4–6.3), and Appendix D. The conclusion that the potential effects on the stocks of marine mammals from behavioral changes would be minimal is discussed in the Final SEIS (RTC 4.3.29). It is reiterated that during Phase I of the LFS SRP research, there were times when the test source level was at the higher, operational level. During such test periods received levels at the subject animals were within the range as specified in the research permit and responses were no different than those observed when using lower source levels.

The Miller *et al.* (2000) article ''Whale songs lengthen in response to sonar'' concerning observations of male humpback whales during Phase III of the LFS SRP was addressed in the Final OEIS/EIS RTC 4–5.19 and in NMFS Final Rule RTC SIC16 and SIC17. Fristrup *et al.* (2003) used a larger data set from Phase III to describe song length variability and to explain song length variation in relation to LF broadcasts. In spite of methodological and sample size differences, the results of the two analyses were generally in agreement, and both studies indicated

that humpback whales tend to lengthen their songs in response to LF broadcasts.

The Fristrup *et al.* (2003) results provide a detailed picture of short-term response as compared to behavioral variation observed in the absence of the stimuli. These responses were relatively brief in duration, with all observed effects occurring within 2 hours of the last LFA sonar source transmission. It should be noted that these effects were not salient to the acoustic observers on the scene, but were revealed by careful statistical analyses (Fristrup *et al.*, 2003). Aside from the delayed responses, other measures failed to indicate cumulative effects from LF broadcasts, with song-length response being dependent solely on the most recent LF transmission, and not the immediate transmission history. The modeled seasonal factors (changes in density of whales sighted near shore) and diurnal factors (changes in surface social activities) did not show trends that could be plausibly explained by cumulative exposure. Increases in song length from early morning to afternoon were the same on days with and without LF transmissions, and the fraction of variation in song length that could be attributed to LF broadcast was low. Fristrup *et al.* (2003) found high levels of natural variability in humpback song length and interpreted the whales' responses to LF broadcasts to indicate that exposure to LFA sonar would not impose a risk of dramatic changes in humpback whale singing behavior that would have demographic consequences.

The effects of SURTASS LFA sonar on fish are discussed elsewhere in this document. Based on the analysis in the Final SEIS, Chapter 4.1, it is not believed that marine mammal prey species will be affected by SURTASS LFA sonar.

Comment 45: The proposed rule-making cites the ICES report on sonar (which was written partly by non-independent scientists receiving funding from U.S. or Royal Navy, or working for the U.S. government), but does not cite the conclusions or reports from the IWC Scientific Committee (SC) (which consists of several hundred international, independent scientists), whose concerns include lack of monitoring and inappropriateness of current mitigation measures.

Response: The SEIS cited the ICES report, which was written by experts in the marine field. The SEIS also cited the Journal of Cetacean Resources Management, which is published by the IWC. Since no citation was provided by the commenter, it is unclear which IWC publication the comment refers to. The SEIS cited Cox *et al.* (2006), which was published in the Journal of Cetacean Resources Management. This article discusses monitoring and mitigation, focusing on beaked whales, but the monitoring and mitigation discussion was not specifically discussed in the Final SEIS. The conclusions on monitoring and mitigation state ''Current visual survey efforts to detect beaked whales in areas of acoustic activity are probably ineffective as a mitigation aid. Key limiting factors include sea state, amount of daylight, experience of observers and the diving and surfacing behavior of beaked whales, which makes them either difficult to see or unavailable for visual observation at the surface for long periods of time. For the same reasons, surveys to determine distribution and abundance are also difficult and limited in their reliability. However, additional sensing technologies, such as passive acoustics, active sonar and radar, are currently in development that may increase scientists' abilities to detect beaked whales.'' As discussed in the Final SEIS, the Final Comprehensive Report and NMFS' Proposed Rule, the agencies recognize that visual monitoring is limited, particularly due to the factors such as sea state and daylight, as discussed in Cox *et al.* (2006). The final rule also requires passive acoustics, estimated to be 32 percent effective with visual monitoring and active acoustics, the HF/M3, which has a calculated effectiveness of 95 percent. The use of this tri-partite monitoring raises overall mitigation effectiveness to 98 percent. Therefore, the Navy will conduct the monitoring and mitigation measures recommended in Cox *et al.* (2006).

Comment 46: The Navy's assessment of the risk of marine mammal injury and mortality from LFA sonar use is deficient. The problems with the Navy's calculation of thresholds for injury and behavioral disturbance, (mentioned previously in their October, 2006 letter) carry through to its analysis of the risk of injury.

Response: NMFS does not agree. The Navy believes that the unusual or innovative nature of LFA sonar is what sets it apart from other anthropogenic sources, especially tactical, mid-frequency sonar and makes it much less likely to cause strandings of those marine mammals most associated with anthropogenic sound-related strandings (i.e., odontocetes, especially beaked whales). First, odontocetes generally have poor LF hearing. Second, the LFA sonar transmit array depth is well below 10 m (33 ft) and thus not likely to be entrained in a surface duct. Third, the 6 to 15 minute off-time in between 60-second transmissions and narrow bandwidth (30 Hz) generally preclude masking.

SURTASS LFA sonar has been operating since 2003 in a restricted area in the western Pacific Ocean, with approximately 470 hours of transmit time under the first four years of the LOAs. These extensive operations, with mitigation, have produced no known Level A takes on marine mammals. As noted before, LFA sonar is not the same as MFA (please see the Comment 44 in this document and the Final SEIS RTC 4.0.3 and 4.3.7). There is no evidence that SURTASS LFA sonar has caused injuries below or within the 180-dB mitigation zone as verified by mitigation monitoring requirements of the LFA sonar safety zone. Therefore, the 180-dB injury threshold remains valid, as does the effectiveness of the mitigation measures within the 180-dB potential injury zone.

The potential for SURTASS LFA sonar to cause harm to marine mammals and the validity of the 180-dB injury threshold for SURTASS LFA sonar are discussed in the Final SEIS RTCs 4.0.1, 4.0.2, 4.0.3, 4.3.1, 4.3.2, 4.3.7, 4.3.8, 4.3.9, 4.3.10, and 4.3.12. LFA sonar will not cause physical harm to marine mammals below 180 dB RL. Moreover, mitigation within the 180-dB mitigation zone is effective (See the Final EIS Subchapter 2.3.2.2).

Comment 47: The Navy wrongly dismisses mechanisms of sonar injury to marine mammals that would cause harm independent of stranding events. The Navy portrays a leading theory that whales suffer from bubble growth in organs that is similar to decompression sickness, or ''the bends'' in human divers as a controversial hypothesis. The Navy and NMFS cannot omit the numerous published, peer-reviewed papers that support this theory, or disregard the recognition bubble growth has received from expert panels, such as the one convened in 2004 by the Marine Mammal Commission to review sonar-related strandings. The Navy's analysis of injuries to whales leaves out a possibility that has been widely noted in literature, that some of the observed injuries are a result of behavioral changes, such as rapid surfacing or premature diving, that sonar could induce. In describing the 2000 Bahamas stranding event, the Navy places undue reliance on a list of ''contributory factors'' that it feels make a similar event unlikely to reoccur. We do not doubt that certain factors, such as the use of sonar in channels, can increase the risk of harm; but it is abundantly evident from the literature that has emerged since the government's

Bahamas report appeared in 2001 that strandings may well occur in their absence.

Response: NMFS has not dismissed any of the mechanisms of sonar injury to marine mammals that would cause harm independent of stranding events. One form of injury theorized to be caused by marine mammal reactions to sonar is gas-bubble disease. Cox *et al.* (2006) (which is the only reference cited by the commenter on this issue) stated that gas-bubble disease, induced in supersaturated tissues by a behavioral response to acoustic exposure, is a plausible pathologic mechanism for the morbidity and mortality seen in cetaceans associated with mid-frequency sonar exposure. They also state that it is premature to judge acoustically mediated bubble growth as a potential mechanism and recommended further studies to investigate the possibility. Since the Draft SEIS was published, there has been additional information available on this theory. If acoustically mediated bubble growth does prove to be the mechanism leading to mortality and/or strandings of beaked whales, then the fact that LFA sonar has not been associated with any of these strandings would indicate that it would be less likely to cause this effect.

Comment 48: In addition, the Navy has failed to consider most of the mass beaked whale strandings that have been identified for their association, or possible association, with sonar and the fact that some marine mammal species are especially vulnerable to acoustical injuries. The Navy overestimates the importance of the fact that the long history of strandings associated with military sonar has usually implicated mid-frequency sonar. Many in the scientific community, including NMFS biologists, have expressed concern, based on the best available evidence, that low frequency sound could potentially induce similar effects. The NRDC believes that the Navy places far too much confidence in its assertion that its use of SURTASS LFA sonar in the last few years has not resulted in marine mammal strandings.

Response: While NMFS shares this concern, to date, SURTASS LFA sonar has not been linked with any stranding events, other than by name association with MF sonar. This was discussed previously in this document. As related to LFA sonar, the Navy performed extensive research to determine the potential for LF transmissions to cause significant behavioral effects in whales (the LFS SRP).

Given that the LFA sonar sound source can be detected at moderate to low levels over large areas of the ocean, there was concern at the initiation of the Navy's NEPA process in 1996 that there was the potential for large percentages of species stocks to be exposed to moderate-to-low received levels. If animals are disturbed at these moderate-to-low exposure levels such that they experience a significant change in a biologically important behavior, then such exposures could potentially have an impact on rates of reproduction or survival. Knowing that cetacean responses to LF sound signals needed to be better defined using controlled experiments, the Navy helped develop and supported the three-year LFS SRP beginning in 1997. This study focused on baleen whales because, as low frequency hearing specialists they are believed to be the most sensitive to LFA sound and thus most likely to have an adverse behavioral reaction. This field research program was designed to address three important behavioral contexts for baleen whales: (1) Blue and fin whales feeding in the southern California Bight; (2) gray whales migrating past the central California coast; and (3) humpback whales breeding off Hawaii. Taken together, the results from the three phases of the LFS SRP do not support the hypothesis that most baleen whales, who are expected to be most sensitive to LF sounds, exposed to RLs near 140 dB would exhibit disturbance behavior and avoid the area. These experiments, which exposed baleen whales to RLs ranging from 120 to about 155 dB, detected only minor, short-term behavioral responses. Short-term behavioral responses do not necessarily constitute significant changes in biologically important behaviors.

Although the LFS SRP did not involve beaked whales, there was no indication during these tests that whales surfaced rapidly or dove prematurely in response to LFA sonar source transmissions. NMFS believes therefore, it is unlikely that, at least for fin, gray and humpback whales exposed to low levels of LFA sonar sounds will not result in the behavioral reactions theorized for beaked whales exposed to MF sonar signals. However, while this does that mean that LF sonar will not cause similar, but presently unknown, reactions in beaked whales, NMFS believes, that based on the best information available, such information does not currently exist. Therefore, NMFS believes, based on our current state of knowledge, it is unlikely that marine mammals would be severely injured by LFA sonar at great distances from the source.

Comment 49: The Navy attempts to discount the well-established link between sonar use and marine mammal injuries and mortalities by suggesting (based on data compiled when acoustic impacts were not generally considered as a potential cause of strandings) that a majority of marine mammals strandings are related to natural causes. Finally, the Navy states, incorrectly, that ''there are no new data that contradict any of the assumptions or conclusions in the Final EIS.'' New data exists linking whale strandings to naval sonar; linking non-stranding injuries in marine mammals to naval sonar; describing mechanisms of harm to marine mammals from sonar; showing unexpectedly high propagation of noise in shallow waters; finding that intense noise sources can mask whale calls over great distances; and revealing the difficulties for noise impacts.

Response: As indicated elsewhere in this response, most marine mammal strandings are unrelated to the use of sonar. While the recognition that there was a link between tactical sonars and beaked whale strandings was slow to develop, that in no way should be interpreted to mean that strandings involving sonar are either common or long-occurring.

NMFS believes the issue for this rulemaking is not whether sonar causes mass strandings of beaked whales, but whether SURTASS LFA sonar has the potential to cause marine mammal strandings. The evidence to date, supported by scientific reports, such as ICES (2005), Cox *et al.* (2006), and D'Spain *et al.* (2006), is that SURTASS LFA sonar has not caused any strandings. In reference to the contributory factors for strandings, the Bahamas 2000 stranding event did not involve LFA sonar. The list of ''contributing factors'' is generally supported by the workshop on understanding the impacts of anthropogenic sound on beaked whales convened by the U.S. Marine Mammal Commission in 2004 (Cox *et al.*, 2006) and the analysis by D'Spain *et al.* (2006). Whether or not surface ducts occurred during other reported strandings is not relevant to LFA sonar operations. First, NMFS believes LFA sonar operations will not cause physical injury to marine mammals at received levels below 180 dB. Second, LFA sonar signals are initially transmitted substantially below 10 m (32.8 ft) depth and are not likely to have signal strength above 180 dB in the surface duct. Surface ducting conditions were analyzed in the Final EIS at a number of the 31 model sites. Therefore, with LFA sonar mitigation, no marine

mammals, either with or without a surface duct, are expected to be exposed to injurious levels of LFA sonar signals.

The evidence to date, supported by scientific reports, such as ICES (2005), Cox *et al.* (2006), and D'Spain *et al.* (2006), is that SURTASS LFA sonar has not caused any strandings. Beaked whales, which hear best in the mid-frequency range appear to be most vulnerable to acoustic-induced stranding. These animals hear poorly in the low frequency range. The LFS SRP specifically studied the behavioral reactions of baleen whales, which hear best in the low frequency range, and thus were concluded to be most at risk (potentially) from the operation of LFA sonar. The three-phase LFS SRP involved more than 20 scientists from 6 universities and independent research groups. The results of the LFS SRP demonstrated that behavioral responses predictably occurred at received levels around 140 dB, not at the lower decibel levels that had been previously predicted. Moreover, the results showed that behavioral responses lasted for only a matter of tens of minutes and involved only modest changes in behavior. These results plus a five-year history of safely operating SURTASS LFA sonar without evidence of strandings or injury supports NMFS conclusion that the system can be operated, with appropriate mitigation measures, in manner that has no more than a negligible impact on marine mammal species and stocks.

In the Final SEIS Subchapter 4.4.3, the Navy discusses both anthropogenic and natural causes of marine mammal strandings. In the conclusion in Subchapter 4.4.3.4, it is stated that military sonar is not the principal cause of marine mammal strandings. There was no conclusion that the majority of marine mammal strandings were related to only natural causes. The Navy did not intend to give the impression that it discounts any scientifically-supported links between anthropogenic sources and marine mammal strandings. However, it will point out that there is no known connection between marine mammal strandings and LFA sonar, which is supported by scientific workshops, reports, and published papers (ICES, 2005; Cox *et al.*, 2006; D'Spain *et al.*, 2006).

Finally, to address the comment that there is no new data to contradict any of the assumptions or conclusions in the Final EIS, in order to address the comment, it must be pointed out once again that there are different types of anthropogenic sounds potentially associated with possible impacts to and strandings of marine mammals. These are naval sonar and seismic airgun arrays, each with different characteristics and purposes. Many comments lump these types under one heading, loud naval sonars or military sonars; or loud anthropogenic noise sources including sonars and seismic survey airguns. Thus, when there is a stranding that may be associated with the use of one type of sonar or sound source, it gets blamed on sonar as a whole-a premise that is not true and one that does not stand up to scientific scrutiny from the marine bio-acoustics community. A wide range of naval sonars are used to detect, localize and classify underwater targets. For the purposes of the SURTASS LFA sonar Final SEIS analysis, these systems are categorized as LFA sonar (less than 1000 Hz) and MFA sonar (1 to 10 kHz). Table 1 provides pertinent information on different types of LFA sonar and MFA sonar. General information is also provided on airgun arrays. Sonar signals are generally coherent while air guns are impulsive.

Cox *et al.* (2006) provided a summary of common features shared by the strandings events in Greece (1996), Bahamas (2000), and Canary Islands (2002). These included deep water close to land (such as offshore canyons), presence of an acoustic waveguide (surface duct conditions), and periodic sequences of transient pulses (i.e., rapid onset and decay times) generated at depths less than 10 m (32.8 ft) by sound sources moving at speeds of 2.6 m/s (5.1 knots) or more during sonar operations (D'Spain *et al.*, 2006). A number of these features do not relate to LFA sonar operations. First, the SURTASS LFA sonar vessel operates with a horizontal line array (SURTASS: a passive listening system) of 1,500 m (4,921 ft) length at depths below 150 m (492 ft) and a vertical line array (LFA sonar source) at depths greater than 100 m. Second, operations are limited by mitigation protocols to at least 22 km (12 nm) offshore. Therefore, for these reasons SURTASS LFA sonar cannot be operated in deep water that is close to land. Finally, the LFA sonar signal is transmitted at depths well below 10 m (32.8 ft), and the vessel has a slow speed of advance of 1.5 m/s (3 knots).

While it is true that there was a LF component of the sonar potentially related to the Greek stranding in 1996, only mid-frequency components were present in the strandings in the Bahamas in 2000, Madeira 2002, and Canaries in 2002. This supports the logical conclusion that the LF component in the Greek stranding was not causative (ICES, 2005; Cox *et al.*, 2006). In its discussion of the Bahamas stranding, Cox *et al.* (2006) stated, ''The event raised the question of whether the mid-frequency component of the sonar in Greece in 1996 was implicated in the stranding, rather than the low-frequency component proposed by Frantzis (1998).'' The ICES in its ''Report of the Ad-Hoc Group on the Impacts of Sonar on Cetaceans and Fish'' raised the same issue as Cox *et al.*, stating that the consistent association of MF sonar in the Bahamas, Madeira, and Canary Islands strandings suggest that it was the MF component, not the LF component, in the NATO sonar that triggered the Greek stranding of 1996 (ICES, 2005).

Most odontocetes, such as beaked whales, have relatively sharply decreasing hearing sensitivity below 2 kHz. If a cetacean cannot hear a sound of a particular frequency or hears it poorly, then it is unlikely to have a significant behavioral impact (Ketten, 2001). Therefore, it is unlikely that LF transmissions from LFA sonar would induce behavioral reactions from animals that have poor LF hearing, e.g. beaked whales, bottlenose dolphins, striped dolphins, harbor porpoise, belugas, and orcas (summarized in: Nedwell *et al.*, 2004).

New data describing potential mechanisms of harm to marine mammals from sonar are concerned with acoustically mediated bubble growth and resonance. Cox *et al.* (2006) stated that it is premature to judge acoustically mediated bubble growth as a potential mechanism and recommended further studies to investigate the possibility. The analysis by the Navy (Cudahy and Ellison, 2002) and reports from two workshops on acoustic impacts (DOC, 2002; Cox *et al.*, 2006) support the conclusion that resonance from LFA sonar operations is not a ''reasonably foreseeable'' impact.

The ICES (2005) report concluded that no strandings, injury, or major behavioral change has yet to be associated with the exclusive use of LF sonar.

Based on the above discussions, there are no ''new'' data: (1) Linking LFA sonar to whale strandings, (2) linking LFA sonar to non-stranding related injuries, or (3) describing mechanisms of harm to marine mammals from LFA sonar.

Regarding unexpectedly high propagation of noise in shallow water, this concerns the measurement of propagation of broadband noise from air gun arrays in both deep and shallow water (Tolstoy *et al.*, 2004). As noted in Table 1, there are substantial differences between the impulsive sounds of air guns and the coherent signals from LFA

sonar, so that one must be careful in how they are compared. First, while Tolstoy *et al.* (2004) found that when their calibrations were conducted in deep water (at 3200 m (10,500 ft)) and slope waters (at 500 m (1641 ft)), the predicted and measured distances to the received level of 160 dB from the air gun arrays indicated that the predicted radii tended to overestimate actual 160 dB RL ranges. (This implied that the 180-dB radii for all arrays should be less than the predicted 1 km (0.54 nm), likely significantly less.) Second, they found that their actual measurements for shallow water (30 m (98 ft)) had been underestimated when compared to the same predicted values used for the deep water comparison. This was due to the model not taking into account interaction with the ocean bottom. In deep, homogenous water, sound initially spreads spherically (spherical spreading) and its intensity decreases in proportion to the square of the range. Once sound has propagated to a distance approximately equal to the water depth, it is physically constrained and propagates cylindrically (cylindrical spreading). When this occurs, its intensity decreases in direct proportion to the range (please see Final EIS, Appendix B). Most importantly, however, SURTASS LFA sonar will not operate in water less than 200 m (656.2 ft), most likely always operating in deep and slope waters. Sound propagation from deep offshore waters onto shallower shelf waters will almost always decrease quickly due to bottom and surface interaction with the sound. This means that LFA sonar sounds will more quickly decrease in intensity in shallow water than in other waters. Lastly, the Tolstoy *et al.*(2004) findings are not applicable to the SURTASS LFA sonar analysis because the propagation models utilized for LFA sonar are empirically validated and correctly account for critical variables, such as water depth (Final EIS Subchapters 4.2, 4.2.1 and 4.2.2; and Technical Report #2).

The masking effect of the SURTASS-LFA sonar signal will be limited for a number of reasons. First, the bandwidth of the system is limited (30 Hz), and the instantaneous bandwidth at any given time of the signal is small, on the order of 10 Hz. Therefore, within the frequency range in which masking is possible, the effect will be limited because animals that use this frequency range typically use signals with greater bandwidth. Thus, only a portion of the animal's signal would be masked by the LFA sonar. Furthermore, when LFA sonar is in operation, the LFA sonar source is active only 7.5 percent of the time (based on historical LFA sonar operational parameters) and no more than 20 percent, which means that for 80–92.5 percent of the time there is no risk of animal signals being masked by the LFA sonar signal when LFA sonar is operating. Therefore, within the area in which masking is possible, the effect will be limited in duration and because animals that use this frequency region typically use broader bandwidth signals that allow them to communicate even when SURTASS LFA sonar is transmitting.

Finally, NMFS does not believe that the Navy has experienced difficulties in executing the mitigation procedures required by NMFS for LFA sonar, which are based on protecting marine animals from injury. Because it is impractical and infeasible for mitigation to cover vast oceanic areas, where the received levels do not cause physical injury to marine mammals or jeopardize threatened or endangered species, the laws provide methods for authorizations for limited non-injurious impacts to marine mammals and listed species. NMFS believes that SURTASS LFA sonar has met all of these requirements and has been operating since 2003-without any known physical injuries to marine animals. Potential non-injurious impacts are estimated based on location and times of operations and best available abundance and density data for the areas and seasons of the operations. These are reported to NMFS both quarterly and annually as required by regulation (50 CFR § 216 Subpart Q).

Comment 50: We don't know the impact of SURTASS LFA sonar on species, stocks, and ecological processes over time. Therefore, NMFS can't say stock-level effects are ''not reasonably likely'' to occur.

Response: When compared to other naturally occurring and anthropogenic sources of noise in the ocean, LFA sonar, barely contributes a measurable portion of acoustic energy in the oceans. Other sources of marine anthropogenic sound that add appreciably to the oceanic ambient noise level are commercial shipping, offshore oil and gas exploration, and other uses of naval sonars (ICES, 2005). Also, the low duty cycle (7.5 to 20 percent) of LFA sonar, the lack of known strandings where LFA sonar has operated, and the results of the LFS SRP support NMFS'' conclusion that SURTASS LFA sonar is neither expected to significantly add to oceanic ambient noise, nor result in significant behavioral responses in marine mamals in waters distant from the LFA sonar vessels, and therefore not likely to have population level impacts. Based on extensive evaluation in the Final EIS and the Final SEIS, the operation of SURTASS LFA sonar, with monitoring and mitigation is not expected to result in lethal takes or serious injury. In addition, no lethal takes are being authorized by NMFS either under this rule or the LOAs issued under the rule. This finding is also supported by the fact that SURTASS LFA sonar has been operating since 2003 in the northwestern Pacific Ocean with no reported Level A (injury) harassment takes or strandings associated with its operations (DON, 2007a). Moreover, there has been no new information or data that contradict NMFS'' finding that the potential impacts from SURTASS LFA sonar operation on any stock of marine mammal will be negligible.

Comment 51: The proposed rule implies that there have been only three sonar-related stranding incidents, when it is known that there have been multiple incidents off the Canary Islands, several likely incidents in the Mediterranean, unusually high rates of strandings adjacent to naval bases in Japan, and published data (in a peer-reviewed journal) of high stranding rates and animals showing signs of acoustic trauma of cetaceans in Taiwan, occurring coincident with U.S. military and Chinese submarine-utilizing exercises, amongst other things.

Response: The Navy's intention in the Draft SEIS was to examine three of the more studied stranding events in which naval sonars were implicated as a potential cause, not to indicate that there have been only three stranding events. The subchapter was expanded in the Final SEIS (Subchapter 4.4.3). However, NMFS believes that the issue is whether SURTASS LFA sonar has caused strandings or could cause strandings in the future. The evidence to date, supported by recent scientific reports, supports the conclusion that the U.S. Navy's LFA sonar is not likely to cause marine mammal strandings. The information supporting this conclusion has been provided in Comment 44 and 47 in this document.

No citation was given with this comment but NMFS assumes that the reference to a recent paper on strandings in Japan refers to the examination by Brownell *et al.* (2004) which evaluated Cuvier's beaked whale strandings from local records between 1950 and 2004 in the waters of Japan. Two facts were presented in this paper: (1) Cuvier's beaked whales stranded in Sagami and Suruga Bays between 1960 and 1990; and (2) U.S. Naval vessels are stationed in Yokosuka, Japan. From these two facts, the authors infer, without any evident support, that the second caused

the first. Based on our review of the paper, we conclude that the authors' assumption is not supported by the available evidence. First, the authors' primary source (Ishikawa, 1994) is not readily available to review because it is in Japanese and no translation was provided except for Table 1 in their report. There are inconsistencies in Brownell *et al.*'s presentation of the data and results, which could not be compared to the cited sources of the data. Table 1 is titled ''Mass strandings of Cuvier's beaked whales Ziphius cavirostris, on the central Pacific coast of Honshu'' and states that the data are from Ishikawa (1994). The number of stranded animals listed from 1960 to 1990 in the table is 47. The first page of their report states ''Ishikawa (1994) reported 68 Cuvier's beaked whales that stranded on the coast of Japan between 1960 and 1993.'' This begs two questions: (1) Where did the remaining 21 beaked whales strand; and (2) why were they not listed? In their results, Brownell *et al.* (2004) state that Ishikawa (1994) records include eight cases of mass strandings (correct, based on Table 1) with a total of 43 individuals (incorrect, based on Table 1, the number should be 35). Finally, general data from the National Science Museum, Tokyo, is provided without citation. Given that the data from Ishikawa (1994) is presented in an inconsistent manner, the museum data is vital for any effective analysis of the Brownell *et al.* (2004) report.

It is inaccurate to state, as the Brownell *et al.* (2004) paper does, that Cuvier's beaked whales are stranding due solely to naval sonar operations. The authors infer several times in the paper that ''naval operations with acoustic components'' or ''the Navy may have tested MFA'' has no foundation and is pure speculation. The ports of Tokyo, Chiba, Kawakai, Yokohama, and Yokosuka are all located on Tokyo Bay, which opens to Sagami Bay. Suruga Bay is separated from Sagami Bay by a large peninsula. Based on the locations, it is most likely that other natural and anthropogenic factors contributed to at least some of the reported strandings. These include dense shipping traffic/shipping-related noise, construction-related noise, dredging, scientific research using active sources, pollution, fisheries interactions, earthquakes, pollution from increased human population, etc.

Therefore, because of the irreconcilable inconsistencies, Brownell *et al.* (2004) do not provide any reliable and supportable linkage between Cuvier's beaked whale stranding events and naval activities in Japanese waters near Yokosuka. The only data that the Navy could confirm were that there is a major U.S. naval base there and that the area is also home to five major Japanese seaports, including Tokyo, one of the world's busiest seaports, with an average of 33,000 vessels arriving annually.

At the time the Final SEIS was published, a non-citable paper describing stranding events in Taiwan was being circulated. Even though the Navy requested but was not given permission by the authors to cite the paper, the strandings are reported to have occurred in the winter of 2004 and were part of the SEIS stranding assessment. These strandings were reported in the Cetacean Stranding Database (*http://www.legaard.org/strandings/index.html*), which was utilized as part of the overall marine mammal stranding evaluations in both the Final SEIS and the Final Comprehensive Report (DON, 2007a, 2007b). The review of recent stranding data from the National Science Museum of Tokyo, Japan; the Cetacean Stranding Database; other Internet sources; and international reports, did not indicate any stranding events associated with the times and locations of LFA sonar operations in the northwestern Pacific Ocean.

The authors of the initial report on the 2004 Taiwan strandings have now published their findings in the Journal of Cetacean Research and Management (Wang and Yang, 2006). This paper also includes additional Taiwanese stranding events in the winter and summer of 2005. A review of these additionally reported strandings events did not indicate any association with the times and locations of SURTASS LFA sonar operations.

The commenter also states that the paper provides data of unusually high rate of strandings in Taiwan and cetaceans showing signs of acoustic trauma, occurring coincident with U.S. military and Chinese submarine-utilizing exercises, amongst other things. NMFS does not agree and believes that the commenter misstates the conclusions drawn in the Wang and Yang (2006) paper. While the information in the paper on the examination of the stranded animals is presented in a clear manner, the authors state that it was impossible to determine the reason for the stranding events. Although the authors opined that the injuries noted in at least one stranding (beaked whale) was from acoustic trauma, the evidence presented does not necessarily support this as the only possible conclusion. But in any event, SURTASS LFA sonar was not implicated in any of these events, as there was no spacial or temporal coincidence between the strandings and the operation of the SURTASS LFA sonar system. The relationship of at least one of the Taiwanese stranding events to naval maneuvers is based on conjecture, not facts.

Comment 52: It is disingenuous to state that at-sea use of LFA sonar since the 1980s has had no impacts. The U.S. Navy has deployed the system but instigated no program to monitor its impacts while being used at sea. Stocks of cetaceans in areas where the system has now been used have not had before- or after-use assessments. For all we know, the system could have had severe impacts, but without a robust research program it is impossible to say.

Response: NMFS does not believe that is a correct assessment. First, NMFS recognizes that an ocean basin effects study would be difficult to undertake, take years to carry out, and would need to ensure that marine mammals were not being affected by other factors, such as shifting food sources due to oceanographic parameter shifts, natural population fluctuations, coastal whaling, incidental take in commercial fishing operations etc. in order to be successful. Although the Navy has not conducted real-time at sea distance sampling for potential impacts, NMFS does not have reason to believe that LFA sonar is having impacts sufficient to have population level effects occur. The potential for impacts on affected marine mammal species was partially addressed by the LFS SRP as discussed previously in Comment 47 and elsewhere in this document. Also, NMFS believes the results from the BRS study (discussed elsewhere in this document) will provide additional information on whether impacts on this potentially sensitive species to anthropogenic sounds is likely.

For additional information on potential impacts on sonar sounds on marine mammals, the Navy's ONR sponsors significant research to study the potential effects of naval activities on marine mammals. In 2004 and 2005, Navy funded research produced approximately 65 peer-reviewed articles in professional journals. Publication in open professional literature through peer review is a benchmark for the quality of the research. This ongoing marine mammal research includes hearing and hearing sensitivity, auditory effects, dive and behavioral response models, noise impacts, beaked whale global distribution, modeling of beaked whale hearing and response, tagging of free ranging marine animals at-sea, and radar-based detection of marine

mammals from ships. Under NMFS 2002 Final Rule, the Navy was required to conduct research. The Navy developed and has been conducting a Long Term Monitoring Program (LTM) Program. The program is designed to: (1) Provide a summary of the unclassified SURTASS LFA sonar operations each year; (2) Provide a summary of unclassified plans for the following year; (3) Assess the efficacy of mitigation measures used during the past year, as well as the value-added from the various LTM elements with recommendations for improvements; (4) Provide a synopsis of LOA reports to NMFS on estimates of percentages of marine mammal stocks affected by SURTASS LFA sonar operations to help confirm the validity of the impact analyses, particularly pertaining to the adequacy of scientific information; and (5) Assess any long-term ecological processes that may be exhibiting effects from SURTASS LFA sonar operations, and reports or scientific papers on discernible or estimated cumulative impacts from such operations.

Since commencing operations in 2003, the *R/V Cory Chouest* and the USNS IMPECCABLE completed 40 missions from January 2003 through August 2006 under the first four LOAs. The general areas are known to the public because they are based on the Court Injunction, published in the Final SEIS and incorporated into the NMFS LOAs. The locations and times of LFA sonar active operations are reported to NMFS quarterly (classified report) as required in the first Final Rule and annual LOAs (50 CFR § 216.186). These operations, with mitigation, have produced no known Level A takes on marine mammals as reported in the Annual Reports (DON, 2003a; 2004a; 2005a; 2006a) and the Final Comprehensive Report (DON, 2007a) to NMFS under 50 CFR § 216.186. To date, there have been no reported Level A harassment (injury) takes from LFA sonar transmissions. Level B harassment is calculated based on the times and locations of LFA sonar operations. Both are submitted to NMFS in quarterly reports, including dates/times and locations of the active LFA sonar missions.

Finally, even the single stranding event where LF sonar was operating, the 1996 Greece stranding, has been addressed. According to Cox *et al.* (2006) and ICES (2005), since a MF component was also used in the Greece stranding, and MF sonar components were implicated in the Bahamas (2000), Madeira (2002), and Canaries (2002) strandings, the LF component in the Greece stranding was not causative.

Comment 53: The active component of the SURTASS LFA sonar operations should not take place off the Atlantic Coast of the United States due to impacts on the North Atlantic right whale.

Response: NMFS disagrees. The area from the coastline to the 200 m (656-ft) isobath of the North American East Coast is protected as an OBIA year-round which protects the North Atlantic right whale migration route and its critical habitat from SPLs greater than 180 dB. As right whales predominantly inhabit coastal waters, and as this OBIA extends the 12-nm (22-km) coastal standoff to 40 nm (74 km) off Drum Inlet, NC and 80 nm (148 km) off Long Island, NY, effects on North Atlantic right whales are expected to be limited to, at most, some Level B (behavioral) harassment and have a negligible impact on the species.

Marine Mammal Cumulative Impact Concerns

Comment 54: How can NMFS ignore the trend that the evidence substantiating a wide range of anthropogenic acoustical impacts is increasing, and also ignore that the Navy's assertions regarding the LFA sonar's safety of operation continue to be unsubstantiated? The trends are clear to any reasonable observer, but by ignoring contrary evidence NMFS give the appearance of arbitrary compliance with the Navy's assertions.

Response: While NMFS agrees that anthropogenic sources of underwater sound in the ocean is increasing (as addressed elsewhere in this document) with a likely increasing impact on marine mammals, NMFS does not agree that we are ignoring contrary evidence on the impacts of LFA sonar on marine mammals. All information to date implicates MF sonar, not LF sonar. NMFS notes that the Navy has conducted an investigation of stranding records and this investigation has not indicated a relationship between LFA sonar operations and marine mammal strandings, as addressed in more detail elsewhere in this document (see, for example Comments 18, 31, 33, 45, 48, and 52). Therefore, if LFA sonar is having an unknown, but serious impact on marine mammals, that impact has not manifested itself through strandings, observable surface behavioral patterns, or deceased marine mammals within an operation area.

Comment 55: In its discussion of acoustic impacts, the Draft SEIS is flawed because it dismisses cumulative and synergistic effects by minimizing the magnitude of the potential impacts and explaining away the unavoidable impacts with promises of ineffectual mitigation measures.

Response: Cumulative and synergistic effects by SURTASS LFA sonar operations are discussed in the Final SEIS (see also RTCs 4.1.9, 4.3.23, 4.3.30, 4.4.27, 4.6.2, 4.6.6, 4.6.16, 4.6.25, 4.6.27, and 4.6.29). In order to effectively evaluate potential cumulative effects of SURTASS LFA sonar, it is necessary to draw comparisons between LFA sonar and other sources of anthropogenic effects. As such, SURTASS LFA sonar was compared to anthropogenic noise levels and injury/lethal takes from other anthropogenic causes.

As discussed previously, Dr. John Hildebrand provided a comparison of anthropogenic underwater sound sources by their annual energy output (Hildebrand, 2005). This analysis included SURTASS LFA sonar, in which he estimated that on an annual basis four SURTASS LFA sonar systems would have a total energy output two orders of magnitude less than seismic air gun arrays and one order of magnitude less than MF sonar and super tankers. This is discussed also in more detail in the Final SEIS (RTC 4.6.19). this information. Therefore, given that all sonars (MF and LF included) account for only 10 percent of the marine anthropogenic noise budget, and SURTASS LFA sonar's energy output using 4 systems is estimated at an order of magnitude less than MF sonar, the contribution of LFA sonar to the total noise budget is trivial, and the potential for adverse cumulative or synergistic effects as a result of LFA sonar use are unlikely.

As stated in the Final SEIS (Subchapter 4.6.3), SURTASS LFA sonar is not likely to cause lethal takes of marine mammals. This is supported by the ICES (2005) report that stated, ''No strandings, injury, or major behavioural change has yet been associated with the exclusive use of low frequency sonar.''

Comment 56: How many vessels is the Navy planning for, and what will be the worldwide cumulative impact of all LFA sonar operations?

Response: The Navy analyzed potential impact of deploying up to four vessels in the Final EIS and the Final SEIS. This final rule does not authorize more than four vessels for SURTASS LFA sonar operations. Therefore, the number of systems has not increased over the number initially proposed in the Final EIS and impacts to marine mammals remain capped by the requirements that the activity have a negligible impact over the 5-year period that the regulations are in effect.

The Final SEIS (Subchapter 4.6) discussed cumulative impacts, including other military sonars, whaling, by-catch and entanglement, ship strikes, oil and gas exploration, geophysical research, and shipping in terms of noise. It states that, even if considered in combination with other underwater sounds (from the aforementioned activities), the SURTASS LFA sonar systems do not add appreciably to the underwater sounds to which fish, sea turtles, and marine mammals stocks are exposed. See also the Final SEIS RTCs 4.6.5, 4.6.6, 4.6.7, 4.6.8, 4.6.13, 4.6.14, 4.6.19, 4.6.20, 4.6.21, 4.6.22, and 4.6.23 for additional information on cumulative impacts.

Comment 57: It is necessary to consider the impacts of the Navy's training with LFA sonar alongside those of existing naval activities as well as those of industrial and commercial activities such as fishing, shipping, and geophysical research. The Navy seems to believe that it can satisfy the requirement to assess cumulative impacts by cataloguing the ways in which impacts from LFA sonar are small compared with the totality of threats faced by marine mammals.

Response: Cumulative impacts are addressed under NEPA, not section 101(a)(5)(A) of the MMPA. Cumulative impacts on marine mammals from activities other than SURTASS LFA sonar have been addressed in the Navy's Final EIS and Final SEIS. The requirement under the MMPA is for NMFS to determine (among other things) that the total taking by the activity (not by the activity and all other activities) is having a negligible impact on affected species and stocks of marine mammals. This has been done in this rulemaking document. In that regard, the Navy's LFS SRP concluded that behavioral impacts to marine mammals at greatest risk are likely to be relatively minor, and thus are unlikely, even in the presence of other stressors taken cumulatively, to alter the health of the species.

In regards to stating that the impacts of LFA sonar are small compared to other activities, as indicated by the LFS SRP, NMFS believes that while significant changes in biologically important behavior can occur to marine animals at significant distances from the LFA sonar source, these impacts will affect relatively few mammals at these distances. The Navy has assessed this potential impact by employing the risk continuum approach as discussed in the Final EIS. For those areas which are outside of the area covered by the risk continuum, the received LFA sonar signal is approximately that of the ambient environment. Thus, the signals do not add appreciably to the ambient noise levels, and therefore do not accumulate, or collect, to greater effects. The conclusion reached in the Final EIS (Subchapter 4.4.4) that even when considered in combination with other underwater sounds, SURTASS LFA sonar does not add appreciably to the underwater sounds that fish, sea turtle and marine mammals are exposed to, remains valid.

Comment 58: Marine mammals may surface too rapidly to escape the sounds and suffer from the bends.

Response: Tissue damage and acoustically mediated bubble growth were examined in the Final SEIS, Subchapter 4.3.1 and RTCs 4.0.3, 4.3.12, 4.3.33, 4.3.4, 4.3.42, 4.3.43, 4.3.44, 4.3.45, 4.3.46, 4.3.47, 4.3.48, 4.3.49, 4.3.50, 4.3.51, 4.3.52, and 4.3.53.

Comment 59: What about animals that die but never surface?

Response: NMFS and the Navy recognize that absence of evidence is not the same as no effect or impact (Final EIS, Comment 4–5.11). However, based on the extensive analyses of the Final EIS and Final SEIS, including the results of the LFS SRP, the results of five years of operations and with monitoring and mitigation measures, SURTASS LFA sonar operations have not been known and are not expected to cause any Level A harassment (injury) or death.

Effects on Other Marine Species

Comment 60: SEAFLOW states that we have no idea what the consequences of SURTASS LFA sonar operations will be to the many other animals in the ocean that make up the marine habitat, but are not identified in the MMPA, ESA, and NEPA.

Response: Under NEPA, analyses must be conducted that include the entire marine environment that has the potential to be affected, not just marine mammals and listed species. Please see Chapters 3 and 4 of Final EIS and Final SEIS for a full discussion and analysis of these potential impacts of SURTASS LFA sonar on the marine environment.

Comment 61: 90 percent of the ocean pelagic predators have been depleted (Myers and Worm, 2003).

Response: Myers and Worm (2003) discuss the decline in large predatory fish biomass. However, the decline is due to industrialized fisheries, not due to SURTASS LFA sonar. Recent studies have shown that SURTASS LFA sonar will likely have a negligible effect on fish, as stated in Subchapter 4.1 of the Final SEIS.

Comment 62: In addition to the target species, a wide variety of marine species can be found within the exposure area, including other marine mammals, sea turtles, invertebrates, teleost and elasmobranch fish, and sea birds. The proposed activity is not designed to expose just one target species. WSPA notes that the sounds to be administered will have unknown (and unmonitored) effects on other animals (e.g., prey species) that may occur in the exposure area thereby subjecting the identified ''affected species'' to additional indirect effects.

Response: When using SURTASS LFA sonar, the Navy's target is to identify potentially hostile submarines, it does not ''target species'' during its operations. The Navy applied for an authorization for the incidental taking of those marine mammal species specified in the application and analyzed impacts to all potentially affected species (including marine mammals, sea turtles, invertebrates, fish, sharks, and sea birds) in Chapters 3 and 4 of the Final EIS and SEIS.

Comment 63: WSPA is concerned that the impacts of the proposed activities could have a more damaging effect on younger animals in the exposed groups.

Response: See the Navy's response in the Final EIS, Comment 4–4.2.4. It states the primary factors increasing risk to a marine species would be a more pelagic and deeper distribution of animals in the water column. No clear examples were identified during the analyses in which juveniles rather than adults met these criteria. For marine mammals, this analysis is further supported by the LFS SRP. Further, coastal marine mammal species would likely receive lower SPLs thereby further protecting calves and juveniles from offshore LFA sonar operations (but not from other coastal anthropogenic sounds).

Impacts on Marine Mammal Habitat

Comment 64: The U.S. Navy has not provided any evidence that the SURTASS LFA sonar system is harmless to the marine environment. The Draft SEIS offers no new information to suggest that SURTASS LFA sonar will not harm marine life.

Response: NMFS believes that the Final SEIS and the Final EIS contains a full analysis of SURTASS LFA sonar and the effects on the marine environment. The potential for SURTASS LFA sonar operations to cause harm to marine invertebrates is discussed also in SEIS RTC 3.2.5 while impacts to marine fish are discussed in SEIS RTC 4.1.4, and impacts to marine mammals are provided in RTCs referenced in SEIS RTC 4.3.6.

Since the Final EIS was published in early 2001, there has been additional research published in a peer reviewed journal that supports the 180-dB criterion for injury as being a conservative level for assessing potential injury to marine mammals. Laurer *et al.* (2002) exposed rats to 5 minutes of continuous high intensity, low frequency (underwater) sound (HI LFS) either at 180 dB SPL re 1 microPa at 150 Hz or 194 dB SPL re 1 microPa at 250 Hz, and found no overt histological damage in brains of any group. Also, blood gases, heart rate, and main arterial blood pressure were not significantly influenced by HI LFS suggesting that there was no pulmonary dysfunction due to exposure. This published paper was based on work performed in support of Technical Report #3 of the SURTASS LFA sonar Final EIS.

From 2003 to 2006, the University of Maryland conducted a series of studies to test the effects of high intensity LFA sonar on fishes. These studies, which tested the effects of an actual LFA sonar transducer, examined the changes in hearing capabilities, changes in the mechanical structures of the ear, and the effects on other organ systems, including the swim bladder and brain. Detailed information on the experiment is provided in the Draft SEIS (pp. 4 10 to 4 22). Popper *et al.* (2007) shows that there is no permanent hearing loss in either species studied (the rainbow trout (*Onchorynchus mykiss*), a close relative of endangered and listed salmonid species, and the channel catfish (*Ictalurus punctatus*), an example of a hearing specialist). Both species showed some temporary hearing loss. This was not of great magnitude, and hearing returned to normal within a day or so after exposure. Results suggest no effect on other organ systems; for example, the swim bladder in fish exposed to the LF sonar signal was completely intact. Moreover, all animals survived the experiments and none died, even several days after exposure. The sound levels (up to 193 dB rms re: 1 microPascal2 at 196 Hz RL) used in these experiments approached those that fish would encounter very close to an active LFA sonar source array (within 200 m (656 ft)). However, the exposure during experiments was very likely more substantial (e.g., experimental exposure to either 324 or 628 seconds) than any a fish would encounter in that the fish were exposed to multiple replicates of very intense sounds, whereas any fishes in the wild would encounter sounds from a moving source, and the successive emissions from the source would decrease in intensity as the ship moved away from exposed fish.

To date, no evidence has been provided that supports the hypothesis that ''SURTASS LFA sonar can do great harm to fish stocks.'' The SEIS discussed several studies which examined fish catch rates before and after presentations of sounds from seismic air guns (SEIS Subchapter 4.1.1.4). These studies noted a temporary decline in catch rate for trawls and longlines. The Navy points out that the exposure to seismic air guns was over a much longer time frame than those projected for LFA sonar. Moreover, there are significant acoustic differences between the impulsive sounds of air guns and the coherent sounds of LFA sonar. Thus, at this time it is scientifically premature to extrapolate from these studies to LFA sonar. Since exposure times to LFA sonar is significantly shorter than to seismic air guns, it is reasonable to suggest that any behavioral effects from LFA sonar signals will be minor and transitory.

Other Marine Life Concerns

Comment 65: The commenter is concerned with the effects of sound energy on marine life. They request we promulgate restrictions which will protect marine mammals from hazards. These restrictions need only be ones of common sense, such as: (1) Avoiding known sensitive feeding, breeding or rearing grounds and migration routes within federally designated critical habitat areas when conducting naval exercises; (2) Using passive technology to determine the presence of marine mammals and avoid using active sonar while in their presence, as defined by the distance necessary to avoid harm; (3) Cease active sonar operations if marine mammals are observed, particularly if observations are compatible with fear, stress displays, or abandonment of young; (4) Not using active sonar in confined, shallow, coastal waters where marine mammals are likely to congregate; and (5) Not exceeding the level sonar energy which has been scientifically documented to be below the threshold of injury to the exquisitely sensitive organs of hearing.

Response: NMFS (and the Navy) agree with these mitigation measures, which are all already in place. Please see Monitoring and Mitigation sections in this rule for details.

Mitigation Concerns

Comment 66: The Navy promises only to turn off LFA sonar if they spot or detect whales in a very small area around the ships. Since the impacts of underwater sound, both to do physical harm to whales and also to disrupt and harass whales' and dolphins' own communication, feeding, and orientation, cover enormous distances, these mitigation measures are too paltry to protect the health of whales and dolphins.

Response: Implementing a shutdown zone of approximately 2 km (1.1 nm) around the LFA sonar unit will ensure that no marine mammals are exposed to an SPL greater than about 174 dB. This is significantly lower than the 180-dB used for other acoustic projects for protecting marine mammals from injury. As shown in this document and elsewhere, SURTASS LFA sonar is not expected to cause physical injury to marine mammals below 180 dB RL. The 180 dB injury criterion is based on scientific documents and research, which are provided in the Final EIS (Subchapter 1.4.2.1, and Chapter 10 and RTCs 4 4.9, 4 5.1, 4 6.1, 4 6.13, and 5 2.1). In NMFS' 2002 Final Rule for the operation of SURTASS LFA sonar (67 FR 46721 89), we discussed the 180-dB criterion (see RTC SIC44 through SIC49).

Since the Final EIS was published in early 2001, there has been additional research published in a peer reviewed journal further supports the 180-dB criterion for injury as being a conservative level for assessing potential injury to marine mammals. As described elsewhere in this document, Laurer *et al.* (2002) research supported the findings in Technical Report #3 of the SURTASS LFA sonar Final EIS. Also, the potential for SURTASS LFA sonar to cause harm to marine mammals and the validity of the 180 dB injury threshold for SURTASS LFA sonar are discussed in the Final SEIS (RTCs 4.0.1, 4.0.2, 4.0.3, 4.3.1, 4.3.2, 4.3.7, 4.3.8, 4.3.9, 4.3.10, and 4.3.12).

Regarding strandings, the best available scientific evidence supports a conclusion that beaked whales are the primary species of concern, and that mid-frequency active sonar, not LFA sonar, when combined with other factors, is the sonar most likely implicated. Also, most odontocetes have relatively sharply decreasing hearing sensitivity below 2 kHz. If a cetacean cannot hear a sound or hears it poorly, it is unlikely to have a significant behavioral impact (Ketten, 2001). Therefore, it is unlikely that LF transmissions from LFA sonar would induce behavioral reactions from animals that have poor LF hearing, such as beaked whales. While it is highly unlikely, the sounds could damage tissues even if the animal does not hear

the sound, but this would have to be occur within the 180 dB sound field (within 1,000 m (3,280 ft)) of the transmit array. The likelihood of a marine mammal entering the 180 dB sound field is considered highly unlikely due to the detection effectiveness of the Navy's HF/M3 sonar. Therefore, NMFS believes that the tripartite monitoring program has a high probability of detecting the presence of marine mammals prior to potential injury. This will be discussed later in this document. Finally, NMFS discusses the potential for masking marine mammal communications and hearing elsewhere in this document.

Comment 67: The Federal Court that struck down the Navy's earlier EIS wrote: '' endangered species, including whales, listed salmon and sea turtles, will be in LFA sonar's path. There is little margin for error without threatening their survival.'' The court therefore urged the Navy to consider protective measures such as wide coastal exclusion zones, more effective surveys for whales before sonar exercises, shut down procedures for fish, and the use of training areas that present less risk to marine life. The Navy's proposed authorization rejects each of these ideas.

Response to the first point: The choice of 46 km (25 nm) was selected because it was just over twice the current coastal exclusion restriction, and seaward of the hypothetical shelf break for all three shelf cases examined in its analysis. The Philippine Sea dual criteria alternative referred to by the commenter (111 km (60 nm) from the coast or 56 km (30 nm) seaward of the 200 m (656 ft) isobath, whichever is greater) was negotiated in a mediated settlement. The Final EIS analysis was based on a coastal geographic restriction of 22 km (12 nm); whereupon it was incorporated into the Navy's ROD, NMFS's 2002 Final Rule and subsequent LOAs. In the Navy's good faith attempt to respond to a Court identified deficiency relating to the number of alternatives considered, additional alternatives were analyzed in the Draft SEIS, including more than doubling the coastal standoff range. The results, which are too complex to discuss in detail here, are summarized in Final SEIS Subchapter 4.7.6. This analysis indicates that increasing the coastal standoff range decreases exposure to higher RLs for the concentrations of marine mammals closest to the shore (shelf species) but does so at the expense of increasing exposure levels for shelf break species and pelagic marine mammal species. Increasing the range to 56 km (30 nm) or even 111 km (60 nm) (criteria from the Permanent Injunction) would not make a significant difference in the outcome. However, coastal shelf areas, in many cases, are already excluded. The Final SEIS Table 2–4 delineates OBIAs that are also a coastal shelf exclusion zones. For example, the North American east coast exclusion zone includes all shelf waters landward of the 200-m (656-ft) isobath between 28 deg N to 50 deg N latitude, west of 40 deg W longitude. This is a year-round restriction and encompasses the Northern Right Whale Critical Habitat, the Stellwagen Bank National Marine Sanctuary (NMS), the Monitor NMS, and the Gray's Reef NMS.

Response to the 2nd Point. The Stipulation Regarding Permanent Injunction issued on October 14, 2003, by the U.S. District Court for the Northern District of California, as agreed to by the parties stated the Navy was not required to conduct ''pre operation surveys'' as described in the Court's Opinion and Order. In response to the Opinion and Order, the Navy provided an evaluation of the use of small boats and aircraft for pre operational surveys in the Draft SEIS Subchapter 5.4. That evaluation demonstrated that small boat and pre operational aerial surveys for SURTASS LFA sonar operations are not practicable, not effective, may increase the harassment of marine mammals, and are not safe for the observers. In addition to small boats, small aircraft surveys were also suggested. This issue was addressed in SEIS Subchapter 5.4 which provided a detailed discussion of why aerial and small craft surveys were not considered a viable mitigation option. The possible harassment of marine mammals from these surveys was only one factor in this consideration. Please see SEIS RTCs 5.4.1, 5.4.2, and 5.4.3 for additional information.

Comment 68: The Navy proposes to retreat from the mitigation measures it currently uses to protect marine life in its operation of LFA sonar today, including wide exclusion zones of 30 to 60 nm (55.6–111 km), 1-km (0.43-nm) buffer zone, 330 Hz limit on frequency. It shrinks the safety zone around transmitting ships, removing three quarters of the buffer currently required by NMFS. It eliminates the restrictions imposed by NMFS to operate the system only at frequencies below 330 Hz. The MMPA's mitigation standard has not been met, nor has the agency prescribed mitigation sufficient to make an affirmative finding of negligible impact [and] the Navy's new permit application * * * fails to adopt or severely shortchange each of these mitigation measures.

Response: Wider exclusion zones are discussed in Comment 67. The one-km (0.54 nm) buffer zone was an interim operational restriction added by NMFS in the 2002 Final Rule. An analysis by the Navy demonstrated that the removal of this restriction will not appreciably change the percentage of animals potentially affected. However, NMFS has again included the one-km (0.54 nm) buffer zone in its rule for SURTASS LFA sonar to further protect against marine mammals entering the 180 dB isopleth.

The 330-Hz frequency restriction was an interim operational restriction added by NMFS in the 2002 Final Rule to preclude the potential for injury to marine mammals by resonance effects. That restriction was based on a statement made by Dr. Darlene Ketten, an expert on the functional morphology of marine mammal hearing, in her testimony before the Subcommittee on Fisheries Conservation, Wildlife and Oceans of the House Committee on Resources on October 11, 2001 (Ketten, 2001). The Navy's Final SEIS states that the NMFS acoustic resonance workshop ruled out resonance, but stated that the report provided part of the evidence required by NMFS that resonance and/or tissue damage from LFA sonar transmissions were unlikely to occur in marine mammals at levels below 190 dB (Final SEIS Subchapter 2.5.1). DOC (2002) states that it seemed unlikely that acoustic resonance in air spaces played a primary role in tissue trauma in the Bahamas and other events. Nevertheless, they suggested continued research. While the Marine Mammal Commission workshop did not discuss in detail the results of the NMFS acoustic resonance workshop, it endorsed three recommended areas of study: (1) Beaked whale lung resonance throughout the dive profile; (2) potential for other organs and structures to be affected by resonance; and (3) possibility that animals experience tissue shear (Cox *et al.*, 2006). At this time, there is no information available that supports an increase in the probability of LFA sonar to cause injury to marine mammals through resonance in the frequency range of 330 to 500 Hz. The frequency requirements for the CLFA sonar to be installed onboard the VICTORIOUS Class vessels are above 330 Hz, but still within the 100 to 500 Hz range as stated in both the Final EIS and Final SEIS. After conducting a full review of resonance in its Final SEIS, the Navy concluded, and NMFS agrees, that effects from resonance are unlikely and that there is no need to retain the 330-Hz restriction.

A full analysis of the mitigation measures was conducted in the Final SEIS, Chapter 5. Further, mitigation measures have been discussed in this document. NMFS believes that use of SURTASS LFA sonar consistent with these regulations meets the MMPA mandate that takings be reduced to the lowest level practicable.

Comment 69: The Navy's take application proposes to abandon or severely curtail existing protections. Every one of its alternatives would allow the Navy to train with LFA sonar throughout 75 percent of the world oceans. It withdraws from a court-ordered extended coastal exclusion zone, reverting to the originally proposed (and rejected) zone of 12 nm (22 km).

Response: Please see previous responses on the comment regarding LFA sonar operation in 75 percent of the world's oceans. As for the coastal exclusion zone, in the Navy's good faith attempt to respond to a court-identified deficiency, additional alternatives were analyzed in the Draft SEIS, including more than doubling the coastal standoff range. The results summarized in Final SEIS Table 4.7.7 indicate that increasing the coastal standoff range does decrease exposure to higher RLs for the concentrations of marine animals closest to the shore (shelf species) but does so at the expense of increasing exposure levels for shelf break species and pelagic species. Increasing the range to 56 km (30 nm) or even 111 km (60 nm) would not make a significant difference in the outcome.

In addition, if the Navy does operate at 12 nm from the coast, there are potential benefits over operating farther from shore. Analysis of the geometry, bathymetry, sound propagation, and animal densities in a variety of sample areas revealed that the overall risk to marine mammals is lower when SURTASS LFA sonar is operated at 12 nm from shore than when it is operated at 25 nm. First, a smaller volume of ocean is ensonified. For example, the estimated volume exposed to a received level of 155 dB decreases by 21%. This is due, in part, to shallower water depths closer to shore. In addition, in the majority of scenarios studied, when all biological factors were taken into account, including marine mammal densities, the risk incurred by moving closer to shore decreased or remained the same. Given the Navy's stated need to have the flexibility to use the system closer to shore if training, testing, or military operational demands required it, and in light of evidence demonstrating that operation at 12 nm from shore created less impact on marine mammals than a larger coastal exclusion zone, NMFS determined that a smaller coastal exclusion zone was warranted and consistent with its obligation under the MMPA to prescribe ''other means of effecting the least practicable adverse impact,'' while taking into account ''personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.'' Naturally, if the Navy's operational needs did not require it to take advantage of the additional flexibility offered by the narrower coastal exclusion zone, then the potential benefits would not be realized, and the impacts would remain the same as before under the broader coastal exclusion zone.

Comment 70: The Draft SEIS does not state at what distance from the source the 180 dB RL isopleths will occur, but in the mitigation section repeatedly refers to the ''mitigation zone.'' Clarification of the distance from the source at which a RL of the 180 dB is expected should be included.

Response: The distance to the 180-dB isopleth is given in the Final EIS on pages 2–14, 2–18, and 5–1, which were incorporated by reference into the Final SEIS. Under normal operating conditions, this zone will vary from 0.75 to 1.00 km (0.4 to 0.54 nm) from the source array, ranging over a depth of approximately 87 to 157 m (285 to 515 ft). This information was added to the appropriate section in Final SEIS Chapter 2. In addition, NMFS has continued the requirement for the Navy to establish a ''buffer'' zone extending an additional 1 km (0.54 nm) beyond the 180-dB isopleth. Any marine mammals detected within the 180-dB zone or the 1-km (0.54-nm) buffer zone will result in a shut-down of the SURTASS LFA sonar array and a power-down of the HF/M3 sonar so that the marine mammal(s) detected are not subject to LFA sonar sounds in excess of 180 dB.

Comment 71: In regards to monitoring, the Draft SEIS does not state how much training these personnel will receive, how their level of expertise will be measured, the amount of refresher training that will be done, or if these ship personnel will have to perform other duties when they are conducting observations. The Draft SEIS also does not state how many trained marine mammal observers will be used at any one time or where they will be positioned on the ship, except at the topside. SURTASS LFA sonar should cease during hours of darkness when the chances of spotting a marine mammal or turtle approximate zero.

Response: As stated in NMFS' 2002 Final Rule (RTC MOC 8), personnel trained in detecting and identifying marine animals will make observations from the SURTASS LFA sonar vessel. At least one observer, qualified by NMFS, has trained, tested and evaluated other visual observers. Visual observation effectiveness estimates will be provided to NMFS in accordance with LOA reporting requirements.

Because of the limitations of both passive acoustic and visual monitoring, the Navy developed the HF/M3 sonar to provide effective 24-hour, all-weather active acoustic monitoring of an area of approximately 2-km (1.1 nm) radius from the array. The HF/M3's detection effectiveness is calculated at 95 percent standing alone and is not dependent on the time of day. For further information see sections on mitigation and monitoring in this rule and the Final SEIS, Chapter 5, and the Navy's Final Comprehensive Report, Chapter 2.

Comment 72: The use of passive acoustic monitoring to listen for vocalizing marine mammals as a complementary detection method to visual observation is a good idea. However, to use the SURTASS array for this purpose would limit detections to those animals vocalizing within the bandwidth of the system. Most marine mammals would therefore not be detected.

Response: This topic was addressed in Final EIS, Subchapter 4.2.7.1. In calculating the effectiveness for the various monitoring systems for purposes of the Final EIS analyses, the passive monitoring component of the three-part monitoring system was estimated at 0.25, or 25 percent. Because of the limitations of both passive acoustic and visual monitoring, the Navy developed the HF/M3 sonar to provide 24-hour, all weather active acoustic monitoring.

Comment 73: The protocol described in the Draft SEIS for reacting to a detected animal is based on a subjective and mission-impacting judgment call by the array technician who has to decide if the detected animal might be impacted by the SURTASS LFA sonar. In all likelihood, such decisions are unlikely to be made in favor of the animal when the consequence is the shut down of operations and chance of incurring the disfavor of peers and superiors.

Response: NMFS has no reason to question that the Navy would not fully comply with the mitigation and monitoring requirements for the SURTASS LFA sonar operations operations which mandate non-operation or shutdown of the sonar source if a marine mammal is detected

within 2 km of the source. For further information on mitigation and monitoring, please see the Final SEIS, Chapter 5, and the Final Comprehensive Report, Chapter 2.

Comment 74: The Draft SEIS does not state what the full power levels of the HF/M3 will be but merely states that RLs will not exceed 180 dB and does not give distances from the HF/M3 source. A mitigation measure that adds more noise to the environment is illogical.

Response: The general operating characteristics of the HF/M3 sonar have been provided in the Final EIS (p. 2–17). The source level is 220 dB re 1 microPascal at 1 m. HF/M3 sonar testing and effectiveness are discussed in the Final EIS (pp. 2–19 through 2–22) and the Final SEIS RTC 5.2.20. As a mitigation measure, the HF/M3 sonar is ramped up from 180 dB SL to full power over 5 minutes in 10 dB increments (Final SEIS, Subchapter 5.2.3).

There is recent scientific evidence that sonars, similar to the HF/M3, which are in common use in the fishing and maritime industries, do not harm marine life. In a recently published paper, Benoit-Bird *et al.* (2006) examined the hypothesis that marine mammals acoustically stun their prey by exposing three species of fish commonly preyed upon by odontocetes to pulsed signals at 18 kHz, 55 kHz, and 120 kHz with exposure levels from 193 dB (peak-to-peak), 208 dB (peak-to-peak), and 213 dB (peak-to-peak), respectively. They observed: (1) No measurable changes in the behavior for any of the species during the exposures; (2) no noticeable change in swimming activity; (3) no apparent loss of buoyancy; (4) no movement away from the transducer; and 95) no mortality. Despite the use of signals at the maximum source levels recorded for odontocetes clicks, the researchers could not induce stunning or even disorientation in the fish tested.

In addition, a requirement to ramp-up the HF/M3 ensures that marine mammals are detected by the HF/M3 sonar at the lowest sound level possible. If a marine mammal is detected during ramp-up within the 180-dB sound field or 1-km (0.54-nm) buffer zone, further increases in power are not initiated until the animal is no longer detected. At that time, ramp-up would continue unless that animal, or another, was detected. The HF/M3 sonar effectiveness has been discussed in a report by Ellison and Stein (2001), which is available to the public on the SURTASS LFA sonar Web site at *http://www.surtass-LFA sonar-eis.com/Download/index.htm*. In addition, a paper on this subject was presented at the 2001 Acoustical Society of America meeting (Stein *et al.*, 2001).

For additional information please see Final EIS Subchapter 4.2.7.3 and RTCs 5–2.4, 5–2.11, 5–2.12, 5–2.13, 5–2.19, 5–2.21, and 5–2.22; and NMFS 2002 Final Rule RTCs MOC10, MOC12, MOC14, and MOC17.

Comment 75: The commenter is concerned by the mention of the use of a high frequency sonar system to detect whales. Has this undergone an appropriate environmental assessment? Has a take authorization been issued for animals that this might impact? Have the cumulative impacts of low and high frequency systems being used in conjunction been considered?

Response: As stated in the SURTASS LFA sonar Final EIS (RTC 5–2.21), the HF/M3 sonar is basically a fish-finder type sonar with similar frequency ranges and power output as many commercial fish finder sonars. These sonar types are commercially available and used worldwide, and are unregulated. The potential impacts of the HF/M3 sonar are discussed in Subchapter 4.2.7.3 in the Final EIS. If a marine mammal is detected during ramp-up within the 180-dB sound field or the 1-km (0.54-nm) buffer zone, further increases in power are not initiated until the animal is no longer detected. At that time, ramp-up would continue unless that animal, or another, was detected. It was concluded that the impacts of the HF/M3 sonar when utilized using the above supplemental safety measures would have negligible impacts. Therefore, the environmental documentation requirements for the HF/M3 sonar have been met by the Final EIS. This analysis from the Final EIS remains valid. Additionally, as required by the first Final Rule, the HF/M3 has undergone further analyses of effectiveness in the Navy's Final Comprehensive Report (2007a) and, to remain in compliance with this Final Rule, the Navy is required to analyze the HF/M3 over the next five years.

The cumulative impacts of LFA sonar and other military and commercial sonars used in conjunction have been addressed in the SEIS Subchapter 4.7.1. Because of the differences in the signal characteristics between LFA sonar and the HF/M3 sonar, synergistic effects are unlikely to occur. The HF/M3 is discussed further in Comment 74.

Comment 76: NMFS must establish that LFA sonar operational mitigations are adequate prior to granting this Authorization. No one has proven that the LFA sonar visual and acoustic detection mitigations actually work under realistic scenarios. There has been enough time to produce something of value; why has NMFS not required the Navy to validate detection mitigations, and instead accepted assertions and models? There have been no directed scientific research efforts to validate that the LFA sonar mitigations reliably detect marine mammals and turtles within the buffer zone under realistic scenarios and conditions, and no research to confirm that the LFA sonar operations are modified by delays or shutdowns whenever individuals of species of concern are actually within or about the enter the zone? The Commission expressed similar concerns in its July 24, 2007 letter. This lack of proof renders baseless the Navy's assertions of adequate shutdowns during yearly operations, because no one knows how many cetaceans and turtles were actually inside the buffer zone during previous LFA sonar operations, no one studied what happened over a reasonable time to those that were within a kilometer, and no one studied actual behavioral impacts over wider ranges and times.

Response: NMFS and the Navy have stated the limitations of the visual and passive acoustic detection systems previously. However, as stated in Subchapter 2.3.2.2 of the Final EIS, the HF/M3 sonar has undergone both qualitative and quantitative assessments of the system's ability to detect marine animals of various sizes and was verified in seven sea trials between 1998 and 2000. In addition, LFA sonar has been operating since 2003 in a restricted area in the northwestern Pacific Ocean with a total of 470 hours of transmit time under the first four LOAs (DON, 2007). These operations, with mitigation, have produced no known Level A takes on marine mammals. NMFS regulations require the Navy to delay or suspend operation of SURTASS LFA sonar whenever a marine mammal is detected within 2 km (1.1 nm) of the sonar source by any means. NMFS has no reason to believe that the Navy has not complied with these requirements and, in fact, the Navy's reports indicate that use of the sonar has been delayed or suspended on many occasions in compliance with the regulations. Further information on mitigation effectiveness is provided in the Annual Reports required under the LOAs (DON 2003, 2004, 2005, 2006, and 2007). Additional analyses have been provided in the Navy's Final Comprehensive Report (DON, 2007). Finally, NMFS is unaware of a practical way to validate the number of animals underwater and outside the LFA sonar mitigation (shutdown) zone to verify the number of Level B takes by harassment. We are

also unsure whether the commenter is recommending research on the number of Level A (injury) harassment takes which (unless surrogate species are used) have the potential to result in injury to marine mammals during the course of research on the effectiveness of the tri-partite mitigation monitoring program. This ethical concern is a reason why the LFS SRP was limited to SPLs below 160 dB.

An evaluation of the effectiveness of the monitoring and mitigation measures has been provided to NMFS in the Final Comprehensive Report (DON, 2007) submitted under 50 CFR 216.186(c). This report is available to the public (see **ADDRESSES**). Estimated marine mammal densities are determined for each potential LFA sonar operations area proposed in the annual requests for LOAs under the current regulations. The 180-dB safety and 1-km (0.54-nm) buffer zones were monitored at all times during LFA sonar active transmissions as required by NMFS 2002 Final Rule (50 CFR 216.185 and 50 CFR 216.186) and the conditions of the LOAs as issued. In addition, available stranding data from the operating areas are continuously reviewed, and no strandings have coincided spatially or temporally with LFA sonar operations.

Comment 77: Why doesn't NMFS challenge detection methods as being compromised during a significant portion of the LFA sonar's operating envelope? Visual detections of marine turtles near one kilometer are unlikely during flat calm conditions, experts testify that only a very small percentage of nearby beaked whales will ever be seen and all visual detections become moot with medium sea states, night, and some weather operations.

Response: NMFS and the Navy agree that visual monitoring has a low detection probability. The Navy stated in several documents, including its Final Comprehensive Report (Navy, 2007) that the detection probability from visual monitoring is approximately 9 percent. For this reason, the Navy uses an active acoustic monitoring system, the HF/M3.

The HF/M3 sonar was specifically developed to improve detection of marine mammals and potentially sea turtles, through active acoustic detection, ensuring that they are not within the LFA sonar mitigation zone during SURTASS LFA sonar transmissions. It provides 24-hour detection for marine animals, even during poor visibility conditions. Analysis and testing of the HF/M3 sonar operating capabilities indicates that this system substantially increases the chances of detecting marine mammals (and possibly sea turtles) within the LFA sonar mitigation zone (i.e., inside the 180-dB safety and 1-km buffer zone sound fields). The probability of detection of various marine mammals is presented in the Final EIS, Figure 2–5. The potential for SURTASS LFA sonar to cause harm to marine mammals and the validity of the 180-dB injury threshold for SURTASS LFA sonar are discussed in Final SEIS (RTCs 4.0.1, 4.0.2, 4.0.3, 4.3.1, 4.3.2, 4.3.7, 4.3.8, 4.3.9, 4.3.10, and 4.3.12).

Comment 78: Acoustic detection requires that the marine animals in the path of the buffer zone make sounds, but current research does not validate that they do so sufficiently for anyone to expect to detect even a small percentage of animals included in, or in the path of the buffer zone. Can NMFS deny that the total acoustical output from the LFA sonar vessel and associated vessels may cause acoustically active animals to be more silent, rendering the acoustic monitoring moot?

Response: In calculating the effectiveness for the various monitoring systems for purposes of the Final EIS analyses, the passive monitoring component of the tri-partite monitoring system was estimated at 0.25, or 25 percent. Because of the limitations of both passive acoustic and visual monitoring, the Navy developed the HF/M3 sonar to provide 24-hour, all weather active acoustic monitoring. The HF/M3 was tested and the results were discussed and analyzed in the Final EIS and in Technical Report 3 (Ellison and Stein, 2001). This topic is also addressed in Final EIS Subchapter 4.2.7.1.

In regards to animals changing their vocal behavior, the following response is a summary of the information provided in the Final EIS.

Given that the LFA sonar sound source can be detected at moderate to low levels over large areas of the ocean, there was concern at the initiation of the NEPA process in 1996 that there was the potential for large percentages of species stocks to be exposed to moderate-to-low received levels. If animals are disturbed at these moderate-to-low exposure levels such that they experience a significant change in a biologically important behavior, then such exposures could potentially have an impact on rates of reproduction or survival. Knowing that cetacean responses to LF sound signals needed to be better defined using controlled experiments, the Navy helped develop and supported the three-year LFS SRP beginning in 1997. This field research program was designed to address three important behavioral contexts for baleen whales: (1) blue and fin whales feeding in the southern California Bight, (2) gray whales migrating past the central California coast, and (3) humpback whales breeding off Hawaii. Taken together, the results from the three phases of the LFS SRP do not support the hypothesis that most baleen whales exposed to RLs near 140 dB would exhibit disturbance behavior and avoid the area. These experiments, which exposed baleen whales to RLs ranging from 120 to about 155 dB, detected only minor, short-term behavioral responses. Short-term behavioral responses do not necessarily constitute significant changes in biologically important behaviors.

These results have been supported by recent, peer reviewed papers. Croll *et al.* (2001a) studied the effects of anthropogenic LF noise (SURTASS LFA sonar) on the foraging ecology of blue and fin whales off San Nicolas Island, California. Overall, the whale encounter rates and diving behavior appeared to be more strongly linked to changes in prey abundance associated with ocean parameters than to LFA sonar transmissions. In some cases, whale vocal behavior was significantly different between experimental and non-experimental periods. However, these differences were not consistent and did not appear to be related to LF sound transmissions. At the spatial and temporal scales examined, Croll *et al.* (2001) stated that they found no obvious responses of whales to a loud, anthropogenic, LF sound.

Both Miller *et al.* (2000) and Fristrup *et al.* (2003) published on the results of tests conducted with male humpback singers off Hawaii in which they evaluated variation in song length as a function of exposure to LF sounds. In spite of methodological differences, the results of both studies indicated that humpback whales slightly increased their songs in response to LF broadcasts. Fristrup *et al.* (2003) found that the fraction of variation in song length that could be attributed to LF broadcast was low and concluded that the effects of LF broadcast did not impose a risk of dramatic changes in humpback whale singing behavior that would have demographic consequences. Therefore, it is not believed that the use of active acoustics will dramatically change the vocalizations of acoustically active animals.

Comment 79: Does NMFS believe that the geographical mitigations are the only areas the LFA sonar may cause significant effects? If previous LFA sonar operations actually were conducted in areas with near-zero marine animals of concern, future operations certainly will be in the areas with significant populations. Again, without adequate detection, how can NMFS know that takes will not be excessive?

Response: As noted in the Final SEIS (Subchapter 2.5.2.1), for the purposes of obtaining an LOA, SURTASS LFA sonar operations are planned in advance for areas with reduced risk by avoiding areas of high marine life concentrations to the greatest extent feasible considering national security tasking. This process is detailed in the Final SEIS (Subchapter 4.4). Also, please see RTCs CSI–1, 2, 3, and 4 in this document. However, it is erroneous to say that the area in which SURTASS LFA has been operated for the last five years had ''near-zero'' marine animals. There are virtually no parts of the ocean that can be accurately described as ''oceanic deserts'' devoid of marine life. While some areas are better studied than others, it would be a mistake to assume that simply because data is lacking on marine mammal abundance the area is devoid of marine mammals. Thus, in selecting areas where the Navy will and will not operate LFA sonar, we must rely on what is known about marine mammal concentrations and attempt to avoid them, continue to fill knowledge gaps through additional research, and recognize that, by necessity, we are regulating in a dynamic area of science.

Comment 80: Without adequate detection, how can NMFS know that takes will not be excessive?

Response: As discussed previously in this document, NMFS believes that the tri-partite mitigation measures, particularly the HF/M3 sonar will be capable of detecting over 95 percent of all marine mammals within the 180 dB range. In addition, since detection is excellent out to the edge of the buffer zone, marine mammal detection will be more than adequate and will prevent Level A injury and mortality. Also please see the Navy's Final Comprehensive Report (DON, 2007).

Comment 81: Because there has been no participation by scientific experts on any LFA sonar mission cruises over several years there is no reliable documentation of observed and probably numbers of cetaceans and turtles that may have been within the LFA sonar's buffer zone, general surrounding area, or track line.

Response: According to the Navy, utilization of third-party marine biological visual observers is not feasible. First, there is no available berthing for additional personnel on the LFA sonar vessels. To accommodate visual observers(s), it would require the reduction of the number of operational personnel on the vessel, which would reduce mission effectiveness. Moreover, because of the nature of the missions, third-party observers would require security clearances. Although it is possible for these personnel to obtain the proper security clearances, the time and cost of applying for security clearances for these individuals is high. Please see NMFS' 2002 Final Rule (RTC MOC32) for further discussion.

However, while third-party observers during military operations are not practicable, NMFS has recommended certain research projects be undertaken by the Navy, during which non-Navy scientists would be participants.

Comment 82: The Navy fails to consider additional mitigation measures that would mitigate LFA sonar's impact on marine species, including, the Navy's failure to extend the coastal zone and instead disputes that greater exclusion zones would be beneficial to marine species. The Navy has failed to present sufficient modeling and analysis.

Response: In order to answer the question of whether a standoff range farther from the coast would, in fact, generate fewer marine mammal takes, a generic analysis was performed (Final SEIS Subchapter 4.7.6). This analysis was not portrayed in the Final SEIS as a modeling effort, but as a ''generic analytical methodology for coastal standoff range comparison'' as clearly stated in the Final SEIS. As further stated, ''The methodology used to assess the change in potential impacts to marine animals was designed to utilize several sets of simplified assumptions in order to determine a relative trend in these potential impacts for a variety of oceanic and biological conditions. This approach allows one to assess the trends without the extensive process of modeling all the conditions that exist.'' This was a method of relative analysis of 3 shelf cases vs. 3 biology types (yielding 9 different combinations of the factors) for each of two potential coastal standoff cases to estimate relative impacts.

Comment 83: The Navy fails to consider all reasonable alternatives for expanding its coastal exclusion zones.

Response: See Comment 67 and the Final SEIS (Subchapter 4.7.6 and RTCs 4.7.12, 4.7.13, 4.7.14, nd 4.7.15.) for response.

Comment 84: The Navy has done very little to respond to the Court's holding with respect to additional offshore exclusion areas. Five of the seven OBIAs in the Navy's preferred alternative were already included in the 2002 Final Rule, among those places where received levels were capped at 180 dB, and thus are not additional mitigations at all.

Response: NMFS has continued in these regulations a means to propose OBIAs, from any source, including the public. NMFS will accept petitions for OBIAs in accordance with 50 CFR 216.191. Additionally, based on the conclusions of the Final SEIS and previous NMFS Biological Opinions on LFA sonar (2002–2006), SURTASS LFA sonar is not likely to affect fish or sea turtles. The analyses in the Final EIS and Final SEIS support the conclusion that LFA sonar operations are not likely to cause injury to marine mammals, and minimal potential to cause significant changes in biologically important behaviors.

Under NMFS' first five year rule (50 CFR 216.191) concerning the designation of additional OBIAs, no nominations have been received.

Comment 85: One of the central flaws of the 2001 Final EIS was its failure to consider concentrating training with LFA sonar into specific, low impact areas, rather than spreading it around the globe.

Response: See Comment 67.

Comment 86: The Navy rejects NMFS' 360-degree, one km buffer zone extending out from the 180 dB isopleths.

Response: See Comment 68.

Comment 87: The Navy rejects the 330 Hz restriction imposed by NMFS.

Response: See Comment 68.

Comment 88: The Navy fails to implement the following mitigation measures: LFA sonar ramp-up, third-party marine biological visual observers, acoustic monitoring using existing acoustic nodes and other external platforms, a modification of sonar signal characteristics, avoidance of enclosed areas and coastal areas with complex, steep sea bed topography, lower power levels, wider safety zones, operational procedures in coastal zones that allow escape routes, and meaningful geographic restriction, avoidance of hot-spots.

Response: Ramp-up of the LFA sonar source is not required because the HF/M3 sonar will be ''ramped-up'' prior to LF transmissions to verify that the LFA sonar mitigation zone is clear of marine animals prior to turning on the LFA sonar. Please see Final EIS RTCs 5–2.26 and 5–2.27 and NMFS 2002 Final Rule RTCs MOC19, MOC20, and MOC21 for additional information.

As mentioned previously, utilization of third-party marine biological visual observers is also not feasible due to berthing concerns and security clearances. Please see Comment 81 in this document and the NMFS 2002 Final Rule (RTC MOC32) for further discussion. The Final EIS (Subchapter 5.2.1) states that visual monitoring is required during daylight hours. The effectiveness of visual monitoring declines during high sea states and periods of reduced visibility. Because of

the limitations of both passive acoustic and visual monitoring, the Navy developed the HF/M3 sonar to provide 24-hour, all-weather active acoustic monitoring of an area of approximately 2-km (1.1-nm) radius from the array. Moreover, to the extent that the comment is suggesting this, NMFS has no reason to believe that the Navy is not complying with its obligations under the regulations, and thus there is no need for observers to confirm compliance. The reporting requirement is designed to enable NMFS to verify that its regulations are being followed and to assist NMFS in improving its mitigation requirements.

Monitoring mitigation is designed to preclude marine mammals from being within the 180-dB mitigation zone of the LFA sonar array to protect them from potential injury. This zone is approximately 1-km (0.54 nm) in radius, thus making the use of other existing acoustic nodes (assuming the commenter is referring to fixed arrays such as SOSUS) and other external platforms not only impractical, but virtually impossible. The SOSUS arrays are no longer manned nor maintained, so their operations are degraded and not real-time. Other external platforms would only be vessels of opportunity. Because the SURTASS LFA sonar vessel would have limited or no communications with these vessels and the time delay in relaying information, the use of these platforms is impractical.

NMFS and the Navy do not consider modification of sonar signal characteristics (including reduction in source level) to be a practical mitigation option. First, the analyses and actual operations have demonstrated that the present mitigation methods are effective. The LFS SRP utilized the actual LFA sonar signal, sometimes at full power, with only minor behavioral effects. The Fish Controlled Exposure Experiment also utilized actual LFA sonar signals and source levels with no injury and minimal behavioral responses at received levels up to 193 dB. During the first four LOAs, the LFA sonar vessels completed 40 missions with over 470 hours of actual transmission (sound-in-the-water) with no known Level A harassment takes and Level B harassment takes estimated well within the requirement of the LOAs. Second, wavetrain characteristics and array source levels are optimally designed to detect threat submarines at long distances. Return signals are below ambient levels and any changes would potentially cause degradation in detection effectiveness. Therefore, there is no need for the Navy to consider modification of LFA sonar's signal characteristics, and NMFS is satisfied that doing so would not be practicable and would result in an ''impact on the effectiveness of the military readiness activity.''

NMFS and the Navy concur that LFA sonar operations should avoid enclosed areas and coastal areas with complex, steep seabed topography. First, because of the lengths of both the passive (SURTASS) and active (LFA sonar) line arrays, enclosed areas are avoided. Second, during the annual LOA application process (Final SEIS Subchapter 4.4 and Figure 4.4–1), marine mammal habitats, seasonal activities, and behavioral activities are considered in the process of determining potential mission areas. Thus these areas will be analyzed as part of the annual LOA application process. Therefore, NMFS believes that the Navy avoids planning and conducting LFA sonar operations in areas of known high marine animal densities or ''hot spots.''

As noted in the Final SEIS Subchapter 2.5.2.1, SURTASS LFA sonar operations are planned for areas with reduced risk by avoiding areas of high marine life concentrations. This process is detailed in SEIS Subchapter 4.4. Additionally, nominations for inclusion as OBIA can be made under 50 CFR 216.191, thus providing protection for specific geographic ''hot spots.''

Because SURTASS LFA sonar will have a coastal standoff distance (at least 12 nm (22 km)), any LFA sonar signal heard by marine animals in the coastal zone will come from the same general direction, thus allowing an animal to move laterally away from the signal's source. Also, NMFS has addressed the wider coastal exclusion zone in Comment 67.

Comment 89: The Navy refuses to adopt small-craft pre-operational surveys for marine mammals in missions close to shore. The Court held that such surveys are necessary to protect marine life. The Navy does not consider: The option of using boats launched from shore; the fact that any minor disturbance to marine mammals from small planes and small boats would be far outstripped by the risk of serious injury and death that might result if marine mammals remain undetected in the zone of highest impact; using more than a single small boat if a single small boat is insufficient to task; the fact that the effectiveness of any visual monitoring program, including the one used by the Navy, is diminished by high sea states, low visibility and diving habits of whales, making additional mitigation more important; and the comparative cost of operating LFA sonar in a manner that exposes coastal marine mammals to a higher risk of stranding and other injuries.

Response: As previously mentioned, the Stipulation Regarding the Permanent Injunction issued on 14 October 2003 by the U.S. District Court, Northern District of California, as amended by Order dated July 7, 2005, and as agreed to by the parties, stated that the Navy is not required to conduct ''pre-operation surveys'' as described in the Opinion and Order. In response to the Opinion and Order, the Navy provided an evaluation of the use of small boats and aircraft for pre-operational surveys in the DSEIS Subchapter 5.4. That evaluation demonstrated that small boat and pre-operational aerial surveys for SURTASS LFA sonar operations are not feasible because they are not practicable, not effective, may increase the harassment of marine mammals, and are not safe to the observers. As a result, under this directive and in compliance with the amendments to the MMPA as made by the NDAA FY04, pre-operational surveys are not considered as a viable mitigation measure.

Vessels launched from land were addressed in the Final SEIS. They would have to sail from ports within reasonable distance from the operations site. Because of the classified nature of LFA sonar operations, National Security considerations would preclude the ability to arrange these vessels in advance. However, the primary concern with the utilization of small boats is not their effectiveness, but their unsafe nature and the impracticality of their operations from the LFA sonar vessels. Therefore, if the use of a single survey boat is considered impractical and unsafe, then this would concomitantly apply to the utilization of additional boats.

The Final SEIS did not state that the visual observers onboard the LFA sonar vessels would be able to see marine mammals better than visual observers during aerial surveys, nor were helicopters mentioned. Subchapter 4.2.7.1 of the Final EIS states that visual monitoring is limited to daylight hours and its effectiveness declines during high sea states. Because of the limitations of both passive acoustic and visual monitoring, the Navy developed the HF/M3 sonar to provide 24-hour, all-weather active acoustic monitoring of an area of approximately 2-km (1.1 nm) radius from the array. In calculating the effectiveness for the various monitoring systems for purposes of the Final EIS, the visual monitoring component of the three-part monitoring

system was estimated at 0.09, or 9 percent and the passive monitoring component was 0.25 or 25 percent effective. Utilization of the HF/M3 sonar with an effectiveness value of 0.95 or 95 percent raises the overall mitigation effectiveness to 0.98 or 98 percent (DON, 2007)

When operated under the mitigation protocols required under this rulemaking, NMFS believes that marine mammals will not be exposed to LFA sonar sound levels that will cause injuries or strandings regardless of whether they are in coastal or open ocean waters. As mentioned previously, LFA sonar has never caused, nor is expected to cause, marine mammal strandings.

Comment 90: The AEI suggests a lower allowable threshold for received levels at 22 km from shore, to protect these biologically important areas for received levels at 22 km in response to moderate noise levels. Given the relatively long duration of SURTASS LFA sonar ''pings,'' masking may be more of an issue that it is with impulsive noise sources.

Response: The subject of masking has been addressed in response to several comments in this rule. The Final SEIS states that mitigation measures for SURTASS LFA sonar operations would be conducted such that the sound field is below 180 dB received level (RL) within 12 nm (22 km) of any coastline, including islands. RLs below 180 dB for LFA sonar will not result in serious injury or death. The Final EIS provided detailed analyses of the potential effects of exposure to LFA sonar received levels less than 180 dB for 31 separate sites. These included numerous sites that were at the closest proximity to land based on SURTASS LFA sonar operational limits where biological densities were high. These analyses determined that potential effects from exposures to LFA sonar RLs greater than or equal to 180 dB were negligible and less than 180 dB were minimal. However, during the annual LOA application process for operations close to coastal areas (and OBIAs), the potential for marine mammal stocks to be affected at RLs less than 180 dB are determined, as outlined in the risk assessment approach described in the Final SEIS Subchapter 4.4. As shown in Tables 4.4–2 to 4.4–10 in the Final SEIS, minimal percentages of marine mammal stocks will be affected, which includes the potential to disturb a marine mammal by causing disruption of natural behavioral patterns to a point where the patterns are abandoned or significantly altered.

Comment 91: Why is the continental shelf off the east coast of North America the only shelf area given a broad exclusion? If there are biologically important reasons to keep the SURTASS LFA sonar signal out of this area, then it follows that other parts of the world's coastal margins at depths of less than 200 m (656 ft) should also be protected.

Response: The intention of the 12 nm (22 km) coastal restriction is to provide protection to areas of greater concentrations of marine mammals and their migration routes. The 12 nm (22-km) exclusion zone is not tied to the width of the continental shelf because of the large variability of the shelf's distance from coastlines around the world. For example, on the U.S. eastern seaboard this distance is 60 to 70 nm (111 to 130 km) from the coast while in Hawaii it can be 5 nm (9.3 km) or less. In order to provide protection to biologically important areas outside of 12 nm, several OBIAs have been designated, including one new one with this Final Rule. Because of animal concentrations and migration routes on the eastern seaboard over the continental shelf, this area has been designated as an OBIA in the Final Rule with limits extending to the 200 m (660 ft) isobath for the East Coast of the United States (from 28 N to 50 N west of 40 W) to protect more species. The 12-nm (22-km) restriction includes almost all marine related critical habitats and NMSs. However, some parts of NMSs, that are recognized to be important for marine mammals, are outside 12 nm (22 km). As a result, NMSs have been designated as OBIAs as shown in SEIS Table 2 3 and this Final Rule, and the 12-nm coastal exclusion zone has been increased to include the LFA sonar ''buffer zone'' of 1 km (0.54 nm). This additional mitigation ensures that LFA sonar SPLs are below 174 dB within OBIAs.

Comment 92: With the lone exception of The Gully, no new OBIA outside U.S. waters is even considered by NMFS. For example, the Navy's analysis does not consider any of the areas specifically mentioned in the Court's Opinion as potential OBIAs, such as the southern end of the Oyashio/Kuroshio region off Kamchatka and the area where the Emperor Seamount Chain intersects the Aleutian Rise.

Response: Areas mentioned by the Court's Opinion and Order of August 26, 2003, are Oyashio/Kuroshio area off Kamchatka, and the Emperor Seamount Chain (45 to 55 deg N latitude and 170 to 160 deg W longitude (the Court's Opinion erroneously listed this longitude as 60 degrees. The northern part of the Oyashio/Kuroshio area off Kamchatka is within the Bering Sea, which is a non-operational area as presented in the Final EIS, Figure 1–1. The southern portion of this area and the Emperor Seamount Chain are large ocean expanses. As stated in NMFS' 2002 Final Rule (RTC MIC11), marine mammals in unspecified migration corridors and open ocean concentrations should be adequately protected by the tripartite monitoring and mitigation protocols. Please see comment 93 for further information on OBIAs.

Comment 93: The commenter states that he has worked on Marine Protected Areas (MPAs) worldwide, focusing on marine mammals, and his book ''Marine Protected Areas for Whales, Dolphins & Porpoises'' (2005) details more than 350 existing MPAs for cetaceans and a further 175 areas proposed for protection. There are also 20 countries and territories that have declared their 200 nm EEZs as marine mammal protection zones. If 70 percent of the world ocean is now to be opened to LF sonar ensonification, it is possible that marine mammals in this proposed and existing MPAs will be impacted.

Response: First, NMFS notes that while 70–75 percent of the world ocean will be open to LF sonar operations, that does not equate to LFA sonar operations affecting even close to 70–75 percent of the world's ocean area at any given time. In addition, because most MPAs are mostly located in coastal waters, where LFA sonar will not operate, MPAs are unlikely to receive high SPLs from SURTASS LFA sonar.

NMFS and the Navy did consider adopting MPAs as OBIAs, as shown in the Final SEIS. MPAs are discussed under E.O. 13158 in Chapter 6 and are further discussed in Comment 4.7.19 in Chapter 10. The commenter's book, Hoyt (2005), was also cited in the Final SEIS. Hoyt (2005) states that most MPAs fall within the nation's EEZ limits and most of them are coastal and would therefore fall within the SURTASS LFA sonar coastal exclusion zone. OBIAs are not designated based on speculation on the location and density of animals. As with the first Final Rule, NMFS has in place a process for the public to propose OBIAs. An area must be of particular importance for marine mammals as an area for primary feeding, breeding, or migration, and not simply an area occupied by marine mammals. The proposed area should also not be within a previously designated OBIA or other 180-dB exclusion area. Further information on proposing OBIAs can be found in the Designation of Biologically Important Marine Mammal Areas section of this Final Rule.

Comment 94: NMFS does not consider any MPAs established by countries other than the U.S., such as any of Canada's 9 existing MPAs with cetaceans (with the exception of The Gully), Australia's 38 existing MPAs with cetaceans, or Brazil's 16 existing MPAs with cetaceans—or any of the non-U.S. protected areas discussed in the recent, relevant assessment (i.e., Hoyt, 2005).

Response: We have reviewed previously the areas cited by the commenter and note that they are within the coastal exclusion zone of these nations, as mentioned by Hoyt (2005). NMFS believes that the level of information about marine mammal abundance is lacking for many parts of the world. However, based on its review of the available science, NMFS believes that it has designated all OBIAs that are currently appropriate for designation.

Comment 95: The Navy does not consider any of the biologically significant, globally representative areas compiled in the 1990s by the World Conservation Union (IUCN), in conjunction with the World Bank and the Great Barrier Reef Marine Park Authority: A recent published assessment of beaked whale hotspots, which identifies more than 20 areas of significant global concern based on currently available evidence.

Response: NMFS does not believe that areas that are vaguely described as areas of marine mammal habitation, such as beaked whale ''hotspots,'' meet the requirement for designation as OBIAs. Also, NMFS does not currently have sufficient information on these areas to know if they meet the criteria for an OBIA. In order for NMFS to make a preliminary determination that an area is biologically important for marine mammals, it needs detailed information on the biology of marine mammals within the area, including estimated population size, distribution, density, status, and the principal biological activity during the proposed period of designation sufficient for; and detailed information on the area with regard to its importance for feeding, breeding, or migration for those species of marine mammals that have the potential to be affected by low frequency sounds. Areas within 12 nm (22 km) of any coastline, including offshore islands (which includes most MPAs), or within non-operating areas for SURTASS LFA sonar (Arctic Ocean) are not eligible for consideration. In its comment, the commenter lists other literary sources that give information for designation as OBIAs. However, these, documents do not provide information sufficient for NMFS to begin the designation process outlined in the regulations.

Comment 96: U.S. MPAs are noted in this proposed rulemaking, but MPAs in other countries are not. For example, what about the important marine mammal sanctuary in waters of the Dominican Republic? Or the international Indian Ocean whale sanctuary designated by the IWC? What about MPAs in the south China sea, on the Russian coast, or in the Philippine Sea, some of which are specifically for threatened cetaceans?

Response: NMFS does not consider it necessary to expand the list of OBIAs prior to its making the required determinations under section 101(a)(5)(A) of the MMPA. NMFS established a process for nominating new OBIAs in its 2002 rulemaking. During the past 5 years, NMFS has not received any nominations from the public for new OBIAs. It should be recognized that while NMFS may nominate areas as OBIAs, it does not believe that it should be the sole proponent for nominating areas and that was the reason for allowing it to be a public process following standard rulemaking practice. NMFS recommends however, that areas already subject to significant anthropogenic noise such as seismic and shipping areas within 12 nm (22 km) of any coastline, or otherwise already excluded (Arctic, Antarctic oceans), areas that cannot be geographically described, and areas designated for non-biological reasons (e.g., the IWC's Indian Ocean Sanctuary) not be nominated. Areas being nominated must include sufficient information to indicate why that area warrants more protection than would be provided through the Navy's visual, passive acoustic and HF/M3 monitoring program and 180-dB shut-down procedures.

Comment 97: NMFS has not considered establishing larger buffer zones around even the few exclusion zones it has identified, allowing ensonification in these areas up to 180 dB even though significant impacts on marine mammal behavior are expected well below this level and would rise, according to the Navy's risk function, as pressure levels increase. Allowing the Navy to place the LFA sonar system directly outside the Monterey Bay National Marine Sanctuary (for example) does not, by any argument, reduce impacts to marine mammals in the Sanctuary to the maximum extent practicable.

Response: As a result of the comment, NMFS has reviewed the information it currently has and has determined that by requiring the Navy to maintain approximately 2-km (1.1-nm) stand-off distance from the outer boundary of any OBIA, SPLs within the NMS will be reduced to approximately 174 dB. This means that the LFA sonar vessel must observe both the measured 180-dB zone and the additional 1-km (0.54 nm) buffer zone from the outer edge of all OBIAs. This measure is both practicable for the Navy to implement, will not cause significant impact to the Navy for conducting LFA sonar operations and results in reducing sounds within NMSs to the lowest level practicable.

Comment 98: The Navy will operate LFA sonar without any limitations or mitigation during periods of ''armed conflict or direct combat support operations, (or) during periods of heightened threat conditions.''

Response: Depending upon the situation, the Navy may decide to implement mitigation measures to protect marine mammals. However, that issue is beyond the current rulemaking action. Depending upon the area and duration of activity, NMFS may determine appropriate review necessary prior to issuing new LOAs after cessation of the armed combat situation.

Comment 99: NMFS has reviewed the Annual Reports without requiring any more mitigation measures.

Response: Based on its review of the Annual Reports, NMFS did not believe that additional mitigation was either practicable or warranted. However, as part of its review of the Navy's SURTASS LFA sonar application, and the comments submitted by the public as part of its rulemaking process, NMFS has added The Gully as an OBIA and has added a new mitigation measure to limit sounds entering offshore OBIAs. An analysis of mitigation and monitoring measures has been provided previously in this document.

Monitoring Concerns

Comment 100: The Navy's monitoring over the past five years has been inadequate to gauge the impact the system is having on marine mammals and other species in the western Pacific.

Response: The 180-dB and 1-km mitigation zone was monitored at all times during LFA sonar active transmissions, as required by NMFS 2002 Final Rule (50 CFR 216.185 and 50 CFR 216.186) and LOAs. In addition, as mentioned previously in this document, available stranding data from the operating areas are continuously reviewed, and no strandings are known to have coincided spatially or temporally with LFA sonar operations. Further, an evaluation of the effectiveness of the monitoring and

mitigation measures has been provided to NMFS in the final Comprehensive Report (DON, 2007a) submitted under 50 CFR 216.186(c). Monitoring areas beyond the buffer zone are not practical from the LFA sonar vessel. As a result, NMFS has required the Navy to conduct research in order to monitor potential impacts at some distance from the vessel. For more information on research, please see the Research section of this document.

Comment 101: NMFS should consider prescribing the following monitoring methods: suspension of acoustic exercises outside daylight hours and during periods of low visibility; aerial surveillance for marine mammals; passive acoustic monitoring using the Navy's existing acoustic nodes in certain ranges and operating areas and various other external platforms, and third-party monitoring by marine biologists.

Response: Operations do not need to be suspended during times of reduced visibility, including darkness, because the Navy's HF/M3 sonar is equally effective during these periods at detecting any marine mammals within the area where injury may occur.

Aerial surveillance has been discussed previously in this document (see Final SEIS RTCs EIIs-4, 10, 11). Pre-operational aerial surveys are not practicable mitigation.

Passive monitoring and second vessel monitoring has been addressed in comment 88 and elsewhere. Because the nodes are inoperable and the SURTASS LFA sonar vessel would have limited or no communications with these vessels and the time delay in relaying information, the use of these measures are considered impracticable.

As mentioned previously, utilization of third-party marine biological visual observers is not necessary because visual monitoring is not the primary means of detecting marine mammals and NMFS has no reason to believe that the Navy is not complying with the regulatory requirements, and it is not feasible due to berthing concerns and security clearances. Please see Comments 81 and 88 in this document and the NMFS 2002 Final Rule (RTC MOC32) for further discussion.

Comment 102: NMFS must question why no verification results are available. Why has there been no embedded but independent research concurrent with those Pacific LFA sonar operations?

Response: The SURTASS LFA sonar vessels are military vessels conducting training exercises; they are not research vessels capable of carrying independent research scientists. Also, because these are military vessels, researchers would be required to have a security clearance prior to conducting any research onboard them. As a result, NMFS and the Navy determined that an LTM program provided the best opportunity to verify (or refute) the current findings that impacts will be negligible. The LTM discussion in the Final EIS (and incorporated by reference in the Final SEIS) has been continued under the new regulations. Under NMFS regulations, the Navy is required to conduct an LTM (as discussed in detail elsewhere (see Research Concerns)) . The status of this research was summarized in Table 2–5 of the Draft and Final SEIS. Planning has commenced for a 2007–2008 deep-diving odontocetes BRS to determine the potential effects of LFA sonar, MFA, and seismic sources on beaked whales and other deep diving odontocetes. Further LTM research will bedetermined by the decision-maker in the Navy's ROD and in consultation with NMFS.

Reporting Concerns

Comment 103: Acoustical detections from the continuously operating HF/M3 sonar systems only logged 16 ''events'' in 10 of 16 missions. Visual monitoring logged cetaceans within the buffer zone only on three occasions during all LFA sonar operations. No marine turtles were ever seen. LFA sonar transmissions were delayed or suspended on 33 occasions, many because of system failures or unverified detections, and only one resulted from a sighting of dolphins. Does NMFS accept that the very few sightings in the Annual Reports mean that very few animals were actually present?

Response: The Navy's Final Comprehensive Report indicates that, under the first four LOAs totaling 40 missions, there were 3 visual sightings of marine mammals, no passive acoustic detections, and 71 active acoustic detections. Based on the quarterly, annual, and Final Comprehensive reports, and based on the fact that the Navy avoids areas of high marine life concentrations, NMFS believes the Navy's reports that there have been few marine mammal sightings as an indicator that either few marine mammals are present (low density) or marine mammals are avoiding the immediate area of LFA sonar operations prior to commencing LFA sonar operations.

Research Concerns

Comment 104: In 2003, the Navy was provided a limited area within which to deploy SURTASS LFA sonar. While it has been required to report on mitigation measures taken to prevent or minimize marine mammal takes in the immediate operating area, it has not been required to perform systematic population studies on marine mammals or examinations of stranding incidents and health trends in operating range. Given both the extent of the current range, as well as the far reach of the SURTASS LFA sonar signals, the health of animals ''taken'' in this area alone would be difficult to assess. Given the short period that the U.S. Navy has been operating in a limited deployment area it is difficult to determine any trends in the natural history, biology and behavior of marine mammals subjected to the SURTASS LFA sonar noise.

Response: NMFS' LOAs under Condition 7(d) require the Navy to conduct research in accordance with 50 CFR 216.185(e). The Navy's completed and ongoing research is detailed in the Final Comprehensive Report (DON, 2007a) and in the Final SEIS Subchapter 2.7. See the Final SEIS RTC 5.3.2 for additional information. Baseline data on the distribution and behavior of marine animals are discussed in the Final SEIS RTCs 1.4.1 and 2.7.2. Prioritization of the available research monies by the Navy does not at this time allow for the systematic population studies on marine mammals. Based on recommendations from the scientific community, planning is underway for a 2007–2008 deep-diving odontocetes BRS to determine the potential effects of LFA sonar, MFA, and seismic sources on beaked whales and other deep diving odontocetes.

Reviews of stranding reports in the area showed that there were a total of 19 strandings reported in Asia (four in Taiwan, nine throughout the Philippines, two in Thailand, two in Indonesia, and two in China) (The Cetacean Stranding Database, accessed: 11/28/2006). None of these strandings were coincident either temporally or spatially with LFA sonar operations. See the Final SEIS (RTC 4.4.12) for additional information of strandings.

Comment 105: What has resulted from research projects related to LFA sonar?

Response: Under the NMFS 2002 and 2007 rulemaking and related LOAs for LFA sonar, the Navy is required to conduct research. These topics and their status are provided in the Final Comprehensive Report (DON, 2007). The Navy is working to meet these research requirements. The SURTASS LFA sonar LTM Program has been budgeted by the Navy at a level of approximately $1M per year for five years, starting with the issuance of the first LOA in 2002. Planningis underway for a 2007–2008 deep-diving odontocetes BRS to determine the potential effects of LFA sonar, MFA,

and seismic sources on beaked whales and other deep diving odontocetes at an estimated cost of $3M per year.

Although not directly related to the LFA sonar MMPA regulatory process, the Navy funded independent research to determine the potential for SURTASS LFA sonar signals to affect fish. Popper *et al.* (2007) investigated the effects of exposure to LFA sonar on rainbow trout (a hearing generalist related to several endangered salmonids) and channel catfish (a hearing specialist) using an element of the standard SURTASS LFA sonar source array (Popper *et al.*, 2005; Halvorsen *et al.*, 2006; Popper *et al.*, 2007).

Comment 106: Why is no current effort to quantify and monitor long-term, cumulative, stock-level impacts from LFA sonar mentioned in the LFA sonar 2005 Annual Report?

Response: NMFS recommended this as a research topic. However, detecting and scientifically validating a change in a marine mammal population (e.g., trend, demographics) is extremely difficult. It is also unrealistic to expect a single factor to explain population changes. For LFA sonar, research results indicate that some whales will respond to LFA sonar over relatively short temporal periods and over small spatial areas, though this research was only capable of testing for responses over short time periods and spatial scales. To date, there is no evidence that LFA sonar will have an effect on individual survival or reproductive success, or population trends or demographics. However, because research on the appropriate temporal and spatial scales has not been conducted, questions concerning the level of impact at such scales remain.

Comment 107: A prioritized study of beaked whale habitats is only at the draft planning stage, although considerable work has been done previously to identify likely habitats in certain regions such as the Mediterranean. While this work also may help to identify the critical link between sonars and beaked whale deaths, the primary goal may simply be to identify areas where naval sonars should not operate for test and training.

Response: Research on beaked whales is underway. A list of recently published papers that was the result of funding by ONR and SERDP was provided in Comment 39. Again, it is worth noting that beaked whales appear to be a species sensitive, under certain conditions, to MF sonar, not LFA sonar.

Comment 108: Behavioral reactions of whales to sound levels above 155 dB have not been tested, in part because the Navy has assumed the required authorization would be extremely hard to get, but primarily because expert researchers have been concerned that such received sound levels might have harmed the research subjects. NMFS should review the size of the potential LFA sonar impact zone based upon the 155 dB isopleth.

Response: Estimates of Level B harassment take are calculated using the risk continum from 120 dB to 179 dB, and NMFS considers all marine mammals to be injured at an SPL of 180 dB or greater, considers, even though at 180 dB, marine mammals are unlikely to even incur TTS (Level B harassment). Therefore, NMFS believes reviewing the size of the LFA sonar impact zone based upon the 155 dB isopleth is unnecessary. Originally, there was concern that if marine mammals experience a significant change in a biologically important behavior at moderate-to-low sound exposure levels, then such exposures could potentially have an impact on rates of reproduction or survival. Knowing that cetacean responses to LF sound signals needed to be better defined using controlled experiments, the Navy helped develop and supported the three-year LFS SRP beginning in 1997. This study was designed to assess the potential impacts of SURTASS LFA sonar on the behavior of low-frequency hearing specialists, those species believed to be at (potentially) greatest risk. This field research program was designed to address three important behavioral contexts for baleen whales: (1) Blue and fin whales feeding in the southern California Bight, (2) gray whales migrating past the central California coast, and (3) humpback whales breeding off Hawaii. Taken together, the results from the three phases of the LFS SRP do not support the hypothesis that most baleen whales exposed to RLs near 140 dB would exhibit disturbance behavior and avoid the area. These experiments, which exposed baleen whales to RLs ranging from 120 to about 155 dB, detected only minor, short-term behavioral responses. Short-term behavioral responses do not necessarily constitute significant changes in biologically important behaviors.

These results have been supported by recent, peer reviewed papers. Croll *et al.* (2001a), Miller *et al.* (2000) and Fristrup *et al.* (2003) that were discussed previously in this document.

Comment 109: There has been classified research to determine if large whales are silenced by anthropogenic noise, presumably sonars, but it has occurred in the Atlantic and its applicability to LFA sonar operations is unknown to the public. Has NMFS reviewed this data?

Response: As reported in the Final Comprehensive Report, passive acoustic monitoring for the possible silencing of calls of large whales using bottom-mounted hydrophones is ongoing. Four research efforts in the North Atlantic (NORLANT, 2004, 2005, 2006–01, 2006–02) have addressed this topic. The research reports for these tasks are classified; unclassified summary reports have been produced. Navy funding has supported and continues to support these research efforts. NMFS has not reviewed any data from this classified research.

Comment 110: CSI recommends research with an immediate focus on cetacean fear, aversion, or avoidance responses to sonars.

Response: Under the application for the BRS for Deep Diving Odontocetes, the Navy (and its partners) proposes to examine behavioral responses to anthropogenic sounds. The proposed BRS study has not yet received a scientific research permit (SRP) under section 104 of the MMPA. If an SRP is issued under section 104 of the MMPA, the proposed BRS would first investigate the acoustic exposures of MF sonar, not LF sonar, and natural sounds. If the BRS is successful and if NMFS is able to issue a second SRP, the BRS proposes to then determine the acoustic exposures of LF sonar. The rationale for this is that beaked whales are not known to have good hearing in the LF range, and as such LFA sonar has not been implicated in any stranding events. Additional information on this study can be found at 72 FR 19181 (April 17, 2007).

Comment 111: The Navy's BRS research (72 FR 19181, April 17, 2007) should be completed before the U.S. Navy is given a 5-year permit to operate the LFA sonar system. Given the controversy on the potential impacts of the low frequency transmissions in sound ducts on marine mammals beyond the buffer zone, it seems inconsistent with the precautionary approach to give the Navy a permit until this research has been completed. This research should be completed by an independent third party and not by the Navy/NMFS.

Response: NMFS believes that it has sufficient scientific information to make the determinations required by section 101(a)(5)(A) of the MMPA. In addition, the Navy has advised that a gap in SURTASS LFA sonar operations would be detrimental to national security and reduce protection of U.S. and Allied naval forces from submarine threats. Uninterrupted operational deployment

of SURTASS LFA sonar is the Pacific Fleet Commander's top antisubmarine warfare priority. As NMFS believes the Navy has adopted a precautionary approach using conservative assumptions for identifying and analyzing potential impacts to the environment, including marine mammals, it has determined that it is not necessary to withhold the MMPA authorization to the Navy. Lastly, the Navy and NMFS are working with many independent researchers (third party scientists) to complete the BRS. Therefore, the Final Rule does not need to be delayed for the completion of the proposed BRS.

NEPA Concerns

Comment 112: With the Supplemental EIS, the Navy hopes not only to correct the deficiencies identified by the Court in the 2001 Final EIS, but also to fulfill its NEPA requirement for an analysis of the environmental impacts of its second five years of LFA sonar operation from 2007 through 2012. The Navy's application for a new incidental take authorization, however, is a separate final agency action from its original application, and, absent the sort of tiering that has not been conducted here, requires its own EIS.

Response: The Navy prepared an original Final EIS for SURTASS LFA sonar in January, 2001. In accordance with CEQ regulations (40 CFR 1502.9), agencies are required to prepare a Supplemental EIS (SEIS) when the agency makes substantial changes to the proposed action that are relevant to environmental concerns, there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action and its impacts, or if the agency determines that the purposes of the act will be furthered. The Navy prepared this SEIS to both address the District Court findings and to review new information relevant to impacts on the marine environment from SURTASS LFA sonar operations. As NMFS is a cooperating agency, as defined under NEPA regulations, in the preparation of the Draft SEIS and the Final SEIS, the issuance of this rulemaking, based upon an application for an incidental take authorization under the MMPA is not considered an action separate from the SURTASS LFA sonar operation.

In accordance with 40 CFR 1506.3(a), NOAA has adopted the Navy's Final SEIS as its own NEPA statement on the issuance of regulations and LOAs for the taking of marine mammals incidental to SURTASS LFA sonar operations.

Comment 113: What rationale does the Navy now assert for failing to prepare an EIS for use of SURTASS LFA sonar during threat and warfare conditions?

Response: As stated in NMFS' 2002 final rule **Federal Register** notice, (RTC AC2), war, combat, and heightened threat conditions are determined by the Congress or the National Command Authorities (NCA), not the U.S. Navy. Chapter 1 (Purpose and Need) and RTC 1–1.7 of the Final EIS identify the NCA as the President and the Secretary of Defense (or their duly designated alternates or successors), as assisted by the Chairman of the Joint Chiefs of Staff. Since these determinations are not made by the Navy, both the application and the Navy's Draft and Final EISs and SEISs are specifically limited to employment of the SURTASS LFA sonar during training, testing, and routine military operations and will not cover use of the SURTASS LFA sonar system in self-defense, in times of war, combat, or heightened threat conditions.

Affected Marine Mammal Species

In its Final SEIS and Final EIS and application, the Navy excluded from incidental take consideration marine mammal species that do not inhabit the areas in which SURTASS LFA sonar would operate. Where data were not available or were insufficient for one species, comparable data for a related species were used. Because all species of baleen whales produce LF sounds, and anatomical evidence strongly suggests their inner ears are well adapted for LF hearing, all balaenopterid species are considered sensitive to LF sound and, therefore, at risk of harassment or injury from exposure to LF sounds. The twelve species of baleen whales that may be affected by SURTASS LFA sonar are blue, fin, minke, Bryde's, sei, humpback, North Atlantic right, North Pacific right, southern right, pygmy right, bowhead, and gray whales.

The odontocetes (toothed whales) that may be affected because they inhabit the deeper, offshore waters where SURTASS LFA sonar might operate include both the pelagic (oceanic) whales and dolphins and those coastal species that also occur in deep water including harbor porpoise, spectacled porpoise, beluga, *Stenella* spp., Risso's dolphin, rough-toothed dolphin, Fraser's dolphin, northern right-whale dolphin, southern right-whale dolphin, short-beaked common dolphin, long-beaked common dolphin, very long-beaked common dolphin, *Lagenorhynchus* spp., *Cephalorhynchus* spp., bottlenose dolphin, Dall's porpoise, melon-headed whale, beaked whales (*Berardius* spp., *Hyperoodon* spp., *Mesoplodon* spp., Cuvier's beaked whale, Shepard's beaked whale, Longman's beaked whale), killer whale, false killer whale, pygmy killer whale, sperm whale, dwarf and pygmy sperm whales, and short-finned and long-finned pilot whales.

Potentially affected pinnipeds include hooded seal, harbor seal, spotted seal, ribbon seal, gray seal, elephant seal, Hawaiian monk seal, Mediterranean monk seal, northern fur seal, southern fur seal (*Arctocephalus* spp.), harp seal, Galapagos sea lion, Japanese sea lion, Steller sea lion, California sea lion, Australian sea lion, New Zealand sea lion, and South American sea lion.

A description of affected marine mammal species, their biology, and the criteria used to determine those species that have the potential for being taken by incidental harassment are provided and explained in detail in the Navy application and Final SEIS and, although not repeated here, are considered part of the NMFS' administrative record for this action. Additional information is available at the following URL: *http://www.nmfs.noaa.gov/pr/sars/*. Please refer to these documents for specific information on marine mammal species.

Effects on Marine Mammals

To understand the effects of LF noise on marine mammals, one must understand the fundamentals of underwater sound and how the SURTASS LFA sonar operates in the marine environment. This description was provided earlier in this document and also by the Navy in Appendix B to the Final EIS.

The effects of underwater noise on marine mammals are highly variable, and have been categorized by Richardson *et al.* (1995) as follows: (1) The noise may be too weak to be heard at the location of the animal (i.e. lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both); (2) the noise may be audible but not strong enough to elicit any overt behavioral response; (3) the noise may elicit behavioral reactions of variable conspicuousness and variable relevance to the well-being of the animal; these can range from subtle effects on respiration or other behaviors (detectable only by statistical analysis) to active avoidance reactions; (4) upon repeated exposure, animals may exhibit diminishing responsiveness (called habituation), or disturbance effects may persist (most likely with sounds that are highly variable in characteristics, unpredictable in occurrence, and associated with situations that the

animal perceives as a threat); (5) any human-made noise that is strong enough to be heard has the potential to reduce (mask) the ability of marine mammals to hear natural sounds at similar frequencies, including calls from conspecifics, echolocation sounds of odontocetes, and environmental sounds such as surf noise; and (6) very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity, also known as threshold shift. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. As described later in this document, received sound levels must be even higher for there to be risk of permanent hearing impairment, or permanent threshold shift (PTS). Finally, intense acoustic or explosive events (not relevant for this activity) may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage. Severe hemorrhage could lead to death.

The original analysis of potential impacts on marine mammals from SURTASS LFA sonar was developed by the Navy based on the results of a literature review; the Navy's Low Frequency Sound Scientific Research Program (LFS SRP) (described later in this document); and a complex, comprehensive program of underwater acoustical modeling.

To assess the potential impacts on marine mammals by the SURTASS LFA sonar source operating at a given site, it was necessary for the Navy to predict the sound field that a given marine mammal species could be exposed to over time. This is a multi-part process involving (1) the ability to measure or estimate an animal's location in space and time, (2) the ability to measure or estimate the three-dimensional sound field at these times and locations, (3) the integration of these two data sets into the Acoustic Integration Model (AIM) to estimate the total acoustic exposure for each animal in the modeled population, (4) beginning the post-AIM analysis, converting the resultant cumulative exposures for a modeled population into an estimate of the risk from a significant disturbance of a biologically important behavior, and (5) using a risk continuum to convert these estimates of behavioral risk into an assessment of risk in terms of the level of potential biological removal.

In the post-AIM analysis, as mentioned in numbers (4) and (5) above, a relationship was developed for converting the resultant cumulative exposures for a modeled population into an estimate of the risk to the entire population of a significant disruption of a biologically important behavior and of injury. This process assessed risk in relation to received level (RL) and repeated exposure. The resultant risk continuum is based on the assumption that the threshold of risk is variable and occurs over a range of conditions rather than at a single threshold. Taken together, the LFS SRP results, the acoustic propagation modeling, and the risk assessment provide an estimate of potential environmental impacts to marine mammals. The results of 4 years of monitoring (2002–2006) onboard the two SURTASS LFA sonar vessels support the use of this methodology.

The acoustic propagation modeling was accomplished using the Navy's standard acoustical performance prediction transmission loss model-Parabolic Equation (PE) version 3.4. The results of this model are the primary input to the AIM. AIM was used to estimate marine mammal sound exposures. It integrates simulated movements (including dive patterns) of marine mammals, a schedule of SURTASS LFA sonar transmissions, and the predicted sound field for each transmission to estimate acoustic exposure during a hypothetical SURTASS LFA sonar operation. Description of the PE and AIM models, including AIM input parameters for animal movement, diving behavior, and marine mammal distribution, abundance, and density, are described in detail in the original Navy application and the Final EIS (see box, page 4.2–11) and are not discussed further in this document.

The same analytical methodology utilized in the application for the first 5-year rule and LOAs was utilized to provide reasonable and realistic estimates of the potential effects to marine mammals specific to the potential mission areas as presented in the application. Information on how the density and stock/abundance estimates are derived for the selected mission sites is in the Navy's application. These data are derived from current, published source documentation, and provide general area information for each mission area with species-specific information on the animals that could occur in that area, including estimates for their stock abundance and density.

Although this rule uses the same analysis that was used for the 2002–2007 rule, the AIM analysis is continuously updated with new marine mammal biological data (behavior, distribution, abundance and density) whenever new information becomes available. It was recently independently reviewed by a panel of experts in mathematics, modeling, acoustics, and marine mammalogy convened by NMFS' Center for Independent Experts (CIE). The task of the Panel was to evaluate whether AIM correctly implements the models and data on which it is based; whether animal movements are correctly implemented; and whether AIM meets the Council for Regulatory Environmental Monitoring (CREM) guidelines. As stated in their Report on AIM, the CIE Panel agreed that: (1) AIM appears to be correctly implemented; (2) the animal movement appears to be appropriately modeled; and (3) the principles of credible science had been addressed during the development of AIM and that AIM is a useful and credible tool for developing application models. A copy of the CIE report is available (see **ADDRESSES**).

During the analytical process in the Final EIS, the Navy developed 31 acoustic modeling scenarios for the major ocean regions. Locations were selected by the Navy to represent the greatest potential effects for each of the three major ocean acoustic regimes where SURTASS LFA sonar could potentially be used. These acoustic regimes were: (1) Deep-water convergence zone propagation, (2) near surface duct propagation, and (3) shallow water bottom interaction propagation. These sites were selected to model the greatest potential for effects from the use of SURTASS LFA sonar incorporating the following factors: (1) Closest plausible proximity to land (from SURTASS LFA sonar operations standpoint), and/or offshore biologically important areas (OBIAs) where biological densities are higher, particularly for animals most likely to be affected; (2) acoustic propagation conditions that allow minimum propagation loss, or transmission loss (TL) (*i.e.*, longest acoustic transmission ranges); and (3) time of year selected for maximum animal abundance. These sites represent the upper bound of impacts (both in terms of possible acoustic propagation conditions, and in terms of marine mammal population and density) that can be expected from operation of the SURTASS LFA sonar system. Thus, if SURTASS LFA sonar operations are conducted in an area that was not acoustically modeled in the Final EIS, the potential effects would most likely be less than those analyzed for the most similar site in the analyses.

The assumptions of the Final EIS are still valid and there are no new data to contradict the conclusions made in the Potential Impacts on Marine Mammals (Chapter 4) in the Final EIS. The chapter on impacts to marine mammals was incorporated by reference into the Navy's Final SEIS.

LFS SRP

The goal of the 1997–1998 LFS SRP was to demonstrate the avoidance reaction of sensitive marine mammal species during critical biologically important behavior to the low frequency underwater sound produced by the LFA sonar system. Testing was conducted in three phases as summarized here from Clark *et al.* (1999).

Phase I was conducted in September through October 1997. The objective of Phase I was to determine whether exposure to low frequency sounds elicited disturbance reactions from feeding blue and fin whales. The goal was to characterize how whale reactions to the sounds vary, depending on: (1) The received level of the sound; (2) changes in the received level; and (3) whether the system was operating at a relatively constant distance or approaching the whale. Full and reduced LFA sonar source power transmissions were used. The highest received levels at the animals were estimated to be 148 to 155 dB. In 19 focal animal observations (4 blue and 15 fin whales), no overt behavioral responses were observed. No changes in whale distribution could be related to LFA sonar operations, and whale the distributions correlated with the distribution of food.

Phase II was conducted in January 1998. The objectives were to quantify responses of migrating gray whales to low frequency sound signals, compare whale responses to different RLs, determine whether whales respond more strongly to RL, sound gradient, or distance from the source, and to compare whale avoidance responses to an LF source in the center of the migration corridor versus in the offshore portion of the migration corridor. A single source was used to broadcast LFA sonar sounds up to 200 dB. Whales showed some avoidance responses when the source was moored 1 mi (1.8 km) offshore, in the migration path, but returned to their migration path when they were a few kilometers from the source. When the source was moored 2 mi (3.7 km) offshore, responses were much less, even when the source level was increased to 200 dB, to achieve the same RL for most whales in the middle of the migration corridor. Also, offshore whales did not seem to avoid the louder offshore source.

Phase III was conducted from February to March 1998. The objectives were to assess the potential effects of LFA sonar signals on behavior, vocalization and movement of humpback whales off the Kona coast in Hawaii. The maximum exposure levels in this phase were as high as 152 dB. Approximately half of the whales observed visually ceased their song during the transmissions, but many of them did so while joining a group of whales, which is the time that singing whales usually stop their songs naturally. All singers who interrupted their songs were observed to resume singing within tens of minutes. The analysis of one data set showed that whales increased their song lengths during LFA sonar transmissions, but a second analysis indicated that song length changes were more complicated and depended on the portion of the song that was overlapped by LFA sonar transmissions. Overall patterns of singer and cow-calf abundance were the same throughout the experiments as they had been during several years of prior study.

Risk Analysis

To determine the potential impacts that exposure to LF sound from SURTASS LFA sonar operations could have on marine mammals, biological risk standards were defined by the Navy with associated measurement parameters. Based on the MMPA, the potential for biological risk was defined as the probability for injury (Level A) or behavioral (Level B) harassment of marine mammals. In this analysis, behavioral (Level B) harassment is defined as a significant disturbance in a biologically important behavior (also referred to as a biologically significant response). NMFS believes that this is equivalent to the MMPA definition of Level B harassment for military readiness activities. The potential for biological risk is a function of an animal's exposure to a sound that would potentially cause hearing, behavioral, psychological or physiological effects. The measurement parameters for determining exposure were RLs in dB, the pulse repetition interval (time between pings), and the number of pings received.

Before the biological risk standards could be applied to realistic SURTASS LFA sonar operational scenarios, two factors had to be considered by the Navy: (1) How does risk vary with repeated sound exposure? and (2) how does risk vary with RL? The Navy addressed these questions by developing a function that translates the history of repeated exposures (as calculated in the AIM) into an equivalent RL for a single exposure with a comparable risk. This dual-question method is similar to those adopted by previous studies of risk to human hearing (Richardson *et al.*, 1995; Crocker, 1997).

It is intuitive to assume that effects on marine mammals would be greater with repeated exposures than for a single ping. However, no published data on repeated exposures of LF sound on marine mammals exist. Based on discussions in Richardson *et al.* (1995) and consistent with Crocker (1997), the Navy determined that the best scientific information available is based on the potential for effects of repeated exposure on human models.

The formula $L + 5 \log10(N)$ (where L = ping level in dB and N is the number of pings) defines the single ping equivalent (SPE). This formula is considered appropriate for assessing the risk to a marine mammal of a significant disturbance of a biologically important behavior from LF sound like SURTASS LFA sonar transmissions.

Behavioral Harassment

For reasons explained in detail in the Final EIS (Section 4.2.5), the Navy interpreted the results of the LFS SRP to support use of unlimited exposure to 119 dB during an LFA sonar mission as the lowest value for risk. Below this level, the risk of a biologically significant behavioral response from marine mammals approaches zero. It is important to note that risk varies with both received level and number of exposures.

Because the LFS SRP did not document a biologically significant response at maximum RLs up to 150 dB, the Navy determined there was a 2.5-percent risk of an animal incurring a disruption of biologically important behavior at an SPL of 150 dB, a 50-percent risk at 165 dB, and a 95-percent risk at 180 dB. For more detailed information, see Chapter 4.2.5 of the Final EIS and Navy's Technical Report #1 (Navy, 2001). The Navy used this risk continuum analysis as an alternative to an all-or-nothing use of standard thresholds for the onset of behavioral change or injury. NMFS has reviewed and agrees with this approach. The subsequent discussion of risk function emphasizes the advantages of using a smoothly varying model of biological risk in relation to sound exposure. These results are analogous to dose-response curves that are accepted as the best practice in disciplines such as epidemiology, toxicology, and pharmacology.

Changes in Hearing Sensitivity

In NMFS's 2002 rule, NMFS and the Navy based their estimate of take by injury or the significant potential for such take (Level A harassment) on the criterion of 180 dB. NMFS continues to believe this is a scientifically supportable value for preventing auditory injury or the significant potential for such injury (Level A harassment), as it represents a value less than where the potential onset of a minor TTS in hearing might occur based on Schlundt *et al.* (2000) research (see Navy Final Comprehensive Report Tables 5 through 8). Also, an SPL of 180 dB is considered a scientifically supportable level for preventing auditory injury because there is general scientific agreement with NMFS's position that TTS is not an injury (i.e., does not result in tissue damage), but rather a temporary impairment to hearing (i.e., results in an increased elevation or decreased sensitivity in hearing) that may last for a few minutes to a few days, depending upon the level and duration of exposure. In addition, there is no evidence that TTS would occur in marine mammals at an SPL of 180 dB. In fact, Schlundt *et al.* (2000) indicates that onset TTS for at least some species occurs at significantly higher SPLs.

Schlundt *et al.*'s (2000) measurement with bottlenose dolphins and belugas at 1-second signal duration implies that the TTS threshold for a 100-second signal would be approximately 184 dB (Table 1–4, Final EIS). For the 400-Hz signal, Schlundt *et al.* found no TTS at 193 dB, the highest level of exposure. Therefore, NMFS believes that establishing onset TTS as the upper bound of Level B harassment, but using 180 dB as the beginning of the zone for establishing mitigation measures to prevent auditory injury, is warranted by the science.

With three levels of mitigation monitoring for detecting marine mammals (described later in this document), NMFS and the Navy believe it is unlikely that any marine mammal would be exposed to received levels of 180 dB before being detected and the SURTASS LFA sonar shut down. However, because the probability is not zero, the Navy has included Level A harassment in its authorization request.

Unlike with behavioral responses, an ''injury continuum'' is not necessary because of the very low numbers of individual marine mammals that could potentially experience high received sound levels, and the high level of effectiveness of the monitoring and shutdown protocols. For this action, all marine mammals exposed to an SPL of 180 dB or above are considered to be injured even though the best scientific data available indicate a marine mammal would need to receive an SPL significantly higher than 180 dB to be injured.

When SURTASS LFA sonar transmits, there is a boundary that encloses a volume of water where received levels equal or exceed 180 dB, and a volume of water outside this boundary where received levels are below 180 dB. In this analysis, the 180-dB SPL boundary is emphasized because it represents a single-ping RL that is a scientifically supportable estimate for the potential onset of injury. Therefore, the level of risk for marine mammals depends on their location in relation to SURTASS LFA sonar. Under this rule, a marine mammal would have to receive one ping greater than or equal to 180 dB to be considered to have been injured or have the potential to incur an injury.

Although TTS is not considered Level A harassment, PTS is considered Level A harassment. The onset of PTS for marine mammals may be 15–20 dB above TTS levels. However, mitigation measures, such as mitigation zones and shutdown protocols, are required where there is the potential for a marine mammal to incur TTS so as to prevent an animal from incurring a PTS.

Potential for Non-Auditory Injury

Since the release of the Final EIS, an investigation by Cudahy and Ellison (2002) hypothesized that the threshold for in vivo tissue damage (including lung damage and hemorrhaging) from LF sound can be on the order of 180 to 190 dB. Balance and equilibrium could be affected, but may not result in injury. These effects are based on studies of humans. Vestibular (balance and equilibrium) function was investigated by the Navy during its Diver's Study and the results reported in LFS SRP Technical Report 3. Measurable performance decrements in vestibular function were observed for guinea pigs using 160 dB SPL signals at lung resonance and 190 dB SPL signals at 500 Hz. Because guinea pigs are not aquatic species, like humans, they are not as robust to pressure changes as marine mammals and, therefore, are likely more susceptible to injury at lower SPLs than marine mammals.

Presently, there is controversy among researchers over whether marine mammals can suffer from decompression sickness. It is theorized that this may be caused by diving and then surfacing too quickly, forcing nitrogen bubbles to form in the bloodstream and tissues. Cox *et al.* (2006) stated that gas-bubble disease, induced in supersaturated tissues by a behavioral response to acoustic exposure, is a plausible pathologic mechanism for the morbidity and mortality seen in cetaceans associated with sonar exposure. The authors also stated that it is premature to judge acoustically mediated bubble growth as a potential mechanism and recommended further studies to investigate the possibility.

As stated in Crum and Mao (1996) and as discussed in the Final EIS (pages 10–137) and the Final SEIS (pages 4–31), researchers hypothesized that RLs would have to exceed 190 dB for there to be the possibility of non-auditory trauma due to supersaturation of gases in the blood. Such non-auditory traumas are not expected to occur from sound exposure below SPLs of 180 dB.

In light of the high detection rate of the high-frequency marine mammal monitoring (HF/M3) sonar, ensuring required SURTASS LFA sonar shutdown when any marine mammal approaches or enters the 180-dB isopleth from LFA sonar, the risks of these traumas to a marine mammal approach zero.

Additional research published in the peer-reviewed journal Ultrasound in Medicine and Biology supports the 180-dB criterion for injury as being a scientifically supportable level for assessing potential non-auditory injury to marine mammals (Laurer *et al.*, 2002). Laurer *et al.* (2002) exposed rats to 5 minutes of continuous high-intensity, low-frequency (underwater) sound (HI-LFS) either at 180 dB SPL re 1 μPa at 150 Hz or 194 dB SPL re 1 μPa at 250 Hz, and found no overt histological damage in brains of any group. Also, blood gases, heart rate, and main arterial blood pressure were not significantly influenced by HI-LFS, suggesting that there was no pulmonary dysfunction due to exposure. This published paper was based on work performed in support of Technical Report #3 of the SURTASS LFA sonar Final EIS.

Strandings

Marine mammal strandings are not a rare occurrence in nature. The Cetacean Stranding Database (*http://www.legaard.org/strandings/index.html* formerly *http://www.strandings.net*) registered over one hundred strandings worldwide in 2004. However, mass strandings, particularly multi-species mass strandings, are relatively rare. Acoustic systems are becoming increasingly implicated in marine mammal strandings. In particular, a number of mass strandings have been linked to mid-frequency sonars (see, e.g.

Joint Interim Report on the Bahamas Marine Mammal Stranding Event of 15–16 March 2000, DOC and DON, 2001). Many theories exist as to why noise may be a factor in marine mammal strandings. It is theorized that marine mammals become disoriented, or that the sound forces them to surface too quickly, which may cause symptoms similar to decompression sickness, or that they are physically injured by the sound pressure. The biological mechanisms for effects that lead to strandings must be determined through scientific research.

There is no record of SURTASS LFA sonar ever being implicated in any stranding event since LFA sonar prototype systems were first operated in the late 1980s. Moreover, the system acoustic characteristics differ between LF and mid-frequency (MF) sonars: LFA sonars use frequencies generally below 1,000 Hz, with relatively long signals (pulses) on the order of 60 sec; while MF sonars use frequencies greater than 1,000 Hz, with relatively short signals on the order of 1 sec. Cox *et al.* (2006) provided a summary of common features shared by the strandings events in Greece (1996), Bahamas (2000), and Canary Islands (2002). These included operation of MF sonar, deep water close to land (such as offshore canyons), presence of an acoustic waveguide (surface duct conditions), and periodic sequences of transient pulses (i.e., rapid onset and decay times) generated at depths less than 10 m (32.8 ft) by sound sources moving at speeds of 2.6 m/s (5.1 knots) or more during sonar operations (D'Spain *et al.*, 2006). These features do not relate to LFA sonar operations. First, no MF-sonar component will be in operation. Second, the SURTASS LFA sonar vessel operates with a horizontal line array of 1,500 m (4,921 ft) length at depths below 150 m (492 ft) and a vertical line array (LFA sonar source) at depths greater than 100 m (328 ft). Third, operations are limited by mitigation protocols to at least 22 km (12 nm) offshore. For these reasons, SURTASS LFA sonar cannot be operated in deep water that is close to land. Also, the LFA sonar signal is transmitted at depths well below 10 m (32.8 ft), and the vessel has a slow speed of advance of 1.5 m/s (3 knots).

While there was an LF component in the Greek stranding in 1996, only mid-frequency components were present in the strandings in the Bahamas in 2000, Madeira 2000, and Canaries in 2002. This supports the conclusion that the LF component in the Greek stranding was not causative (ICES, 2005; Cox *et al.*, 2006). In its discussion of the Bahamas stranding, Cox *et al.* (2006) stated: ''The event raised the question of whether the mid-frequency component of the sonar in Greece in 1996 was implicated in the stranding, rather than the low-frequency component proposed by Frantzis (1998).'' The ICES in its ''Report of the Ad-Hoc Group on the Impacts of Sonar on Cetaceans and Fish'' raised the same issues as Cox *et al.*, stating that the consistent association of MF sonar in the Bahamas, Madeira, and Canary Islands strandings suggests that it was the MF component, not the LF component, in the NATO sonar that triggered the Greek stranding of 1996 (ICES, 2005). The ICES (2005) report concluded that no strandings, injury, or major behavioral changes have been associated with the exclusive use of LF sonar.

Beaked whales have been the subject of particular concern in connection with strandings. Like most odontocetes, they have relatively sharply decreasing hearing sensitivity below 2 kHz (Cook *et al.* (2006), Richardson *et al.* (1995) and Finneran *et al.* (2002)). The SURTASS LFA sonar source frequency is below 500 Hz. If a cetacean cannot hear a sound or hears it poorly, the sound is unlikely to have a significant behavioral impact (Ketten, 2001). Therefore, it is unlikely that LF transmissions from LFA sonar would induce behavioral reactions from animals that have poor LF hearing. Though highly unlikely, the sounds could damage tissues even if the animal does not hear the sound, but this would have to be within 1,000 m (3,280 ft) of the array, where detection would be very likely, triggering shutdown.

Estimates of Potential Effects on Marine Mammals

The effects on marine mammals from operation of SURTASS LFA sonar will not be the lethal removal of animals. In addition, while possible, Level A harassment, if it occurs at all, is expected to be so minimal as to have no effect on rates of reproduction or survival of affected marine mammal species. Based on AIM modeling results, the primary effects would be the potential for Level B harassment. The Final SEIS Subchapter 4.4 provides the risk assessment methodology applied to SURTASS LFA sonar operations for the annual LOA applications for proposed operational areas.

Tables 4.4–2 through 4.4–10 in the Final SEIS provide, through a case study based on the results of the Navy's 2005–2006 LOA, estimates of the percentage of stocks potentially affected for SURTASS LFA sonar operations, which are based on reasonable and realistic estimates of the potential effects to marine mammal stocks specific to the potential mission areas. Also, Tables 5 through 8 in the Navy's Final Comprehensive Report for the 2002–2007 rule provide annual total estimates of percentages of marine mammal stocks potentially affected annually during the first four years of LFA sonar operations, based on actual operations during the period of the LOAs.

The scenarios chosen by the Navy are not the only possible combinations of areas where the SURTASS LFA sonar will operate. The potential effects from other scenarios can be estimated by making a best prediction of the areas in which the Navy would conduct SURTASS LFA sonar operations annually in each oceanic basin area, determining from Tables 4.4–2 through 4.4–10 in the Final SEIS the percentage of each stock that may potentially be affected, and adding those percentages together for each affected stock. Tables 5–8 in the Navy's Comprehensive Report indicate that annually Level B harassment may affect 0 to 6 percent for most marine mammal stocks, rising to just over 11 percent annually for other species (e.g., common dolphins (6.4 percent), Risso's dolphins (6–8 percent), short-finned pilot whales (6 to 9 percent), false killer whales (5 to 10 percent), Pacific white-sided dolphins (6 to 11 percent) and melon-headed whales (11.2 percent)).

Also, using updated modeling where appropriate, the Navy will rerun AIM when planning missions and, if necessary, modify annual LOA requests with an analysis of take estimates prior to any mission in a new/different area. For this rule, NMFS is adopting the Navy estimates shown in Final SEIS (Tables 4.4–2 through 4.4–10) as the best scientific information currently available.

As with the 2002 rule, Navy will limit operation of LFA sonar to ensure no stocks will be subject to more than 12 percent of takes (by Level B harassment) annually, although most stocks are estimated to incur a lower percentage of takes. This per-stock cap applies regardless of the number of ships operating with LFA sonar or the overall increased number of hours of LFA sonar operations. The Navy will use the 12 percent take cap to guide its mission planning and annual LOA applications.

Mitigation for Marine Mammals

NMFS is requiring the same visual, passive acoustic, and active acoustic monitoring of the area surrounding the SURTASS LFA sonar array, as required for the current 2002–2007 rule and LOAs, to prevent the incidental injury of marine mammals that might enter the 180-dB isopleth from the SURTASS

LFA sonar. These three monitoring systems are described in the next section of this document. NMFS has implemented the same protocols as in the 2002–2007 rule. Prior to each active sonar exercise, the distance from the SURTASS LFA sonar source to the 180-dB isopleth will be determined. If, through monitoring, a marine mammal is detected within the 180-dB isopleth, the Navy proposes to shut down or immediately suspend SURTASS LFA sonar transmissions. Transmissions may commence/resume 15 minutes after the marine mammal has left the area of the 180-dB isopleth or there is no further detection of the animal within the 180-dB isopleth. The protocol established by the Navy for implementing this temporary shut-down is described in the application. As an added safety measure, NMFS is again requiring a ''buffer zone'' extending an additional 1 km (0.54 nm) beyond the 180-dB isopleth. This 180-dB plus 1 km (0.54 nm) distance will be the established mitigation zone for that exercise. If a marine mammal is detected by the HF/M3 sonar, the SURTASS LFA sonar will be either turned off or not turned on. This is an effective mitigation measure since testing of the HF/M3 sonar indicates effective levels of detection up to 2 km (1.1 nm). At 2 km (1.1 nm), the SPL from the SURTASS LFA sonar will be approximately 174 dB, significantly below the 180 dB threshold for estimating onset of injury. SURTASS LFA sonar operators would be required to estimate SPLs before and during each operation to provide the information necessary to modify the operation, including delay or suspension of transmissions, so as not to exceed the mitigation sound field criteria.

In addition to establishing a mitigation zone at 180 dB plus 1 km (0.54 nm) to protect marine mammals, the Navy has established a mitigation zone for human divers at 145 dB re 1 microPa(rms) around all known human commercial and recreational diving sites. Although this geographic restriction is intended to protect human divers, it will also reduce the LF sound levels received by marine mammals located in the vicinity of known dive sites.

The Navy also recommended establishing OBIAs for marine mammal protection in its Final EIS and SEIS. The Navy evaluated nine sites in its Final EIS and SEIS where marine animals of concern (marine animals listed under the ESA and other marine mammals) congregate to carry out biologically important activities.

Based on the Navy's evaluation, NMFS has designated these nine sites as OBIAs for LFA sonar. The nine areas are: (1) The North American East Coast between 28° N. and 50° N. from west of 40° W. to the 200-m (656-ft) isobath year-round; (2) the Antarctic Convergence Zone, from 30° E. to 80° E. to 45° S., from 80° E. to 150° E. to 55° S., from 150° E. to 50° W. to 60° S., from 50° W to 30° E. to 55° S. from October through March; (3) the Costa Rica Dome, centered at 9° N. and 88° W., year-round; (4) Hawaiian Islands Humpback Whale National Marine Sanctuary-Penguin Bank, centered at 21° N. and 157° 30′ W. from November 1 through May 1; (5) Cordell Bank National Marine Sanctuary, boundaries in accordance 15 CFR 922.110 year-round; (6) Gulf of the Farallones National Marine Sanctuary, boundaries in accordance 15 CFR 922.80 year-round; (7) Monterey Bay National Marine Sanctuary, boundaries in accordance with 15 CFR 922.30 year-round; (8) Olympic Coast National Marine Sanctuary, boundaries within 23 nm of the coast from 47°07′ N. to 48°30′ N. latitude in December, January, March, and May; and (9) Flower Garden Banks National Marine Sanctuary, boundaries in accordance with 15 CFR 922.120 year-round.

NMFS has also designated an additional OBIA that was recommended by several commenters on the Draft SEIS: The Gully with boundaries at 44°13′ N., 59°06′ W. to 43°47′ N., 58°35′ W. to 43°35′ N., 58°35′ W. to 43°35′ N., 59°08′ W. to 44°06′ N., 59°20′ W., year round. NMFS believes this area is biologically important for marine mammals, based on its importance as habitat for several species of marine mammals, particularly the northern bottlenose whale.

NMFS'' proposed rule solicited public comments and information on marine mammal distribution, densities, and the specific biologically important activities that take place in the Northwestern Hawaiian Islands to determine whether certain areas should be designated as OBIAs. We did not receive public comment on this issue. Any additional OBIA designations would be made through a separate rulemaking process.

NMFS is continuing the system established in the 2002–2007 rule for expanding the number of OBIAs, as described later in this document. While retaining the requirement to provide notice and an opportunity to comment, this final rule eliminates the specific length of time for public comment on proposed OBIAs. OBIAs are not intended to apply to other Navy activities and sonar operations, but rather as a mitigation measure to reduce incidental takings by SURTASS LFA sonar.

These regulations require the Navy to refrain from operating the SURTASS LFA sonar within any OBIA and requires that the SURTASS LFA sonar vessel ensures that the 180 dB (re 1 microPa(rms)) isopleth remains at least 1 km (0.54 nm) seaward of the outer perimeter of the OBIA.

Marine Mammal Monitoring

In order to minimize risks to marine mammals that may be present in waters surrounding SURTASS LFA sonar, NMFS is again requiring the Navy to: (1) Conduct visual monitoring from the ship's bridge during daylight hours, (2) use passive SURTASS sonar to listen for vocalizing marine mammals; and (3) use high frequency active sonar (i.e., similar to a commercial fish finder) to monitor/locate/track marine mammals in relation to the SURTASS LFA sonar vessel and the sound field produced by the SURTASS LFA sonar source array.

Through observation, acoustic tracking and implementation of shut-down criteria, the Navy will ensure, to the greatest extent practicable, that no marine mammals approach the SURTASS LFA sonar source close enough to be subjected to potentially injurious sound levels (inside the 180-dB sound field; approximately 1 km (0.54 nm) from the source). In the Navy's Final EIS, as reanalyzed in the Final Comprehensive Report for SURTASS LFA sonar, the Navy assessed mitigation effectiveness. The overall effectiveness of detecting a marine mammal approaching the 180-dB sound field of the source array by at least one of these monitoring methods is above 95 percent. This value is supported by analyses of field data in a sampling of 6 missions between June 2004 and February 2006 (see the Navy's Final Comprehensive Report for LFA sonar).

The results of the visual, passive, and active monitoring for each LOA are discussed in the Annual Reports (most recently, Annual Report 5, 2007, Chapter 4). Mitigation effectiveness is described in Chapter 4 for the Final Comprehensive Report (2007) and in the Annual Reports.

Visual monitoring consists of daylight observations for marine mammals from the vessel. Daylight is defined as 30 minutes before sunrise until 30 minutes after sunset. Visual monitoring would begin 30 minutes before sunrise or 30 minutes before the SURTASS LFA sonar is deployed. Monitoring would continue until 30 minutes after sunset or until the SURTASS LFA sonar is recovered. Observations will be made by personnel trained in detecting and identifying marine mammals. Marine mammal biologists qualified in conducting at-sea

marine mammal visual monitoring from surface vessels train and qualify designated ship personnel to conduct at-sea visual monitoring. The objective of these observations is to maintain a track of marine mammals observed and to ensure that none approach the source close enough to enter the LFA sonar mitigation zone (including the buffer zone).

These personnel would maintain a topside watch and marine mammal observation log during operations that employ SURTASS LFA sonar in the active mode. The numbers and identification of marine mammals sighted, as well as any unusual behavior, will be entered into the log. A designated ship's officer will monitor the conduct of the visual watches and periodically review the log entries. There are two potential visual monitoring scenarios.

First, if a marine mammal is sighted outside of the LFA sonar mitigation zone, the observer will notify the Officer-in-Charge (OIC). The OIC then notifies the HF/M3 sonar operator to determine the range and projected track of the animal. If it is determined the animal will enter the LFA sonar mitigation zone, the OIC will order the delay or suspension of SURTASS LFA sonar transmissions when the animal enters the LFA sonar mitigation zone. Second, if the animal is visually observed within the mitigation zone, the OIC will order the immediate delay or suspension of SURTASS LFA sonar transmissions. The observer will continue visual monitoring/recording until the animal is no longer seen.

Passive acoustic monitoring is conducted when SURTASS is deployed, using the SURTASS towed horizontal line array to listen for vocalizing marine mammals as an indicator of their presence. If the sound is estimated to be from a marine mammal that may be in the SURTASS LFA sonar mitigation zone, the technician will notify the OIC who will alert the HF/M3 sonar operator and visual observers. If a marine mammal is detected within or approaching the mitigation zone prior to or during transmissions, the OIC will order the delay or suspension of SURTASS LFA sonar transmissions.

HF-active acoustic monitoring uses the HF/M3 sonar to detect, locate, and track marine mammals that could pass close enough to the SURTASS LFA sonar array to enter the LFA sonar mitigation zone. HF acoustic monitoring will begin 30 minutes before the first SURTASS LFA sonar transmission of a given mission is scheduled to commence and continue until transmissions are terminated. Prior to full-power operations, the HF/M3 sonar power level is ramped up over a period of 5 min from 180 dB SL in 10-dB increments until full power (if required) is attained to ensure that there are no inadvertent exposures of local animals to RLs greater than 180 dB from the HF/M3 sonar. There are two potential scenarios for mitigation via active acoustic monitoring.

First, if a ''contact'' is detected outside the LFA sonar mitigation zone, the HF/M3 sonar operator determines the range and projected track of the animal. If it is determined that the animal will enter the LFA sonar mitigation zone, the sonar operator notifies the OIC. The OIC then orders the delay or suspension of transmissions when the animal is predicted to enter the LFA sonar mitigation zone. If a contact is detected by the HF/M3 sonar within the LFA sonar mitigation zone, the observer notifies the OIC who promptly orders the immediate delay or suspension of transmissions.

All contacts will be recorded in the log and provided as part of the Long-Term Monitoring (LTM) Program to monitor for potential long-term environmental effects.

Research

The Navy spends approximately $10 to 14 million annually on marine mammal research programs. These research programs provide a means of learning about potential effects of anthropogenic underwater sound on marine mammals (including long-term) and ways to mitigate potential effects. During the first 4 years of LFA sonar operations, the Navy conducted research on several research areas. Table 9 in the Navy's Final Comprehensive Report for SURTASS LFA sonar provides the status of the research that is planned or underway.

NMFS is requiring the Navy to continue researching the impacts of LF sounds on marine mammals to supplement its monitoring and increase knowledge of the species, and coordinate with others on additional research opportunities and activities. This includes cumulative impact analyses of the annual takes of marine mammals over the next 5 years and the continuation of scientific data collection during SURTASS LFA sonar operations.

NMFS recommends that the Navy conduct, or continue to conduct, the following research regarding SURTASS LFA sonar over the second 5-year authorization period:

1. Systematically observe SURTASS LFA sonar training exercises for injured or disabled marine mammals.

2. Compare the effectiveness of the three forms of mitigation (visual, passive acoustic, HF/M3 sonar).

3. Conduct research on the responses of deep-diving odontocete whales to LF-sonar signals. These species are believed to be less sensitive to LF-sonar sounds than the species studied prior to the LFS SRP. However, enough questions exist that these species should be studied further. The Navy has applied for a Scientific Research Permit under section 104 of the MMPA to conduct a behavioral response study on deep-diving cetacean species exposed to natural and artificial underwater sounds and quantify exposure conditions associated with various effects (72 FR 19181, April 17, 2007).

4. Conduct research on the habitat preferences of beaked whales.

5. Conduct passive acoustic monitoring using bottom-mounted hydrophones before, during, and after LF sonar operations for the possible silencing of calls of large whales.

6. Continue to evaluate the HF/M3 mitigation sonar. This is the primary means of mitigation, and its efficacy must continue to be demonstrated.

7. Continue to evaluate improvements in passive sonar capabilities.

Reporting

During routine operations of SURTASS LFA sonar, technical and environmental data would be collected and recorded, which, along with research, are part of the Navy's LTM Program. These would include data from visual and acoustic monitoring, ocean environmental measurements, and technical operational inputs.

First, a mission report would be provided to NMFS on a quarterly basis, with the report including all active-mode missions completed 30 days or more prior to the date of the deadline for the report. Second, the Navy would submit an annual report no later than 45 days after expiration of an LOA. Third, the Navy would submit a Final Comprehensive Report at least 240 days prior to expiration of these regulations. These reports are summarized here.

Quarterly Report—On a quarterly basis, the Navy would provide NMFS with a classified report that includes all active-mode missions completed 30 days or more prior to the date of the deadline for the report. The Navy must submit its quarterly mission reports to NMFS, no later than 30 days after the end of each quarter beginning on the date of effectiveness of an LOA or as specified in the appropriate LOA. Specifically, these reports will include dates/times of exercises, location of vessel, LOA province (as set forth in

Longhurst (1998)), location of the mitigation zone in relation to the LFA sonar array, marine mammal observations, and records of any delays or suspensions of operations. Marine mammal observations would include animal type and/or species, number of animals sighted by species, date and time of observations, type of detection (visual, passive acoustic, HF/M3 sonar), the animal's bearing and range from vessel, behavior, and remarks/narrative (as necessary). The report would include the Navy's analysis of whether any Level A and/or Level B harassment taking occurred within the SURTASS LFA sonar 180-dB and 1 km (0.54 nm) mitigation zone and, if so, estimates of the percentage of marine mammal stocks affected (both for the quarter and cumulatively (to date) for the year covered by the LOA) by SURTASS LFA sonar operations. This analysis would include estimates of Level A and Level B harassment takes of marine mammals for within the mitigation zone, using predictive modeling based on operating locations, dates/times of operations, system characteristics, oceanographic environmental conditions, and animal demographics. In the event that no SURTASS LFA sonar missions are completed during a quarter, a report of negative activity would be provided.

Annual Report—The annual report would provide NMFS with an unclassified summary of the year's quarterly reports and will include the Navy's analysis of whether any Level A and/or Level B harassment takings of marine mammals occurred within the SURTASS LFA sonar's 180-dB and 1 km (0.54 nm) mitigation zones and, if so, estimates of the percentage of marine mammal stocks affected by SURTASS LFA sonar operations. This analysis would include estimates for both within and outside the 180-dB and 1 km (0.54 nm) mitigation zone, using predictive modeling based on operating locations, dates/times of operations, system characteristics, oceanographic environmental conditions, and animal demographics.

The annual report would also include: (1) Analysis of the effectiveness of the mitigation measures with recommendations for improvements where applicable; (2) assessment of any long-term effects from SURTASS LFA sonar operations; and (3) any discernible or estimated cumulative impacts from SURTASS LFA sonar operations.

Comprehensive Report—NMFS is requiring the Navy to provide NMFS and the public with a final comprehensive report analyzing the impacts of SURTASS LFA sonar on marine mammal species and stocks. This report, which is due at least 240 days prior to expiration of these regulations, would include an in-depth analysis of all monitoring and Navy-supported research pertinent to SURTASS LFA sonar conducted during the 5-year period of these regulations, a scientific assessment of cumulative impacts on marine mammal stocks, and an analysis on the advancement of alternative (passive) technologies as a replacement for LFA sonar. This report would be an important document for NMFS' review and assessment of impacts for any future rulemaking.

Annual reports and the Comprehensive Report will be posted on the NMFS homepage (see **ADDRESSES**).

Modification to Mitigation Measures

Any substantial modifications to NMFS' mitigation, monitoring, and reporting requirements will be proposed in the **Federal Register** with an opportunity for public comment prior to implementation (unless an emergency exists and modifications are necessary for the protection of marine mammals).

Designation of Offshore Biologically Important Areas for Marine Mammals

In addition to NMFS designating OBIAs independently, this rule describes a process for members of the public to petition NMFS to add an area to the list of OBIAs for marine mammals. To qualify for designation, an area must be of particular importance for marine mammals as an area for feeding, breeding, calving, or migration, and not simply an area occupied by marine mammals. The proposed area should not be within a previously designated OBIA or other 180-dB exclusion area. In order for NMFS to begin a rulemaking process for designating OBIAs, proponents must petition NMFS and submit the information described in 50 CFR 216.191(a). If NMFS makes a preliminary determination that the area is biologically important for marine mammals, NMFS will publish a **Federal Register** document proposing to add the area as an OBIA. After review of public comments and information, NMFS will make a final decision on whether to designate the area as an OBIA and publish a **Federal Register** document of its decision. Proposals for designation of areas will not affect the status of LOAs while the rulemaking is in process.

Waiver of Delay in Effectiveness Date

NMFS has determined good cause exists to waive the delay in effectiveness date for this final rule. Regulations governing the current MMPA authorization for Navy SURTASS LFA sonar operations expires on August 15, 2007. This final rule must therefore be effective by August 16, 2007 to avoid a gap in SURTASS LFA sonar operations. The Navy recently provided specific, credible, and verifiable information indicating that activities may occur on or after August 16, 2007 such that a gap in SURTASS LFA sonar operations would be detrimental to national security and reduce protection of U.S. and Allied naval forces from submarine threats. This rule, together with LOAs issued hereunder, will afford the Navy lawful incidental take coverage for marine mammals during SURTASS LFA sonar testing, training, and routine operations and avoid any gap in operations. The required mitigation and monitoring, which are designed to ensure the least practicable adverse impact on affected species or stocks will ensure that SURTASS LFA sonar will have a negligible impact on the affected species or stocks of marine mammals.

Changes From the Proposed Rule

NMFS has amended the proposed rule to add a 1-km (0.5-nm) buffer to the OBIA SPL restriction. Accordingly, the final rule requires the Navy to ensure SPLs do not exceed 180 dB (re 1 microPa(rms)) at a distance of 1km (0.5 nm) seaward of the outer perimeter of the OBIA. This measure will limit SPLs within OBIA to less than approximately 174 dB.

These regulations require the Navy to refrain from operating the SURTASS LFA sonar within any OBIA and further require the Navy to ensure SPLs do not exceed 180 dB (re 1 microPa(rms)) at a distance of 1km (0.5 nm) seaward of the outer perimeter of the OBIA.

Determinations

Based on the scientific analyses detailed in the Navy application and further supported by information and data contained in the Navy's Final SEIS and Final EIS for SURTASS LFA sonar operations and summarized in this rule, NMFS has determined that the incidental taking of marine mammals resulting from SURTASS LFA sonar operations would have a negligible impact on the affected marine mammal species or stocks over the 5-year period of LFA sonar operations covered by these regulations. That assessment is based on a number of factors: (1) The best information available indicates that effects from SPLs less than 180 dB will be limited to short-term Level B behavioral harassment averaging less than 12 percent annually for all affected marine mammal species; (2) the

mitigation and monitoring is highly effective in preventing exposures of 180 dB or greater; (3) the results of monitoring as described in the Navy's Comprehensive Report supports the conclusion that takings will be limited to Level B harassment and not have more than a negligible impact on affected species or stocks of marine mammals; (4) the small number of SURTASS LFA sonar systems (two systems in FY 2008 and FY 2009 (totaling 864 hours of operation annually), 3 in FY 2010 (totaling 1296 hours of operation annually), and 4 systems in FY 2011 and FY 20012 (totaling 1728 hours of operation annually)) that would be operating world-wide; (5) that the LFA sonar vessel must be underway while transmitting (in order to keep the receiver array deployed), limiting the duration of exposure for marine mammals to those few minutes when the SURTASS LFA sonar sound energy is moving through that part of the water column inhabited by marine mammals; (6) in the case of convergence zone (CZ) propagation, the characteristics of the acoustic sound path, which deflect the sound below the water depth inhabited by marine mammals for much of the sound propagation (see illustration 67 FR page 46715 (July 16, 2002); (7) the findings of the SRP on LF sounds on marine mammals indicated no significant change in biologically important behavior from exposure to sound levels up to 155 dB; and (8) during the 40 LFA sonar missions between 2002 and 2006, there were only three visual observations of marine mammals and only 71 detections by the HF/M3 sonar, which all resulted in mitigation protocol suspensions in operations. These measures all indicate that while marine mammals will potentially be affected by the SURTASS LFA sonar sounds, these impacts will be short-term behavioral effects and are not likely to adversely affect marine mammal species or stocks through effects on annual rates of reproduction or survival. In addition, mortality of marine mammals is not expected to occur as a result of LFA sonar operations and is not authorized in these regulations nor in any LOA issued under this rule.

Finally, because SURTASS LFA sonar operations will not take place in Arctic waters, it would not have an unmitigable adverse impact on the availability of marine mammals for subsistence uses identified in MMPA section 101(a)(5)(A)(i), 16 U.S.C. 1371(a)(5)(A)(i).

NEPA

On November 10, 2005 (70 FR 68443), the Environmental Protection Agency (EPA) announced receipt of a Draft SEIS from the U.S. Navy on the deployment of SURTASS LFA sonar. This Final SEIS incorporated by reference the Navy's Final EIS on SURTASS LFA sonar deployment. The public comment period on the Draft SEIS ended on February 10, 2006. On May 4, 2007 (72 FR 25302), EPA announced receipt of a Final SEIS from the U.S. Navy on the deployment of SURTASS LFA sonar. NMFS was a cooperating agency, as defined by the Council on Environmental Quality (40 CFR 1501.6), in the preparation of these documents. NMFS reviewed the Navy's Final SEIS, adopted the Navy Final EIS, as provided for in 40 CFR 1506.3, and has determined it is unnecessary to prepare additional NEPA analyses. The Navy's Final SEIS is available at: *http://www.surtass-LFA sonar-eis.com.*

ESA

On June 9, 2006, the Navy submitted a Biological Assessment to NMFS to initiate consultation under section 7 of the ESA for the 2007–2012 SURTASS LFA sonar activities and NMFS'' authorization for incidental take under the MMPA. NMFS concluded consultation with the Navy on this action on August xx, 2007. The conclusion of that consultation was that operation of the SURTASS LFA sonar system for testing, training and military operations and the issuance by NMFS of MMPA incidental take authorizations for this activity are not likely to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS or result in the destruction or adverse modification of critical habitat.

Classification

This action has been determined to be significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage, that this action would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. If implemented, this rule would affect only the U.S. Navy which, by definition, is not a small business. Because of this certification, a regulatory flexibility analysis is not required.

List of Subjects in 50 CFR Part 216

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: August 14, 2007.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For reasons set forth in the preamble, 50 CFR part 216 is amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

■ 2. Subpart Q is added to part 216 to read as follows:

Subpart Q—Taking of Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA sonar) Sonar

Sec.

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216.191 Designation of Offshore Biologically Important Marine Mammal Areas.

Subpart Q—Taking of Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA sonar) Sonar

§ 216.180 Specified activity.

Regulations in this subpart apply only to the incidental taking of those marine mammal species specified in paragraph (b) of this section by the U.S. Navy, Department of Defense, while engaged in the operation of no more than four SURTASS LFA sonar systems conducting active sonar operations, in areas specified in paragraph (a) of this section. The authorized activities, as specified in a Letter of Authorization issued under §§ 216.106 and 216.188, include the transmission of low frequency sounds from the SURTASS LFA sonar and the transmission of high frequency sounds from the mitigation

sonar described in § 216.185 during training, testing, and routine military operations of SURTASS LFA sonar.

(a) With the exception of those areas specified in § 216.183(d), the incidental taking by harassment may be authorized in the areas (biomes, provinces, and subprovinces) described in Longhurst (1998), as specified in a Letter of Authorization.

(b) The incidental take, by Level A and Level B harassment, of marine mammals from the activity identified in this section is limited to the following species and species groups:

(1) Mysticete whales—blue (*Balaenoptera musculus*), fin (*Balaenoptera physalus*), minke (*Balaenoptera acutorostrata*), Bryde's (*Balaenoptera edeni*), sei (*Balaenoptera borealis*), humpback (*Megaptera novaeangliae*), North Atlantic right (*Eubalaena glacialis*), North Pacific right (*Eubalena japonica*) southern right (*Eubalaena australis*), pygmy right (*Capera marginata*), bowhead (*Balaena mysticetus*), and gray (*Eschrichtius robustus*) whales.

(2) Odontocete whales—harbor porpoise (*Phocoena phocoena*), spectacled porpoise (*Phocoena dioptrica*), beluga (*Dephinapterus leucas*), *Stenella spp.*, Risso's dolphin (*Grampus griseus*), rough-toothed dolphin (*Steno bredanensis*), Fraser's dolphin (*Lagenodelphis hosei*), northern right-whale dolphin (*Lissodelphis borealis*), southern right whale dolphin (*Lissodelphis peronii*), short-beaked common dolphin (*Delphius delphis*), long-beaked common dolphin (*Delphinus capensis*), very long-beaked common dolphin (*Delphinus tropicalis*), *Lagenorhynchus spp.*, *Cephalorhynchus spp.*, bottlenose dolphin (*Tursiops truncatus*), Dall's porpoise (*Phocoenoides dalli*), melon-headed whale (*Peponocephala spp.*), beaked whales (*Berardius spp., Hyperoodon spp., Mesoplodon spp.*, Cuvier's beaked whale (*Ziphius cavirostris*), Shepard's beaked whale (*Tasmacetus shepherdi*), Longman's beaked whale (*Indopacetus pacificus*), killer whale (Orcinus orca), false killer whale (*Pseudorca crassidens*), pygmy killer whale (*Feresa attenuata*), sperm whale (*Physeter macrocephalus*), dwarf and pygmy sperm whales (*Kogia simus and K. breviceps*), and short-finned and long-finned pilot whales (*Globicephala macrorhynchus* and *G. melas*).

(3) Pinnipeds—hooded seal (*Cystophora cristata*), harbor seal (*Phoca vitulina*), spotted seal (*P. largha*), ribbon seal (*P. fasciata*), gray seal (*Halichoerus grypus*), elephant seal (*Mirounga angustirostris and M. leonina*), Hawaiian monk seal (*Monachus schauinslandi*), Mediterranean monk seal (*Monachus monachus*), northern fur seal (*Callorhinus ursinus*), southern fur seal (*Arctocephalus spp.*), harp seal (*Phoca groenlandica*), Galapagos sea lion (*Zalophus californianus wollebaeki*), Japanese sea lion (*Zalophus californianus japonicus*), Steller sea lion (*Eumetopias jubatus*), California sea lion (*Zalophus californianus*), Australian sea lion (*Neophoca cinerea*), New Zealand sea lion (*Phocarctos hookeri*), and South American sea lion (*Otaria flavescens*).

§ 216.181 Effective dates.

Regulations in this subpart are effective from August 16, 2007 through August 15, 2012.

§ 216.182 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 216.188, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals by Level A and Level B harassment within the areas described in § 216.180(a), provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The activities identified in § 216.180 must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

§ 216.183 Prohibitions.

No person in connection with the activities described in § 216.180 shall:

(a) Take any marine mammal not specified in § 216.180(b);

(b) Take any marine mammal specified in § 216.180(b) other than by incidental, unintentional Level A and Level B harassment;

(c) Take a marine mammal specified in § 216.180(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of the regulations in this subpart or any Letter of Authorization issued under §§ 216.106 and 216.188.

§ 216.184 Mitigation.

The activity identified in § 216.180(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting operations identified in § 216.180, the mitigation measures described in this section and in any Letter of Authorization issued under §§ 216.106 and 216.188 must be implemented.

(a) Through monitoring described under § 216.185, the Holder of a Letter of Authorization must act to ensure, to the greatest extent practicable, that no marine mammal is subjected to a sound pressure level of 180 dB or greater.

(b) If a marine mammal is detected within or about to enter the mitigation zone (the area subjected to sound pressure levels of 180 dB or greater plus the 1 km (0.54 nm) buffer zone extending beyond the 180-dB zone), SURTASS LFA sonar transmissions will be immediately delayed or suspended. Transmissions will not resume earlier than 15 minutes after:

(1) All marine mammals have left the area of the mitigation and buffer zones; and

(2) There is no further detection of any marine mammal within the mitigation and buffer zones as determined by the visual and/or passive or active acoustic monitoring described in § 216.185.

(c) The high-frequency marine mammal monitoring sonar (HF/M3) described in § 216.185 will be ramped-up slowly to operating levels over a period of no less than 5 minutes:

(1) At least 30 minutes prior to any SURTASS LFA sonar transmissions;

(2) Prior to any SURTASS LFA sonar calibrations or testings that are not part of regular SURTASS LFA sonar transmissions described in paragraph (c)(1) of this section; and

(3) Anytime after the HF/M3 source has been powered down for more than 2 minutes.

(d) The HF/M3 sound pressure level will not be increased once a marine mammal is detected; ramp-up may resume once marine mammals are no longer detected.

(e) The Holder of a Letter of Authorization will not operate the SURTASS LFA sonar, such that:

(1) the SURTASS LFA sonar sound field exceeds 180 dB (re 1 microPa(rms)) at a distance less than 12 nautical miles (nm) (22 kilometers (km)) from any coastline, including offshore islands;

(2) the SURTASS LFA sonar sound field exceeds 180 db (re 1 microPa(rms)) at a distance of 1 km (0.5 nm) seaward of the outer perimeter of any offshore biologically important area designated in 216.184(f) during the biologically important period specified.

(f) The following areas have been designated by NMFS as Offshore Biologically Important Areas (OBIAs) for marine mammals (by season if appropriate):

Name of area	Location of area	Months of importance
(1) 200-m isobath North American East Coast	From 28° N. to 50° N., west of 40° W	Year-round.
(2) Antarctic Convergence Zone	30° E. to 80° E. to 45°; 80° E. to 150° E. to 55°; S. 150° E. to 50° W. to 60° S.; 50° W. to 30° E. to 50° S.	October 1–March 31.
(3) Costa Rica Dome	Centered at 9° N. and 88° W	Year-round.
(4) Hawaiian Islands Humpback Whale National Marine Sanctuary-Penguin Bank.	Centered at 21° N. and 157° 30' W	November 1 through May 1.
(5) Cordell Bank National Marine Sanctuary	Boundaries in accordance with 15 CFR 922.110.	Year-round.
(6) Gulf of the Farallones National Marine Sanctuary.	Boundaries in accordance with 15 CFR 922.80.	Year-round.
(7) Monterey Bay National Marine Sanctuary	Boundaries in accordance with 15 CFR 922.30.	Year-round.
(8) Olympic Coast National Marine Sanctuary	Boundaries within 23 nm of the coast from 47°07′ N. to 48°30′ N. latitude.	December January, March and May.
(9) Flower Garden Banks National Marine Sanctuary.	Boundaries in accordance with 15 CFR 922.120.	Year-round.
(10) The Gully	44°13′ N., 59°06′ W. to 43°47′ N.; 58°35′ W. to 43°35′ N.; 58°35′ W. to 43°35′ N.; 59°08′ W. to 44°06′ N.; 59°20′ W.	Year-round.

§ 216.185 Requirements for monitoring.

(a) In order to mitigate the taking of marine mammals by SURTASS LFA sonar to the greatest extent practicable, the Holder of a Letter of Authorization issued pursuant to §§ 216.106 and 216.188 must:

(1) Conduct visual monitoring from the ship's bridge during all daylight hours (30 minutes before sunrise until 30 minutes after sunset);

(2) Use low frequency passive SURTASS sonar to listen for vocalizing marine mammals; and

(3) Use the HF/M3 (high frequency) sonar developed to locate and track marine mammals in relation to the SURTASS LFA sonar vessel and the sound field produced by the SURTASS LFA sonar source array.

(b) Monitoring under paragraph (a) of this section must:

(1) Commence at least 30 minutes before the first SURTASS LFA sonar transmission;

(2) Continue between transmission pings; and

(3) Continue either for at least 15 minutes after completion of the SURTASS LFA sonar transmission exercise, or, if marine mammals are exhibiting unusual changes in behavioral patterns, for a period of time until behavior patterns return to normal or conditions prevent continued observations;

(c) Holders of Letters of Authorization for activities described in § 216.180 are required to cooperate with the National Marine Fisheries Service and any other federal agency for monitoring the impacts of the activity on marine mammals.

(d) Holders of Letters of Authorization must designate qualified on-site individuals to conduct the mitigation, monitoring and reporting activities specified in the Letter of Authorization.

(e) Holders of Letters of Authorization must conduct all monitoring required under the Letter of Authorization.

§ 216.186 Requirements for reporting.

(a) The Holder of the Letter of Authorization must submit quarterly mission reports to the Director, Office of Protected Resources, NMFS, no later than 30 days after the end of each quarter beginning on the date of effectiveness of a Letter of Authorization or as specified in the appropriate Letter of Authorization. Each quarterly mission report will include all active-mode missions completed during that quarter. At a minimum, each classified mission report must contain the following information:

(1) Dates, times, and location of each vessel during each mission;

(2) Information on sonar transmissions during each mission;

(3) Results of the marine mammal monitoring program specified in the Letter of Authorization; and

(4) Estimates of the percentages of marine mammal species and stocks affected (both for the quarter and cumulatively for the year) covered by the Letter of Authorization.

(b) The Holder of a Letter of Authorization must submit an annual report to the Director, Office of Protected Resources, NMFS, no later than 45 days after the expiration of a Letter of Authorization. This report must contain all the information required by the Letter of Authorization.

(c) A final comprehensive report must be submitted to the Director, Office of Protected Resources, NMFS at least 240 days prior to expiration of these regulations. In addition to containing all the information required by any final year Letter of Authorization, this report must contain an unclassified analysis of new passive sonar technologies and an assessment of whether such a system is feasible as an alternative to SURTASS LFA sonar.

§ 216.187 Applications for Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. Navy authority conducting the activity identified in § 216.180 must apply for and obtain a Letter of Authorization in accordance with § 216.106.

(b) The application for a Letter of Authorization must be submitted to the Director, Office of Protected Resources, NMFS, at least 60 days before the date that either the vessel is scheduled to begin conducting SURTASS LFA sonar operations or the previous Letter of Authorization is scheduled to expire.

(c) All applications for a Letter of Authorization must include the following information:

(1) The date(s), duration, and the area(s) where the vessel's activity will occur;

(2) The species and/or stock(s) of marine mammals likely to be found within each area;

(3) The type of incidental taking authorization requested (i.e., take by Level A and/or Level B harassment);

(4) The estimated percentage of marine mammal species/stocks potentially affected in each area for the 12-month period of effectiveness of the Letter of Authorization; and

(5) The means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and the level of taking or impacts on marine mammal populations.

(d) The National Marine Fisheries Service will review an application for a Letter of Authorization in accordance with § 216.104(b) and, if adequate and complete, issue a Letter of Authorization.

§ 216.188 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked will be valid for a period of time not to exceed one year, but may be renewed annually subject to annual renewal conditions in § 216.189.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Authorized geographic areas for incidental takings;

(3) Means of effecting the least practicable adverse impact on the species of marine mammals authorized for taking, their habitat, and the availability of the species for subsistence uses; and

(4) Requirements for monitoring and reporting incidental takes.

(c) Issuance of each Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity specified in § 216.180 as a whole will have no more than a negligible impact on the species or stocks of affected marine mammal(s), and that the total taking will not have an unmitigable adverse impact on the availability of species or stocks of marine mammals for taking for subsistence uses.

(d) Notice of issuance or denial of an application for a Letter of Authorization will be published in the **Federal Register** within 30 days of a determination.

§ 216.189 Renewal of Letters of Authorization.

(a) A Letter of Authorization issued for the activity identified in § 216.180 may be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 216.187 will be undertaken and that there will not be a substantial modification to the described activity, mitigation or monitoring undertaken during the upcoming season;

(2) Notification to NMFS of the information identified in § 216.187(c), including the planned geographic area(s), and anticipated duration of each SURTASS LFA sonar operation;

(3) Timely receipt of the monitoring reports required under § 216.185, which have been reviewed by NMFS and determined to be acceptable;

(4) A determination by NMFS that the mitigation, monitoring and reporting measures required under §§ 216.184 and 216.185 and the previous Letter of Authorization were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization; and

(5) A determination by NMFS that the number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the species or stock of affected marine mammal(s), and that the total taking will not have an unmitigable adverse impact on the availability of species or stocks of marine mammals for taking for subsistence uses.

(b) If a request for a renewal of a Letter of Authorization indicates that a substantial modification to the described work, mitigation or monitoring will occur, or if NMFS proposes a substantial modification to the Letter of Authorization, NMFS will provide a period of 30 days for public review and comment on the proposed modification. Amending the areas for upcoming SURTASS LFA sonar operations is not considered a substantial modification to the Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register** within 30 days of a determination.

§ 216.190 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantial modification (including withdrawal or suspension) to a Letter of Authorization subject to the provisions of this subpart shall be made by NMFS until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization, without modification, except for the period of validity and a listing of planned operating areas, or for moving the authorized SURTASS LFA sonar system from one ship to another, is not considered a substantial modification.

(b) If the National Marine Fisheries Service determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 216.180(b), a Letter of Authorization may be substantially modified without prior notice and opportunity for public comment. Notification will be published in the **Federal Register** within 30 days of the action.

§ 216.191 Designation of Offshore Biologically Important Marine Mammal Areas.

(a) Offshore biologically important areas for marine mammals may be nominated under this paragraph by the National Marine Fisheries Service or by members of the public.

(b) Proponents must petition NMFS by requesting an area be added to the list of offshore biologically important areas in § 216.184(f) and submitting the following information:

(1) Geographic region proposed for consideration (including geographic boundaries);

(2) A list of marine mammal species or stocks within the proposed geographic region;

(3) Whether the proposal is for year-round designation or seasonal, and if seasonal, months of years for proposed designation;

(4) Detailed information on the biology of marine mammals within the area, including estimated population size, distribution, density, status, and the principal biological activity during the proposed period of designation sufficient for NMFS to make a preliminary determination that the area is biologically important for marine mammals; and

(5) Detailed information on the area with regard to its importance for feeding, breeding, or migration for those species of marine mammals that have the potential to be affected by low frequency sounds;

(c) Areas within 12 nm (22 km) of any coastline, including offshore islands, or within non-operating areas for SURTASS LFA sonar are not eligible for consideration.

(d) If a petition does not contain sufficient information for the National Marine Fisheries Service to proceed, NMFS will determine whether the nominated area warrants further study. If so, NMFS will begin a scientific review of the area.

(e)(1) If through a petition or independently, NMFS makes a preliminary determination that an offshore area is biologically important for marine mammals and is not located within a previously designated area, NMFS will publish a **Federal Register** notice proposing to add the area to § 216.184(f) and solicit public comment.

(2) The National Marine Fisheries Service will publish its final determination in the **Federal Register**.

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The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 2863/P.L. 110–75

To authorize the Coquille Indian Tribe of the State of Oregon to convey land and interests in land owned by the Tribe. (Aug. 13, 2007; 121 Stat. 724)

H.R. 2952/P.L. 110–76

To authorize the Saginaw Chippewa Tribe of Indians of the State of Michigan to convey land and interests in lands owned by the Tribe. (Aug. 13, 2007; 121 Stat. 725)

H.R. 3006/P.L. 110–77

To improve the use of a grant of a parcel of land to the State of Idaho for use as an agricultural college, and for other purposes. (Aug. 13, 2007; 121 Stat. 726)

S. 375/P.L. 110–78

To waive application of the Indian Self-Determination and Education Assistance Act to a specific parcel of real property transferred by the United States to 2 Indian tribes in the State of Oregon, and for other purposes. (Aug. 13, 2007; 121 Stat. 727)

S. 975/P.L. 110–79

Granting the consent and approval of the Congress to an interstate forest fire protection compact. (Aug. 13, 2007; 121 Stat. 730)

S. 1716/P.L. 110–80

To amend the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, to strike a requirement relating to forage producers. (Aug. 13, 2007; 121 Stat. 734)

Last List August 13, 2007

CORRECTION

In the last **List of Public Laws** printed in the *Federal Register* on August 13, 2007, H.R. 2025, Public Law 110-65, and H.R. 2078, Public Law 110-67, were printed incorrectly. They should read as follows:

H.R. 2025/P.L. 110–65

To designate the facility of the United States Postal Service located at 11033 South State Street in Chicago, Illinois, as the "Willye B. White Post Office Building". (Aug. 9, 2007; 121 Stat. 568)

H.R. 2078/P.L. 110–67

To designate the facility of the United States Postal Service located at 14536 State Route 136 in Cherry Fork, Ohio, as the "Staff Sergeant Omer T. 'O.T.' Hawkins Post Office". (Aug. 9, 2007; 121 Stat. 570)

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