

countervailing duty proceedings at the Department.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218 (c).

Dated: January 22, 2010.

**John M. Andersen,**

*Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

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## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

[Docket No.: PTO-P-2010-0006]

#### Interim Procedure for Patentees To Request a Recalculation of the Patent Term Adjustment To Comply With the Federal Circuit Decision in *Wyeth v. Kappos* Regarding the Overlapping Delay Provision of 35 U.S.C. 154(b)(2)(A)

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice.

**SUMMARY:** The United States Patent and Trademark Office (USPTO) is modifying the computer program it uses to calculate patent term adjustments in light of *Wyeth v. Kappos*, No. 2009-1120 (Fed. Cir., Jan. 7, 2010). The USPTO expects to complete this software modification by March 2, 2010. In the meantime, the USPTO is providing patentees with the ability to request a recalculation of their patent term adjustment without a fee as an alternative to the petition and fee required by 37 CFR 1.705(d). In order to qualify, a form requesting a recalculation of the patent term adjustment must be submitted no later than 180 days after the patent has issued and the patent must be issued prior to March 2, 2010. In addition, this procedure is only available for alleged errors that are specifically identified in *Wyeth*. The USPTO is deciding pending petitions under 37 CFR 1.705 in accordance with the *Wyeth* decision. This notice also provides information concerning the Patent Application Information Retrieval (PAIR) screen that displays the patent term adjustment calculation.

**DATES:** *Effective Date:* The procedure set forth in this notice is effective on February 1, 2010.

*Applicability Date:* The procedure set forth in this notice is applicable only to patents issued prior to March 2, 2010,

in which a request for recalculation of patent term adjustment in view of *Wyeth* is filed within 180 days of the day the patent was granted.

**FOR FURTHER INFORMATION CONTACT:** The Office of Patent Legal Administration by telephone at (571) 272-7702, or by mail addressed to: Mail Stop Comments-Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

**SUPPLEMENTARY INFORMATION:** Under 35 U.S.C. 154(b)(1), an applicant is entitled (subject to certain conditions and limitations) to patent term adjustment for the following reason: (1) If the USPTO fails to take certain actions during the examination and issue process within specified time frames (35 U.S.C. 154(b)(1)(A)), which are known as the "A" delays; (2) if the USPTO fails to issue a patent within three years of the actual filing date of the application (35 U.S.C. 154(b)(1)(B)), which are known as the "B" delays; and (3) for delays due to interference, secrecy order, or successful appellate review (35 U.S.C. 154(b)(1)(C)), which are known as the "C" delays. 35 U.S.C. 154(b)(2)(A) provides that "[t]o the extent that periods of delay attributable to grounds specified in [35 U.S.C. 154(b)(1)] overlap, the period of any adjustment granted under this subsection shall not exceed the actual number of days the issuance of the patent was delayed." The USPTO interpreted this provision as covering situations in which a delay by the USPTO contributes to multiple bases for adjustment (the "pre-*Wyeth*" interpretation of 35 U.S.C. 154(b)(2)(A)). See *Explanation of 37 CFR 1.703(f) and of the United States Patent and Trademark Office Interpretation of 35 U.S.C. 154(b)(2)(A)*, 69 FR 34283 (June 21, 2004). The United States Court of Appeals for the Federal Circuit, however, recently held in *Wyeth* that the USPTO's interpretation of 35 U.S.C. 154(b)(2)(A) was too strict, and that periods of delay overlap under 35 U.S.C. 154(b)(2)(A) only if the periods which measure the amount of adjustment under 35 U.S.C. 154(b)(1) occur on the same calendar day.

The USPTO makes patent term adjustment determinations by a computer program that uses the information recorded in the USPTO's Patent Application Locating and Monitoring (PALM) system, except when an applicant requests reconsideration pursuant to 37 CFR 1.705. See *Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term*, 65 FR 56365, 56370, 56380-81 (Sept. 18, 2000) (final rule). The USPTO is in the process of revising the computer program it uses to

calculate patent term adjustment to calculate overlapping delays consistent with the Federal Circuit's interpretation of 35 U.S.C. 154(b)(2)(A) in *Wyeth*. The USPTO expects the revisions to the patent term adjustment computer program to be in place for use on the patents issuing on March 2, 2010.

Patentees should note that the patent term adjustment provisions of 35 U.S.C. 154(b) are complex, there are numerous types of communications that are exchanged between applicants and the USPTO during the patent application process, the PALM system was not originally designed for the purpose of calculating patent term adjustment as provided in 35 U.S.C. 154(b), and one or more of the time frames specified in 35 U.S.C. 154(b)(1)(A) and (B) are not met presently in a high percentage of the patents. In addition, revisions to the patent term adjustment computer program necessary to calculate overlapping delays consistent with the Federal Circuit's interpretation of 35 U.S.C. 154(b)(2)(A) in *Wyeth* significantly increases the complexity of the patent term adjustment computer program. Thus, for patents issuing on or after March 2, 2010, a patentee who believes that the patent term adjustment calculation for his or her patent is not correct must file a request for reconsideration under 37 CFR 1.705(d) that complies with the requirements of 37 CFR 1.705(b)(1) and (b)(2) within two months of the date the patent issued. The USPTO is modifying and will continue to modify the patent term adjustment computer program as it becomes aware of situations in the patent term adjustment computer program where it is not correctly calculating the applicable patent term adjustment.

*Requests for Reconsideration of the Patent Term Adjustment indicated in the Patent:* 37 CFR 1.705(d) provides, in part, that any request for reconsideration of the patent term adjustment indicated in the patent must be filed within two months of the date the patent issued and must comply with the requirements of 37 CFR 1.705(b)(1) and (b)(2). 35 U.S.C. 154(b)(4) provides that an applicant dissatisfied with a determination made by the Director under 35 U.S.C. 154(b)(3) shall have remedy by a civil action against the Director filed in the United States District Court for the District of Columbia within 180 days after the grant of the patent.

The USPTO is providing an optional procedure under which patentees seeking a revised patent term adjustment in a patent issued prior to March 2, 2010, may request that the

USPTO recalculate the patent term adjustment without a request for reconsideration under 37 CFR 1.705(d) (or fee), provided that the patentee's sole basis for requesting reconsideration of the patent term adjustment in the patent is the USPTO's pre-*Wyeth* interpretation of 35 U.S.C. 154(b)(2)(A) and such a request is filed within 180 days of the day the patent was granted. The USPTO is providing a Request for Recalculation of Patent Term Adjustment in View of *Wyeth* form (PTO/SB/131) for use in making such a request. The Request for Recalculation of Patent Term Adjustment in View of *Wyeth* form (PTO/SB/131) is available on the USPTO Web site at <http://www.uspto.gov/forms/index.jsp>. This procedure and Request for Recalculation of Patent Term Adjustment in View of *Wyeth* form (PTO/SB/131) are applicable only for patents that issue prior to March 2, 2010. The USPTO will deny as untimely any request for recalculation of patent term adjustment indicated on a patent that is not filed within 180 days of the day the patent was granted. Patentees are reminded that this is an optional procedure, and that any patentee who wishes to preserve his or her right to review in the United States District Court for the District of Columbia of the USPTO's patent term adjustment determination must ensure that he or she also takes the steps required under 35 U.S.C. 154(b)(3) and (b)(4) and 37 CFR 1.705 in a timely manner.

The fee specified in 37 CFR 1.18(e) is required for a request for reconsideration under 37 CFR 1.705 (37 CFR 1.705(b)(1)), and the USPTO may only refund fees paid by mistake or in excess of that required (35 U.S.C. 42(d)). Therefore, the procedure set forth in this notice is not a basis for requesting a refund of the fee specified in 37 CFR 1.18(e) for any request for reconsideration under 37 CFR 1.705, including any previously filed request that was solely based on the USPTO's pre-*Wyeth* interpretation of 35 U.S.C. 154(b)(2)(A).

The procedure set forth in this notice and the Request for Recalculation of Patent Term Adjustment in View of *Wyeth* form (PTO/SB/131) may not be used to request a reconsideration of the patent term adjustment indicated in the notice of allowance in an application that has not yet issued as a patent. If the application issues as a patent prior to March 2, 2010, the optional procedure set forth in this notice and the Request for Recalculation of Patent Term Adjustment in View of *Wyeth* form (PTO/SB/131) may be used to request recalculation of the patent term

adjustment provided on the patent. It is expected that for applications issuing as patents on or after March 2, 2010, the patent term adjustment calculation will be consistent with the Federal Circuit's interpretation of 35 U.S.C. 154(b)(2)(A) in *Wyeth*.

The USPTO is deciding any currently pending request for reconsideration of the patent term adjustment indicated in the patent under 37 CFR 1.705(d) that was filed within two months of the date the patent issued consistent with the Federal Circuit's interpretation of 35 U.S.C. 154(b)(2)(A) in *Wyeth*. Patentees who received a decision on a request for reconsideration of the patent term adjustment indicated in the patent under 37 CFR 1.705(d) under the USPTO's pre-*Wyeth* interpretation of 35 U.S.C. 154(b)(2)(A) may file a request for reconsideration of that decision if such a request for reconsideration is filed within two months of the date of the decision on a request for reconsideration (37 CFR 1.181(f)). If the patentee's sole basis for requesting reconsideration of the decision is the USPTO's pre-*Wyeth* interpretation of 35 U.S.C. 154(b)(2)(A), the request for reconsideration need only state that reconsideration is being requested in view of the Federal Circuit's decision in *Wyeth* (the Request for Recalculation of Patent Term Adjustment in View of *Wyeth* form (PTO/SB/131) may also be used for this purpose).

Patentees seeking a revised patent term adjustment in a patent issued on or after March 2, 2010, must file a request for reconsideration under 37 CFR 1.705(d) that complies with the requirements of 37 CFR 1.705(b)(1) and (b)(2) within two months of the date the patent issued.

To the extent that the procedures adopted under the authority of 35 U.S.C. 2(b)(2) and 154(b)(3) require that any request for reconsideration of the patent term adjustment indicated in the patent must be filed within two months of the date the patent issued and include the information required by 37 CFR 1.705(b)(2) and the fee required by 37 CFR 1.18(e), these requirements are hereby *sua sponte* waived for patents that meet all of the following criteria: (1) The patent must be issued prior to March 2, 2010; (2) the patentee's sole basis for requesting reconsideration of the patent term adjustment in the patent is the USPTO's pre-*Wyeth* interpretation of 35 U.S.C. 154(b)(2)(A); and (3) the Request for Recalculation of the Patent Term Adjustment in View of *Wyeth* form (PTO/SB/131) is filed within 180 days of the day the patent was granted. See 37 CFR 1.183. This waiver does not apply to patents issued on or after

March 2, 2010, to requests that the USPTO recalculate the patent term adjustment for alleged errors other than that identified in *Wyeth*, or to any request for reconsideration of the patent term adjustment indicated in the patent filed later than 180 days after the patent was granted.

*Paperwork Reduction Act:* This notice involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collection of information involved in this notice is covered by OMB control number 0651-0020.

*Patent Term Adjustment Information Displayed in PAIR:* The USPTO provides a patent term adjustment calculation screen that is viewable through PAIR. The patent term adjustment screen has been displaying the following information at the right hand column: (1) USPTO delay days (the number of days of "A" and "C" delay); (2) Three Year Delay days (the number of days of "B" delay); (3) Applicant Delay days (the number of days by which the USPTO delay days will be reduced); and (4) the Total Patent Term Adjustment. Patentees who use the PAIR patent term adjustment calculation screen should note that it does not display the periods of delay which overlap and thus is not adequate for calculating the patent term under the Federal Circuit's interpretation of 35 U.S.C. 154(b)(2)(A) in *Wyeth*. The USPTO plans to revise this screen to show: (1) the number of days of "A" delay; (2) the number of days of "B" delay; (3) the number of days of "C" delay; (4) the number of days of "A" delay that overlap with a day of "B" delay plus the number of days of "A" delay that overlap with a day of "C" delay (the provisions of 35 U.S.C. 154(b)(1)(B)(i) prevent a "B" delay period and "C" delay period from overlapping); (5) the number of days of non-overlapping USPTO delay; (6) the number of days of applicant delay; and (7) the total patent term adjustment. The revised PAIR patent term adjustment screen, however, will not be ready by March 2, 2010. The USPTO expects the revised PAIR patent term adjustment screen to be ready by July of 2010.

Nothing in this notice shall be construed as a waiver of the requirement of 35 U.S.C. 154(b)(4) that any civil action by an applicant dissatisfied with a determination made by the Director under 35 U.S.C. 154(b)(3) be filed in the United States District Court for the District of Columbia within 180 days after the grant of the patent.

Dated: January 26, 2010.

**David J. Kappos,**

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

[FR Doc. 2010-2041 Filed 1-29-10; 8:45 am]

**BILLING CODE 3510-16-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648-XS20

#### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Conducting Air-to-Surface Gunnery Missions in the Gulf of Mexico

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

**ACTION:** Notice; issuance of an incidental harassment authorization.

**SUMMARY:** In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the U.S. Air Force (USAF), Eglin Air Force Base (Eglin AFB), to take marine mammals, by harassment, incidental to conducting air-to-surface (A-S) gunnery missions in the Gulf of Mexico (GOM). The USAF's activities are considered military readiness activities.

**DATES:** Effective January 27, 2010, through January 26, 2011.

**ADDRESSES:** A copy of the authorization, the application containing a list of the references used in this document, and NMFS' 2008 Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) may be obtained by writing to 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, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>. Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Candace Nachman, Office of Protected Resources, NMFS, (301) 713-2289, ext 156.

**SUPPLEMENTARY INFORMATION:**

## Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. 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."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

The National Defense Authorization Act (NDAA) (Public Law 108-136) removed the "small numbers" and "specified geographical region" provisions and amended the definition of "harassment" as it applies to a "military readiness activity" to read as follows (Section 3(18)(B) of the MMPA):

(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].

## Summary of Request

NMFS originally received an application on February 13, 2003, from Eglin AFB for the taking, by harassment, of marine mammals incidental to programmatic mission activities within the Eglin Gulf Test and Training Range (EGTTR). The EGTTR is described as the airspace over the GOM that is controlled by Eglin AFB. A notice of receipt of Eglin AFB's application and Notice of Proposed IHA and request for 30-day public comment published on January 23, 2006 (71 FR 3474). A 1-year IHA was subsequently issued to Eglin AFB for this activity on May 3, 2006 (71 FR 27695, May 12, 2006).

On January 29, 2007, NMFS received a request from Eglin AFB for a renewal of its IHA, which expired on May 2, 2007. This application addendum requested revisions to three components of the IHA requirements: protected species surveys; ramp-up procedures; and sea state restrictions. A Notice of Proposed IHA and request for 30-day public comment published on May 30, 2007 (72 FR 29974). A 1-year IHA was subsequently issued to Eglin AFB for this activity on December 11, 2008 (73 FR 78318, December 22, 2008).

On February 17, 2009, NMFS received a request from Eglin AFB for a renewal of its IHA, which expired on December 10, 2009. No modifications to the activity location, the mission activities, or the mitigation and monitoring measures required under the 2008-2009 IHA were requested by Eglin AFB. Therefore, these activities are identical to what has been described previously (73 FR 78318, December 22, 2008). A-S gunnery operations may potentially impact marine mammals at or near the water surface. Marine mammals could potentially be harassed, injured, or killed by exploding and non-exploding projectiles, and falling debris (USAF, 2002). However, based on analyses provided in the USAF's 2002 Final Programmatic EA (PEA), Eglin's Supplemental Information Request (2003), and NMFS' 2008 EA, as well as for reasons discussed in the Notice of Proposed IHA (74 FR 53474, October 19, 2009) and later in this document, NMFS concurs with Eglin AFB that gunnery exercises are not likely to result in any injury or mortality to marine mammals. Potential impacts resulting from A-S test operations include direct physical impacts (DPI) resulting from ordnance. Sixteen marine mammal species or stocks are authorized for taking by Level B harassment incidental to Eglin AFB's A-S activities and include: Bryde's whale (*Balaenoptera brydei*); sperm whale (*Physeter macrocephalus*); dwarf