on a substantial number of small entities.

Interested persons may participate in this proposed rulemaking by submitting data, views, or arguments in writing to the Bureau of Prisons, Room 767, 320 First Street NW., Washington, DC 20534. Comments received will be considered before final action is taken. The proposed rule may be changed in light of the comments received. No oral hearings are contemplated.

List of Subjects in 28 CFR Part 544

Education, Libraries, Prisoners, Recreation.

In consideration of the foregoing, it is proposed to amend Subchapter C of 28 CFR, Chapter V as follows: In Subchapter C, amend Part 544, Subpart H, § 544.73 to read as follows:

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 544—EDUCATION

Subpart H—Adult Basic Education (ABE) Program

A. The authority citation for Part 544, Subpart H is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4081, 4082 (Repealed as to conduct occurring on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to conduct occurring after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

B. In Part 544, Subpart H, revise § 544.73 to read as follows:

§ 544.73 Federal Prison Industries (UNICOR) and Inmate Performance Pay (IPP) assignments.

(a) Inmates who wish to secure a UNICOR or IPP work assignment in either grade two or three of compensation must be able to demonstrate achievement of at least an 8.0 academic grade level. Inmates who wish to secure a UNICOR or IPP work assignment in grade one or who wish to work in incentive pay (piece rate) positions must be able to demonstrate the prior obtainment of a GED or high school diploma and the achievement of at least an 8.0 academic grade level. The Warden may, for good cause, exempt inmates from this requirement.

(b) An inmate may be assigned to the fourth grade of compensation in a UNICOR or IPP work assignment contingent on the inmate's enrollment, and satisfactory participation, in the ABE program. Failure of an inmate to make adequate progress in the ABE program may be used as the basis to remove the inmate from the UNICOR or IPP work assignment.

Dated: March 14, 1989.

J. Michael Quinlan,

Director, Federal Bureau of Prisons.

[FR Doc. 89-6286 Filed 3-16-89; 8:45 am]

BILLING CODE 4410-05-M

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28 CFR Part 545

Control, Custody, Care, Treatment, and Instruction of Inmates Inmate Financial Responsibility Program

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: In this document, the Bureau of Prisons is proposing an amendment to its rule on inmate financial responsibility program. The proposed amendment is intended to place into the rules a minimum monthly payment for UNICOR and Non-UNICOR workers.

DATE: Public comments must be received on or before May 1, 1989.

ADDRESS: Office of General Counsel, Bureau of Prisons, Room 767, 320 1st Street, NW., Washington, DC 20534. Comments received by the closing date will be available for examination by interested persons at the above address.

FOR FURTHER INFORMATION CONTACT: Mike Pearlman, Office of General Counsel, Bureau of Prisons, phone 202/724-3062.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is proposing an amendment to its final rule on its inmate financial responsibility program. A final rule on this subject was published in the Federal Register April 1, 1987 (at 52 FR 10529 et seq.). The proposed amendment is intended to place into the rules a minimum monthly payment for non-UNICOR and UNICOR workers.

The Bureau of Prisons has determined that this rule is not a major rule for the purpose of EO 12291. The Bureau of Prisons has determined that EO 12291 does not apply to this rule since the rule involves agency management. After review of the law and regulations, the Director, Bureau of Prisons, has certified that this rule, for the purpose of the Regulatory Flexibility Act (Pub. L. 96-354), does not have a significant impact on a substantial number of small entities.

Interested persons may participate in this proposed rulemaking by submitting data, views, or arguments in writing to the Bureau of Prisons, Room 767, 320 1st Street NW., Washington, DC 20534. Comments received during the comment period will be considered before final action is taken. The proposed rule may be changed in light of the comments received. No oral hearings are contemplated.

List of Subjects in 28 CFR Part 545

Work and compensation.

In consideration of the foregoing, it is proposed to amend Subchapter C of 28 CFR, Chapter V as follows:

In Subchapter C, amend Part 545, Subpart B, § 545.11(b) to read as follows:

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 545—WORK AND COMPENSATION

1. The authority citation for Part 545, Subpart B is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed as to conduct occurring on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to conduct occurring after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

2. In § 545.11 revise paragraph (b) to read as follows:

§ 545.11 Payment.

* * * * *

(b) *Payment.* The inmate is responsible for making all payments required by the financial responsibility plan, and for providing documentation to staff. Payments may be made from earnings of the inmate within the institution or from outside resources. Ordinarily, the minimum payment for non-UNICOR and UNICOR grade 5 inmates will be $25.00 per quarter. Inmates assigned grades 1 through 4 in UNICOR will be expected to allot not less than 50% of their monthly pay to the payment process. Allotments may exceed this percentage after considering the individual inmate's specific obligations and resources..

* * * * *

Dated: March 14, 1989.

J. Michael Quinlan,

Director, Bureau of Prisons.

[FR Doc. 89-6285 Filed 3-16-89; 8:45 am]

BILLING CODE 4410-05-M

Friday
March 17, 1989

Part III

Department of Commerce

Patent and Trademark Office

37 CFR Parts 1 and 10

Duty of Disclosure and Practitioner Misconduct; Proposed Rule

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1 and 10

[Docket No. 90135-9035]

Duty of Disclosure and Practitioner Misconduct

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Proposed rule.

SUMMARY: The Patent and Trademark Office (Office) proposes to amend the rules of practice in patent cases (1) to clarify the duty of disclosure standard for information required to be submitted to the Office; (2) to make information disclosure statements mandatory for complying with the duty of disclosure; (3) to provide specific deadlines for submitting such statements including the requirement of a fee in some cases if the statement is filed after the first deadline; (4) to eliminate consideration of duty of disclosure issues by the Office except in disciplinary proceedings, and under limited circumstances in the examination of reissue applications; and (5) to eliminate the striking of patent applications which are improperly executed. The Office further proposes to amend the rules governing practice before it by registered attorneys and agents to define acts of misconduct which conform to a failure to comply with the proposed rules on duty of disclosure.

These proposed changes are considered desirable in view of the large amount of resources that are being devoted to duty of disclosure issues both within and outside the Office without significantly contributing to the reliability of the patents being issued. The proposed rules are intended: (1) To reduce the burden on patent applicants and those associated with the filing and prosecution of patent applications in complying with the duty of disclosure to the Office; (2) to minimize the risk that valuable patent rights will be lost by providing procedures and mandatory deadlines for submitting information to the Office in pending patent applications; (3) to ensure consideration of relevant information by the Office before a final decision on patentability is made by the patent examiner; and (4) to permit some of the Office resources now devoted to a consideration of duty of disclosure issues to be directed to the reduction in the backlog of pending patent applications.

DATES: Comments must be submitted on or before June 20, 1989. A public hearing will be held on June 22, 1989, beginning at 9:30 a.m. Requests to present oral testimony should be received on or before June 20, 1989.

ADDRESSES: Address written comments and requests to present oral testimony to Box 8, Commissioner of Patents and Trademarks, Washington, DC 20231, marked to the attention of Charles E. Van Horn. The hearing will be held at the U.S. Patent and Trademark Office in Room 912 of Building 2, Crystal Park, located at 2121 Crystal Drive, Arlington, Virginia. Written comments and a transcript of the public hearing will be available for public inspection in Room 5C15 of Building 2, Crystal Plaza.

FOR FURTHER INFORMATION CONTACT: Charles E. Van Horn or John H. Raubitschek by telephone at (703) 557-4035 or by mail addressed to Box 8, Commissioner of Patents and Trademarks, Washington, DC 20231.

SUPPLEMENTARY INFORMATION: The goal of any patent examination system is to provide for the grant of reliable patents to protect the patent owner and those who must often expend considerable resources in developing the invention. The grant of reliable patents is dependent, in large part, on the examiner making a decision on patentability after a thorough consideration of the scope and content of the prior art. Any intentional withholding from the Office of information which directly affects the determination of patentability of an invention may undermine the reliability of the resulting patent.

This proposed rule change is designed to ensure that the examiner considers the pertinent prior art before making a final decision on patentability and to allow for the reallocation of Office resources regarding the duty of disclosure in the prosecution of patent applications before the Office. It has long been recognized that by reason of the nature of an application for patent, those representing a patent applicant before the Office are required to act in a manner consistent with the highest degree of candor and good faith. *Kingsland* v. *Dorsey*, 338 U.S. 318, 83 USPQ 330 (1949), *reh'g denied*, 338 U.S. 939 (1950).

There have been several attempts to define the duty to disclose information to the Office in 37 CFR 1.56. In addition, an evolving body of case law on fraud and inequitable conduct in the Office has reflected, at times, a lack of cohesive direction. This has led to some uncertainty about the duty of disclosure and to the unproductive use of considerable resources by the Office, the patent bar, patent applicants, and patent owners in addressing issues relating to this duty. See 16 AIPLA Quarterly Journal Nos. 1 and 2 (1988).

The determination of inequitable conduct in the office as it relates to the nondisclosure of information affecting the patentability of an invention has involved a factual determination of two elements: (1) Materiality of the information; and (2) intent to mislead the Office on the part of the individual who did not bring the information to the attention of the Office. After the withheld information and conduct of the individual are determined to meet the threshold levels of materiality and intent, courts balance the findings relating to materiality and intent in order to evaluate whether inequitable conduct has occurred. *J.P. Stevens & Co.* v. *Lex Tex, Ltd.*, 747 F.2d 1553, 223 USPQ 1089 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 822 (1985).

The Office standard for materiality in § 1.56 is considered by the courts to be an appropriate starting point for analysis since it appears to be the broadest, thus encompassing other standards, and because § 1.56 governs how one ought to conduct business with the Office. *American Hoist & Derrick Co.* v. *Sowa & Sons, Inc.*, 725 F.2d 1350, 220 USPQ 763 (Fed. Cir.), *cert. denied*, 469 U.S. 821 (1984). However, the Office believes that an appropriate standard of materiality should take into consideration whether or not the examiner was influenced by the withholding of the information to avoid the harsh effects of *A.B. Dick Co.* v. *Burroughs Corp.*, 798 F.2d 1392, 230 USPQ 849 (Fed. Cir. 1986), Where a patent was held to be unenforceable even though the examiner was aware of and applied the withheld prior art. In addition, there may be a question of the need for applying the concept of materiality to claims which have been canceled or modified in order to find inequitable conduct. *See Driscoll* v. *Cebalo*, 731 F.2d 878, 221 USPQ 745 (Fed. Cir. 1984).

Some court decisions have held that intent to mislead may be inferred from the materiality of the withheld reference(s). *Argus Chemical Corp.* v. *Fibre Glass-Evercoat Co., Inc.*, 759 F.2d 10, 225 USPQ 1100 (Fed. Cir.), *cert. denied*, 474 U.S. 903 (1985). Other decisions require consideration of the attorney's or agent's good faith or lack thereof. *Allen Archery, Inc.* v. *Browning Mfg. Co.*, 819 F.2d 1087, 2 USPQ 2d 1490 (Fed. Cir. 1987). However, recently the Federal Circuit has required that in order to prove inequitable conduct, there must be evidence of intent to mislead the Office beyond the materiality of the withheld references.

FMC Corp. v. *Manitowoc, Co. Inc.*, 835 F.2d 1411, 5 USPQ 2d 1112 (Fed. Cir. 1987) and *Burlington Industries, Inc.* v. *Dayco Corp.*, 849 F.2d 1418, 7 USPQ 2d 1158 (Fed. Cir. 1988). *See also Kingsdown Medical Consultants, Ltd.* v. *Hollister Inc.*, 863 F.2d 867, 9 USPQ 2d 1384 (Fed. Cir. 1988) (en banc).

The requirement for evidence on intent to mislead the Office was also applied to the Office in making a rejection under § 1.56. *In re Harita*, 847 F.2d 801, 6 USPQ 2d 1930 (Fed. Cir. 1988). The recent emphasis by the courts on the element of intent has led the Office to re-examine its policy with respect to § 1.56 because of the difficulty in obtaining probative evidence on intent. The Office makes its decision on the record and does not take live testimony where the demeanor of the witnesses, who are subject to cross-examination, can be observed. For the Office to conduct hearings is not considered to be an effective utilization of resources. Further, the examination procedure is essentially *ex parte* and so the evidence on intent would have to be developed primarily by the Office.

On the other hand, courts hear testimony, have subpoena power, and can easily fashion an equitable remedy to fit the precise facts in those cases where inequitable conduct is established. In addition, a court proceeding generally involves at least two participating adverse parties to develop the evidence. Thus, it seems more appropriate for inequitable conduct issues to be handled by the courts rather than by an administrative body, especially since inequitable conduct is not a statutory criterion for patentability but rather results from a judicial application of the doctrine of unclean hands.

The proposed changes to the rules relating to the duty of disclosure retain the responsibilities of candor and good faith in dealing with the Office and are intended to promote the reliability of issued patents while minimizing the risks that patent rights may be unnecessarily compromised in the examination of patent applications. The Office believes that these purposes can be accomplished by specifying the threshold level of materiality to conform with an objective "but for" standard, and by ensuring that an information disclosure statement will be considered in an application at a point in time before a final determination of patentability is made. The "but for" standard of materiality should result in a more predictable duty of disclosure because it is based on a statutory standard of patentability. Although submission of an information disclosure statement might be acceptable a short time after final action by the examiner with an additional fee to cover the increased costs of examination, the Office considers the establishment of final action as a specific deadline to be a more effective way to ensure that pertinent information will be thoroughly considered by the examiner before the patent issues and to discourage intentional delays in the submission of information disclosure statements.

Under the proposed changes to the rules, the Office will no longer investigate violations of the duty to disclose, except with respect to a charge of misconduct under § 10.131, nor will it reject claims for such violations. Similarly, the Office will not comment upon duty of disclosure issues which are brought to the attention of the examiner except to note in the application file, when appropriate, that such issues are no longer considered by the Office during its examination of patent applications.

Examination of lack of deceptive intent in reissue applications will continue, but without any independent investigation of inequitable conduct issues. The reissue applicant's statement of lack of deceptive intent will be accepted as dispositive except in special circumstances, such as a judicial determination of fraud or inequitable conduct or an admission of facts which would conclusively establish fraud or inequitable conduct without any investigation. In those cases, the claims will be rejected under 35 U.S.C. 251 for failing to satisfy the statutory requirement of a lack of "deceptive intent." *See In re Clark*, 522 F.2d 623, 187 USPQ 209 (CCPA 1975). Accordingly, reissue will not be available to cure a prior judicial determination of inequitable conduct.

It is anticipated that under the proposed change in practice, information pertinent to a determination of patentability will be brought to the attention of the Office in a timely manner. An applicant's desire to minimize the prospect of facing an inequitable conduct charge or decision in any later litigation as well as to assure the greatest benefit of the presumption of validity under 35 U.S.C. 282, should provide sufficient incentive to furnish the necessary information to the Office. By filing information disclosure statements which include close art or information even though it is not considered to render any claim unpatentable, an applicant may thereby avoid inequitable conduct issues or charges and develop a strong defense in the event of such a charge. The practice of citing close art may be helpful in those cases where the art is combinable with other art subsequently found and cited by the examiner especially since a court may find that the withheld information does, in fact, affect patentability.

It should be noted that patentees may have to show later in litigation that there was no "intent" to withhold information or deceive the Office. Thus, until the proposed change by the Office is adopted by the Office and the courts, an applicant and those others who owe a duty to the Office should comply also with the duty as applied by the courts which may find inequitable conduct or fraud with respect to one or more claims, thereby rendering a patent unenforceable or invalid. *See Kingsdown Medical Consultants, Ltd.* v. *Hollister Inc., supra*, at 20.

The proposed change is very unlikely to have a significant impact on the workload of the Federal courts since the duty of disclosure issue was raised in less than 0.3% of the pending applications over the past two fiscal years and patent suits were filed at a rate of about 0.83% of all patents granted in the same time period. Further, enforcement by the Office of the duty of disclosure has rarely avoided the necessity of consideration of this issue by the courts.

Practitioners found to have participated in inequitable conduct or fraud remain subject to disciplinary proceedings. 37 CFR Part 10.

The proposed rules would substantially conform the rules to the policy announced in the Official Gazette: "Patent and Trademark Office Implementation of 37 CFR 1.56," 1095 *Official Gazette* 16 (October 11, 1988), "Further Clarification on Patent and Trademark Office Implementation of 37 CFR 1.56," 1096 *Official Gazette* 19 (November 8, 1988), and "Patent and Trademark Office Implementation of 37 CFR 1.28(d) and 1.56 (c), (f) and (g)," 1098 *Official Gazette* 502 (January 3, 1989).

Discussion of Specific Rule Change Proposals

Section 1.17, if amended as proposed, would add a fee defined in paragraph (p) to be $200.00, which is due upon filing of an information disclosure statement more than three months after the filing date of the application as described in proposed § 1.97 (f) and (g) or more than two months after the date of the order for examination as set forth in proposed § 1.555(b). Two exemptions from this fee requirement are provided in §§ 1.97(g) and 1.555(b). The information disclosure statement will not be considered to have been filed until the fee is paid in full.

Prior to the changes in the duty of disclosure proposed herein, an applicant assumed the risk of violating the duty if an examiner cited a reference before it was brought to the attention of the Office. Under the proposed rules, which are more flexible in allowing information to be brought to the attention of the Office, the duty would not be violated until a patent issued. Therefore, the proposed fee is being charged to cover a new service as well as to compensate the Office for the extra work caused the examiner who may have to redo part or all of the examination.

Section 1.28(d)(2) is proposed to be amended to remove the references to § 1.56(d) (proposed to be deleted) and to § 1.555 of this part. This proposal retains the identification of a fraud practiced or attempted on the Office, but removes the reference to those sections of this part which provide for rejections based on such fraud.

Section 1.52(c) is proposed to be amended to remove the reference to § 1.56(c), which is proposed to be deleted. As noted below, the Office proposes that it will no longer take steps to strike an application for the reasons defined in § 1.56(c).

Section 1.56 is proposed to be deleted in its entirety to provide a clear demarcation with past practice in the Office and to facilitate future citation and application of the proposed new rule and the principles it embodies. Thus, a legal search of § 1.57 will reveal only cases decided under the new practice, but a search of § 1.56 will be limited to cases decided under the old practice.

Proposed § 1.57 defines the new duty to disclose information to the Office and the limited circumstances in which the Office will take action when it is determined that a violation has occurred. Proposed § 1.57 defines various aspects of Office practice, procedure, and policy as follows:

(a) Who has the duty to disclose;

(b) What information is required to be disclosed;

(c) Circumstances for action by the Office; and

(d) Misconduct—lack of candor and good faith.

Section 1.57(a), as proposed, defines the class of individuals who owe a duty of candor and good faith to the Office. The purpose of § 1.57(a) is to define the same class of individuals included in § 1.56. Thus, the duty is owed by four groups of individuals that are not necessarily mutually exclusive: (1) Any named inventor as defined in paragraph (a)(1); (2) any non-inventor as defined in paragraph (a)(2); (3) each registered attorney or agent as defined in paragraph (a)(3); and (4) any other individual who is both substantively involved in the preparation or prosecution of the application and who is associated with at least one of the entities defined in paragraph (a)(4)(II). The latter group of individuals would include foreign patent attorneys representing an applicant for a U.S. patent through a local correspondent firm. *See In re Harita, supra*, and *Gemveto Jewelry Co., Inc.* v. *Lambert Bros., Inc.*, 542 F. Supp. 933, 216 USPQ 976 (S.D.N.Y. 1982). It would also include a person acting as liaison between the inventor and the attorney or agent handling the prosecution of an application before the Office and who is involved in the preparation or prosecution of the application in a manner that would make a reasonable representative aware of the substantive aspects of the patent application. The person does not have to be a member of a law firm or corporate patent department employed by the assignee of the patent application. On the other hand, merely because the individual worked on related cases for the same assignee would not, without further knowledge of the content and claims of the application being considered, create a duty of disclosure for that individual, nor would there be a duty to inquire of that individual as to whether he or she knew of relevant information.

Section 1.57(b), as proposed, represents a significant departure from the standard defined under § 1.56. It adopts an objective "but for" standard of materiality, which requires a conclusion that a pending claim would not have been permitted to issue in a patent grant "but for" the misrepresentation, concealment, or otherwise culpable conduct with respect to any fact. That is, the "but for" standard of materiality requires a conclusion that a pending claim is (1) patentable in the absence of a given fact which is the subject of misrepresentation, concealment, or otherwise culpable conduct; and (2) unpatentable in the presence of such fact. In deciding the question of materiality under the "but for" standard, a decision maker would first look to the patentability of the claim based on the record and the facts known to the individuals designated in § 1.57(a) without the fact which was misrepresented, concealed, or otherwise subject to culpable conduct, i.e., as though the fact did not exist. Having determined that the claim is patentable without the fact which was misrepresented, concealed, or otherwise subject to culpable conduct, the decision maker would then determine if the claim is unpatentable assuming the fact does exist. If the claim is determined to be unpatentable, the fact would meet the "but for" test standard of materiality proposed in these rules.

Whether or not information meets the "but for" standard of materiality is not dependent upon what the examiner would do with the misrepresented or concealed information if the true facts were known to the examiner, but rather whether or not the information would make a difference in the patentability of the claims if the information had been properly disclosed and not misrepresented nor concealed.

Thus, the determination of patentability under this standard is not based on the subjective determination of any particular examiner or other Office personnel, nor on the subjective determination of any of the individuals defined in proposed § 1.57(a), but consists of an objective legal conclusion as to the patentability of one or more claims under relevant sections of Title 35 and applicable judicial precedent. A person would not be considered by the Office to have violated the duty of disclosure under § 1.57 until a patent issued and it is determined that at least one patent claim is unpatentable based at least in part on information withheld from the Office.

The duty to disclose under proposed § 1.57(b) does not apply to information which is of record in an application. In other words, there would be no violation of the duty if the examiner independently finds the withheld prior art and makes it of record in the application file prior to the issuance of a patent. Further, information and documents cited in international search reports from the European Patent Office (EPO) and Japanese Patent Office (JPO) will be considered to be of record under certain circumstances in the corresponding PCT-based national stage application filed under 35 U.S.C. 371. Those circumstances include the current agreement among the three patent offices (EPO, JPO, USPTO) that international search reports prepared by any of the three offices and designating another office will include a copy of each document cited and an indication of the relevance of such document. This cooperative arrangement has been working informally for about five years and became a formal continuing program recently. Thus, the duty to disclose does not apply to documents cited in an international search report prepared by any of the three offices because they will be considered by the Office to be of record in the national stage application filed in the United States under 35 U.S.C. 371.

The information which is misrepresented or concealed need not anticipate a pending claim to fall within the "but for" standard of materiality, but must, when added to other facts of record in the application and known to the individuals designated in proposed § 1.57(a) preclude the allowance of at least one pending claim in a patent. Allowance may be precluded under appropriate sections of Title 35 in addition to any judicially created doctrine such as double patenting of the obviousness type.

A pending claim within the meaning of proposed § 1.57(b) is a claim which is presented for examination and has not been canceled. No duty of disclosure would exist as to a claim that is canceled in a preliminary amendment submitted with the application papers. Similarly, no duty of disclosure would exist as to a claim that has been canceled at the time a person defined in proposed § 1.57(a) becomes aware of a publication that would render that claim unpatentable, either by itself or in combination with other evidence of record or known to such a person. On the other hand, a duty of disclosure would exist as to a claim that has been withdrawn from consideration by the examiner—for example, as the result of a restriction requirement—but has not been canceled. Nevertheless, a violation of that duty would not occur unless and until a patent issued with such a claim.

The duty of disclosure arises at the point in time when an individual becomes aware of information not of record in the application that would render unpatentable any claim then pending. Actual knowledge of the pertinent information and its materiality is not required by this proposed paragraph if the individual should have known of the information and its materiality. *See FMC Corp.* v. *Manitowoc Co., supra* and *FMC Corp.* v. *Hennessy Industries, Inc.*, 836 F.2d 521, 5 USPQ 2d 1272 (Fed. Cir. 1987). The duty of disclosure continues until that claim is canceled. If a claim is modified during prosecution in the Office, the scope of the amended claim determines the duty of disclosure. But, as mentioned above, there would be no violation of that duty unless a patent issues with a claim which would be unpatentable over information which includes the withheld prior art or information.

Proposed § 1.57(b) makes mandatory the procedures set forth in proposed §§ 1.97 and 1.98 for disclosing to the Office information that meets the "but for" standard of materiality. The general practice of filing information disclosure statements as a method of complying with the duty of disclosure would no longer be optional.

Finally, proposed § 1.57(b) indicates that an individual designated in proposed § 1.57(a)(4) can satisfy the duty of disclosure by disclosing information to an individual designated in any of proposed § 1.57(a) (1)–(3). This provision relates only to the determination of possible misconduct on the part of the individual designated in proposed § 1.57(a)(4), and does not otherwise satisfy the duty of disclosure owed to the Office.

Proposed § 1.57(c) emphasizes that responsibility for compliance with the duty defined in paragraph (b) rests with the individuals identified in paragraph (a), and that generally no evaluation will be made by the Office in any proceeding as to compliance with paragraph (b). The only circumstances in which the Office will consider compliance with this section under the proposed rules are either with reference to a disciplinary proceeding under 37 CFR Part 10 or in limited situations with a reissue application, as where there is a judicial determination of fraud or inequitable conduct or an admission of facts which would conclusively establish fraud or inequitable conduct without any investigation.

Proposed § 1.57(d) would provide a cross reference to the rules relating to the representation of others before the Office in 37 CFR Part 10 and indicate that the failure of a registered representative to comply with the duty of candor and good faith required by proposed § 1.57 may be cause for instituting disciplinary action under § 10.131 for misconduct.

The provisions of § 1.56 (c), (f), and (g) are proposed to be eliminated because an application may be filed in the Office without an oath or declaration pursuant to § 1.53(d). Further, the defects in executing a patent application listed in § 1.56(c) would have to be cured by filing a supplemental oath or declaration pursuant to proposed § 1.67(c). Accordingly, the Office will not consider striking an application for these defects under the proposed rules and will not entertain a petition directed to such matters. However, the conduct of any practitioner permitting a material alteration of the application papers after the oath or declaration has been signed, which is prohibited by § 1.52(c), is not condoned by the Office and remains subject to a disciplinary proceeding. *See* § 10.23(c)(11).

Similarly, since the Office will not comment on duty of disclosure issues which are brought to its attention in original or reissue applications except in very limited circumstances related to deceptive intent in a reissue application, the provisions of § 1.56 (d), (e), (h), and (i) are proposed to be eliminated. The provision in § 1.56(j) that a time period would be set by the Office for the applicant to provide copies of documents omitted from an information disclosure statement is to be deleted because time may be given only in very limited circumstances in order to complete an information disclosure statement under proposed § 1.97.

Section 1.63(a)(1) is proposed to be revised to require that an oath or declaration be dated when it is signed. Thus, the Office will be able to determine if there has been an unusual length of time between the date of execution of the oath or declaration and the filing date of the application. Also, a cross reference to § 1.64 is added because that section contains several execution requirements.

Section 1.63 (b)(3) and (d) are proposed to be revised to reflect that § 1.56 is being replaced by new § 1.57. The oath or declaration filed with an application would need to acknowledge a duty to disclose information as required by proposed § 1.57. Any oath or declaration, which acknowledges a duty to disclose information material to the examination of the application in accordance with the present § 1.56(a), would be acceptable under the proposed rules since the proposed standard of materiality is included within the standard previously applied by the Office (i.e., if an individual complied with the former standard, that individual would comply with the proposed standard).

Section 1.67 is proposed to be revised to add new paragraph (c) requiring that a new oath or declaration be filed if a prior one contained any of the defects previously listed in § 1.56(c). The new oath or declaration may be sought by the Office or the applicant may voluntarily submit one.

The provisions of present § 1.97 are proposed to be revised to require the submission of a statement regarding information which an individual designated in proposed § 1.57(a) has a duty to disclose under proposed § 1.57(b), to define the time periods for filing an information disclosure statement, and to continue the option to file a statement directed to information which the applicant would like the Office to consider even though the information may not meet the "but for" level of materiality.

Under proposed § 1.97(a), an information disclosure statement would be required to be filed in each national application or Patent Cooperation Treaty (PCT)-based national stage application where an individual designated in proposed § 1.57(a) knows or should have known of information which meets the objective "but for" test of proposed § 1.57(b). An individual is not obligated to conduct a prior art search nor furnish a negative information disclosure statement. The filing of an information disclosure statement in a reexamination proceeding is addressed in the proposed revision of § 1.555.

Under proposed § 1.97(b), an information disclosure statement may be filed to contain information which an applicant would like the Office to consider in the examination of an application. There is no duty or requirement to disclose information to the Office unless it meets the threshold materiality and knowledge requirements set forth in proposed § 1.57.

Section 1.97(c), as proposed, would make mandatory the time periods for filing an information disclosure statement. This provision differs from current practice which only encouraged the filing of an information disclosure statement within a short period of time after the application is filed. By requiring a statement to be filed within the times specified, the Office seeks to promote the efficiency of the examination process and to help avoid duty of disclosure issues. Specifically, the statement shall be filed in a national patent application within three months of the filing date of the application. For a PCT-based national stage application, the statement shall be filed within three months of entry of the national stage application as set forth in § 1.491. In each type of application, an information disclosure statement may be filed after the three-month period, but this would normally require a fee. The purpose of the fee for information submitted after the three-month period is to compensate the Office for the extra work caused the examiner who may have to redo part or all of the examination because of the late submission.

The time periods for filing a statement are not subject to an extension of time under § 1.136. However, the examiner may allow an additional time period to permit an applicant to provide any information required by § 1.98, which was inadvertently omitted. The concept proposed here is the same as that applied under § 1.135(c). Otherwise, if the applicant needs to supplement an incomplete statement after the three-month period has expired, the additional information would have to be filed as part of a separate statement under § 1.97(f), which may require a fee.

An information disclosure statement timely filed within the three months of the filing date pursuant to proposed § 1.97(c) will be considered by the examiner, even if filed after the mailing of an examiner's final action or a notice of allowance, which in rare instances may occur within three months of the filing date. For the purposes of this proposed section, the statement will be considered to be filed on the day it is received in the Office, or the date of mailing on a properly executed certificate of mailing pursuant to § 1.8 or Express Mail certificate pursuant to § 1.10, whichever is earlier.

Proposed § 1.97(d) would continue the present practice of permitting an applicant to file an information disclosure statement either as a paper or submission separate from the specification or by incorporating the information disclosure statement in the specification of the application.

Proposed § 1.97(e) would stipulate that the mere filing of an information disclosure statement shall not constitute an admission that any information disclosed in that statement renders unpatentable any claim pending in the application, unless the statement contains an admission within the meaning of § 1.106(c). This section would also continue the present policy that the filing of an information disclosure statement will not be construed as a representation that any patentability search has been made.

Proposed § 1.97(f) would expand and revise the existing practice of filing supplemental information disclosure statements under § 1.99. Under the proposed section, an applicant may satisfy the duty of disclosure requirement by filing a statement after the three-month period in paragraph (c) has expired. In addition, a statement would be required to bring to the attention of the Office any information not in the record nor contained in an information disclosure statement filed under proposed paragraph (c), which meets the standard of materiality in proposed § 1.57. As in paragraph (c), a statement filed under paragraph (f) may include other information which an applicant would like the Office to consider in examining the application. Thus, such a statement may be used to supplement one filed under paragraph (c).

It should be noted that the standard of materiality applies to claims pending in the application and relates to information of record in the application being examined in addition to the information known or which should have been known by an individual designated in proposed § 1.57(a). Thus, a document known to such an individual which was not required to be disclosed in an information disclosure statement under proposed § 1.97(c) may need to be disclosed in a statement under proposed § 1.97(f) due to intervening events.

For example, the scope of the claims may be changed to make a document fall within the proposed standard of materiality even though the document was not relevant to the patentability of the claims as originally presented. As an additional example, an inventor may know of a first reference which by itself does not render a claim unpatentable. However, the examiner may find and cite a second reference which makes the first reference fall within the proposed scope of materiality—thereby creating a duty to disclose the first reference. Likewise, the first reference may become relevant due to the citation of a third reference by a foreign patent office or because of the independent discovery by the inventor during the examination process of a fourth reference. All of these possibilities continue to make it important for individuals to bring pertinent information to the attention of the Office as soon as it is discovered.

It is recognized that patentability may be established by the submission to the Office of evidence of unexpected results or commercial success. In addition, a reference may be removed from consideration by filing an antedating affidavit containing evidence of prior invention under § 1.131. It is permissible for an applicant to rely on such evidence in determining whether or not to disclose certain information to the Office even if the evidence is not submitted to the Office for evaluation. Therefore, there would be no violation of the duty of disclosure if, prior to the issuance of a patent, an applicant is or becomes aware of such evidence that would establish patentability of all the claims over the withheld information and the art of record. Of course, a court later might conclude that the evidence was not sufficient to establish patentability and find that there was inequitable conduct. On the other hand, if the applicant becomes aware of such evidence after issuance of a patent, this would not avoid a violation of the duty to the Office because the patent would not have issued *but for* the withholding of information.

A statement under paragraph (f) must be filed no later than the business day prior to the mailing date of the final action or the notice of allowance, whichever occurs first. This will enable the examiner to consider carefully the statement without disrupting the normal processing of applications within the Office. In the event that a final Office action is withdrawn or a notice of allowance is rescinded, any information disclosure statement that had not been filed in a timely manner would be acceptable if timely resubmitted and otherwise proper in form and content. The application would then be treated as if no final action or notice of allowance had been mailed up to the point that such an action is withdrawn or rescinded. No extensions of time are permitted under § 1.136 although the examiner may set an additional time period to permit an applicant to provide any information required by § 1.98, which was inadvertently omitted.

As noted above, a statement that was untimely when filed under paragraph (f) could be considered timely by the occurrence of subsequent events. If one of those events occurs, the information contained in the statement would be considered by the examiner if the information disclosure statement is timely resubmitted. In the absence of any of those events, such that the statement remains untimely, the information contained in the statement would be considered only if the application in which it is filed is abandoned and the information is disclosed in a continuing application in the manner prescribed in proposed §§ 1.97 and 1.98. This will require that copies of documents cited in the information disclosure statement be resubmitted in the continuing application.

Proposed § 1.97(g) would require that a fee in the amount set forth in proposed § 1.17(p) accompany an information disclosure statement filed under paragraph (f) unless the statement certifies that all of the information disclosed in such a statement was, within three months prior to the date the statement is filed in the Office, either first cited by a foreign patent office in a counterpart foreign patent application or first came to the attention of any person charged with the duty of disclosure in § 1.57(a). The date on the action by the foreign patent office begins the three-month period in the same manner as the mailing of an Office action starts a three-month shortened statutory period for response. Likewise, the filing date of the statement is the date the statement is received in the Office, or the date of mailing if accompanied by a properly executed certificate of mailing under § 1.8, or certificate of Express Mail under § 1.10, whichever occurs earlier.

The term "counterpart foreign patent application" means that a claim for priority has been made in either the U.S. application or a foreign application based on the other, or that the disclosures of the U.S. and foreign patent application are substantively identical. Although paragraph (g) does not require a fee if the information disclosure statement is submitted within certain time periods, this is not intended to modify the requirement in paragraph (f) of this section that a statement must be filed before the final action or notice of allowance is mailed.

Certification by a registered practitioner that the statement was filed within the three-month period of either first citation by a foreign patent office or first discovery of the information (not the materiality of the information) will be accepted as dispositive of compliance with this provision in the absence of evidence to the contrary. A statement on information and belief normally will not be sufficient. Although it is recognized that an individual actually becomes aware of the information in the communication from the foreign patent office sometime after it was mailed, the mailing date of such a communication, if it occurs prior to the first awareness of the same information, would determine the date for filing of an information disclosure statement without a fee. The Office is willing to absorb any additional cost in considering such information submitted three months after filing the application only when it is clear that an applicant is diligent in providing the information to the Office.

Under proposed § 1.97(h), an information disclosure statement would not be considered to be filed until all component parts of a complete statement under proposed § 1.98 are filed with the Office, except for inadvertent omissions. Thus, the filing of a statement identifying relevant documents but intentionally failing to supply available copies of all the cited documents will not be accepted until such copies are supplied. Paragraph (h) also sets forth the consequences and procedures for processing an information disclosure statement that is either not complete and/or not filed in a timely manner. Such a statement will not be deemed to satisfy any applicable duty of disclosure owed to the Office by an individual designated in proposed § 1.57(a) but will be returned to the applicant and not considered by the Office in that application. If the required fee was submitted, it will be refunded. The Office will note in the record of the application that an information disclosure statement was returned to the applicant. It is expected that an applicant will file a continuing application to have the Office consider pertinent prior art which comes to his or her attention after final action or notice of allowance has been mailed if the prior art affects the patentability of any claim.

Under the proposed revision of § 1.98, the administrative details of supplying information to the Office are defined. For the most part, these details remain unchanged from current practice, but the format and wording has been modified to provide greater clarity. Under proposed § 1.98(a), the information disclosure statement must include a listing of the information required to be disclosed by § 1.97, preferably in or on a form which is suitable for inclusion in the record without requiring the examiner to reproduce the same information on a form acceptable to the printer so that the documents will be listed on the patent. Those submitting an information disclosure statement are encouraged to use form PTO-1449, "Information Disclosure Citation." In addition to the listing, the statement must include an explanation of the reason each item of information is listed. Typically, the reason would include a concise explanation of the relevance of each item to the claimed invention, but may further contain an explanation of why the claimed invention should be considered patentable over the item of information.

Proposed § 1.98(b) would continue the present practice and policy of requiring an individual to submit a legible copy of the document or other information cited in the information disclosure statement either in its entirety or at least that portion of each item of information which caused the individual submitting the information to list that item in the information disclosure statement. If a copy of the document or item of information is not in the possession, custody, control or is not otherwise readily available to any individual designated in proposed § 1.57(a), the individual submitting the statement must submit a statement to that effect at the time of presenting the statement to the Office. It is not expected that the latter situation will arise very often, but because of the time deadlines involved in filing an information disclosure statement, it is considered appropriate to provide this flexibility for individuals charged with the duty to bring information to the attention of the Office. The Office will not, however, assume the responsibility of obtaining a copy of that item of information before making a final determination of patentability.

Copies of pending U.S. patent applications cited in the information disclosure statement should not be submitted to the Office as set forth in proposed § 1.98(b)(1)(III) because this may result in the unnecessary disclosure of the contents of such patent applications when the application in which it was cited matures into a patent.

Proposed § 1.98(c) continues the present practice and policy regarding the identifying information to be listed for each document typically cited in an information disclosure statement. Listing of the patentees or authors in a patent or publication may be limited to the last name of the first listed inventor followed by "*et al.*"

Proposed § 1.98(d) continues the present practice and policy relative to citing and supplying information which is cumulative and relative to supplying a translation of information that is not in the English language. Under this proposed section, if any of the information required to be disclosed is substantially cumulative in terms of its content relative to the patentability of the claims, the statement need be accompanied by only a single copy of a document containing the essential information provided that the omission of the copies of the cumulative information is explained.

In addition, an English language translation of a foreign language document or the relevant portion thereof need only be submitted when it is in the possession, custody or control of, or readily available to any individual designated in proposed § 1.57(a). This does not mean that such an individual must purchase a translation in each case, even though a translating service is readily available. But if the individual has the ability to translate the foreign language into English and has done so for the purposes of reviewing the information relative to the claimed invention, the translation would be considered "readily available" to the individual.

Section 1.175(a)(7) is proposed to be revised to reflect that § 1.56 is being replaced by § 1.57. Any reissue oath acknowledging a duty to disclose information, which is material to the examination of the application in accordance with the present § 1.56(a), would be acceptable under the proposed rules as explained in connection with the proposed change to § 1.63 (b) and (d).

Section 1.193(c) is proposed to be deleted and reserved, reflecting the intention of the Office not to comment on duty of disclosure issues in an original or reissue application except in very limited circumstances related to deceptive intent in a reissue application.

Section 1.291(a) is proposed to be revised to eliminate consideration in a protest of an allegation about duty of disclosure issues. Since the Office will not be investigating these issues, such a protest will merely be placed in the application file without comment. Further, protests which do not adequately identify a pending application will be disposed of because the Office cannot act on such protests.

Section 1.291(c) is proposed to be revised to remove the reference to § 1.56. As explained above, there would be no need to require information in a protest with respect to an issue of duty of disclosure.

Section 1.313(b) is proposed to be revised to include, as a reason for withdrawing an application from issue after the issue fee has been paid, a request by an applicant to consider information which has not been filed in a timely manner. Accordingly, since the Office will not consider information which is untimely filed in an application, it is necessary to provide a mechanism to permit an applicant to withdraw an application from issue in the event that it is desired to have the Office consider information that has come to the attention of an individual specified in proposed § 1.57(a) after the mailing of the final Office action or the notice of allowance. This mechanism is also available to those who belatedly decide to bring the information to the attention of the Office before the patent issues. The Office wishes to provide every reasonable opportunity for an individual to avoid the consequences of misconduct in the Office.

Section 1.555 is proposed to be revised to conform with the duty of disclosure contained in new § 1.57 and to require that an information disclosure statement be filed within certain time periods. Under proposed § 1.555(a), there would be no fee if the statement is filed within two months of the date of the order for reexamination pursuant to § 1.525. An information disclosure statement limited to information not of record as of the date of the order for reexamination will not be considered to be a patent owner's statement pursuant to § 1.530.

Under proposed § 1.555(b), a statement may be filed after the two months if accompanied by a fee in certain circumstances and if filed prior to the mailing of a notice of intent to issue a reexamination certificate. A fee would be due unless it is certified that all of the information disclosed in such a statement was, within two months prior to the date the statement is filed in the Office, either first cited by a foreign patent office in a counterpart foreign patent application or first came to the attention of any person charged with the duty of disclosure in § 1.57(a) if the same information was not earlier cited by a foreign patent office in a counterpart foreign application.

As stated with respect to proposed § 1.97(g), the date on the action by the foreign patent office begins the two-month period and the filing date of the statement is the date the statement is received in the Office, or the date of mailing if accompanied by a properly executed certificate of mailing under § 1.8, or certificate of Express Mail under § 1.10, whichever is earlier. Extensions of time to file an information disclosure statement under either paragraph will not be permitted because 35 U.S.C. 305 requires that reexamination proceedings be conducted with special dispatch and because such a provision would defeat the purpose of the fee to pay for the added costs of examination.

The duty of disclosure is not violated in a reexamination proceeding unless a claim either confirmed or allowed in a reexamination certificate would be rendered unpatentable by withheld information known at the time of the mailing of the notice of intent to issue a reexamination certificate.

Relevant prior art discovered after the mailing of the notice of intent would not be considered in the pending reexamination proceeding. Therefore, the patent owner may wish to file a new request for reexamination under 35 U.S.C. 302 to have the new information considered on the merits. An information disclosure statement filed in a reexamination proceeding must be made in accordance with the form and content specified in proposed § 1.98.

Subparagraph 10 of § 10.23(c) is proposed to be revised to reflect that § 1.56 is proposed to be replaced by proposed § 1.57 and to add a reference to the duty of disclosure requirement in a reexamination set forth in § 1.555. The proposed change in the duty of disclosure will, of course, have an impact on any disciplinary action charging a practitioner with a violation of that duty.

Subparagraph 11 of § 10.23(c) is proposed to be revised to reflect the change that § 1.56(c) is proposed to be deleted. Although applications having defects in their execution will no longer be stricken, the Office desires to continue to discourage practitioners from permitting alterations in the application papers after the oath or declaration is signed as prohibited by § 1.52(c), especially if such alterations are material.

Mere editing, such as correcting misspellings, would not be considered to involve material changes. Nor would the insertion of filing or patent information of a parent or related application. However, adding to or deleting from the application matters of substance, such as a working example or a claim, would be considered to be a material change.

Other Considerations

The proposed rule change is in conformity with the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, Executive Orders 12291 and 12612, and the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

The General Counsel of the Department of Commerce has certified to the Small Business Administration that the rule change will not have a significant adverse economic impact on a substantial number of small entities (Regulatory Flexibility Act, 5 U.S.C. 605(b)) because the proposed rules do not require individuals to submit information that they are not already under an obligation to provide to the Office. The proposed rules further promote the efficiency of the examination process by requiring a timely submission of an information disclosure statement and eliminating rejections based on inequitable conduct, thereby reducing the costs to all patent applicants.

The Patent and Trademark Office has determined that this proposed rule change is not a major rule under Executive Order 12291. The annual effect on the economy will be less than $100 million. There will be no major increase in costs or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions. There will be no significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Patent and Trademark Office has also determined that this proposed rule has no Federalism implications affecting the relationship between the National Government and the States as outlined in Executive Order 12612.

This proposed rule contains a collection of information requirement subject to the Paperwork Reduction Act, which has previously been approved by the Office of Management and Budget under Control No. 0651-0011. Each information disclosure statement is estimated to take approximately 30 minutes, including time for reviewing instructions, gathering and maintaining data needed and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Patent and Trademark Office, Office of Management and Organization and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington DC 20503. (Attention Paper Reduction Project 0651-0011)

List of Subjects

37 CFR Part 1

Administrative practice and procedure, Inventions and patents, Reporting and record keeping requirements, Small businesses.

37 CFR Part 10

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and record keeping requirements.

For the reasons set forth in the preamble, 37 CFR Parts 1 and 10 are proposed to be amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

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

Authority: 35 U.S.C. 6, unless otherwise noted.

2. In § 1.17, paragraph (p) is proposed to be added to read as follows:

§ 1.17 Patent Application Processing Fees.

* * * * *

(p) For filing an information disclosure statement under §§ 1.97 (f) and (g) and 1.555(b) * * * 200.00.

3. Section 1.28(d)(2) is proposed to be revised to read as follows:

§ 1.28 Effect on fees of failure to establish status, or change status, as a small entity.

* * * * *

(d)(1) * * *

(2) Improperly and through gross negligence (i) establishing status as a small entity or (ii) paying fees as a small entity shall be considered as a fraud practiced or attempted on the Office.

4. Section 1.52(c) is proposed to be revised to read as follows:

§ 1.52 Language, paper, writing margins.

* * * * *

(c) Any interlineation, erasure, cancellation or other alteration of the application papers filed must be made before the signing of any accompanying oath or declaration pursuant to § 1.63 referring to those application papers and should be dated and initialed or signed by the applicant on the same sheet of paper. No such alterations in the application papers are permissible after the signing of an oath or declaration referring to those application papers. After the signing of the oath or declaration referring to the application papers, amendments may only be made in the manner provided by §§ 1.121 and 1.123 through 1.125.

* * * * *

5. Section 1.56 is proposed to be removed and reserved.

§ 1.56 [Reserved]

6. Section 1.57 is proposed to be added to read as follows:

§ 1.57 Duty of disclosure.

(a) A duty of candor and good faith toward the Office rests on the following individuals:

(1) Any named inventor who signs the oath required by 35 U.S.C. 115;

(2) Any non-inventor who signs the oath required by the last sentence of 35 U.S.C. 115 in an application filed under 35 U.S.C. 117 and 35 U.S.C. 118;

(3) Each registered attorney or agent who prepares or prosecutes the application; and

(4) Every other individual who is:

(i) Substantively involved in the preparation or prosecution of the application; and

(ii) Associated with the inventor, an assignee, or any entity to whom there is an obligation to assign the application or any patent issuing thereon.

(b) Any individual designated in paragraph (a) of this section has a duty to disclose to the Office all information not considered by the Office to be of record in an application, which that individual knows or should have known would render unpatentable any pending claim. This duty continues with respect to the pending claim until it is canceled or the application becomes abandoned at which time the duty ceases. Thus, the duty is violated only if a patent issues with a claim which would be rendered unpatentable by the withheld information when all the facts of record in the patent file and known to the individuals designated in paragraph (a) of this section at the time the patent issues are considered. The manner for submitting the required information to the Office is provided in §§ 1.97 and 1.98. Disclosure to a person designated in paragraphs (a)(1), (a)(2), or (a)(3) of this section by an individual designated in paragraph (a)(4) of this section shall satisfy the duty as to that individual.

(c) No evaluation as to compliance with this section will be made by the Office except as provided below:

(1) In a reissue application where the Office is presented with clear and convincing evidence of deceptive intent in obtaining a patent, such as a judicial determination of fraud or inequitable conduct or an admission of facts conclusively establishing fraud or inequitable conduct without conducting an investigation; or

(2) In a disciplinary proceeding against a practitioner under Part 10.

(d) Failure of a registered patent attorney or agent to comply with the duty of candor and good faith may be cause for instituting disciplinary action under § 10.131 for misconduct. *See also* § 10.23(c)(10).

7. In § 1.63 paragraphs (a)(1), (b)(3), and (d) are proposed to be revised to read as follows:

§ 1.63 Oath or declaration.

(a) * * *

(1) Be signed, dated and executed in accordance with §§ 1.64 and 1.66 or 1.68;

* * * * *

(b) * * *

(3) Acknowledges the duty to disclose information in accordance with § 1.57.

* * * * *

(d) In any continuation-in-part application filed under the conditions specified in 35 U.S.C. 120 which discloses and claims subject matter in addition to that disclosed in the prior copending application, the oath or declaration must also state that the person making the oath or declaration acknowledges the duty to disclose information in accordance with § 1.57 which occurred between the filing date of the prior application and the national or PCT international filing date of the continuation-in-part application.

8. Section 1.67 is proposed to be amended to add paragraph (c) to read as follows:

§ 1.67 Supplemental oath or declaration.

* * * * *

(c) A supplemental oath or declaration meeting the requirements of § 1.63 must also be filed if the application was altered after the oath or declaration was signed or if the oath or declaration was signed:

(1) In blank;

(2) Without review thereof by the person making the oath or declaration; or

(3) Without review of the specification, including the claims, as required by § 1.63(b).

9. Section 1.97 is proposed to be revised to read as follows:

§ 1.97 Filing of information disclosure statement.

(a) An information disclosure statement shall be filed within the time periods set forth in this section in each:

(1) National patent application; and

(2) PCT-based national stage application to disclose all information which any individual charged with the duty of disclosure in § 1.57(a) knows or should have known renders unpatentable any claim pending in the application at the time the information disclosure statement is filed. If there is no such information, an information disclosure statement is not required.

(b) An information disclosure statement may also disclose other information which an applicant would like the Office to consider in examining the application.

(c) An information disclosure statement may be filed without a fee in a national patent application within 3 months of the filing date of the application. In a PCT-based national stage application, the statement may be filed without a fee within 3 months of entry of the national stage application under § 1.491. No extensions of time are permitted under § 1.136 except that if a *bona fide* attempt has been made to comply with § 1.98 but part of the required information was inadvertently omitted, additional time may be given to enable full compliance.

(d) Any information disclosure statement filed under this section may be:

(1) Filed in a paper separate from the specification of the application; or

(2) Incorporated in the specification.

(e) Unless an information disclosure statement contains an admission within the meaning of § 1.106(c), the filing of an information disclosure statement shall not constitute an admission that any information disclosed renders unpatentable any claim pending in the application. Nor shall the mere filing be construed as a representation that a patentability search has been made.

(f) If, after the time for submitting an information disclosure statement under paragraph (c) of this section has expired, there is information not of record which is required to be disclosed under § 1.57(b), a statement shall be timely filed in the form required by § 1.98. The statement may also include other information which the applicant would like to have considered. Any statement filed under this paragraph will be deemed timely only if it is filed prior to the mailing of an examiner's final action under § 1.113 or of a notice of allowance under § 1.311, whichever occurs first. No extensions of time are permitted under § 1.136 except that if a *bona fide* attempt has been made to comply with § 1.98 but part of the required information was inadvertently omitted, additional time may be given to enable full compliance.

(g) The information disclosure statement under paragraph(f) of this section shall be accompanied by the fee set forth in § 1.17(p) unless the statement certifies that, within 3 months prior to the date the statement is filed in the Office, the date of either one of the following events occurred:

(1) The mailing of a communication from a foreign patent office in a counterpart foreign patent application first citing all the patents, publications, and other material disclosed in the statement; or

(2) The first knowledge by any person charged with the duty of disclosure in § 1.57(a) of all the patents, publications, and other material disclosed in the statement if they were not cited earlier by a foreign patent office in a counterpart foreign patent application.

(h) Any information disclosure statement which does not comply with § 1.98 except for inadvertent omissions considered under paragraphs (c) and (f) of this section or any statement which is not timely filed as required by this section, will be:

(1) Deemed not to satisfy any applicable duty of disclosure owed under § 1.57 if a patent subsequently issues;

(2) Returned to the applicant; and

(3) Considered only if:

(i) The application is abandoned, and

(ii) The information is disclosed in an information disclosure statement timely filed in a continuing application.

10. Section 1.98 is proposed to be revised to read as follows:

§ 1.98 Content of information disclosure statement.

(a) The information disclosure statement shall include:

(1) A list of all the patents, publications, or other material required or permitted to be disclosed under § 1.97 (a), (b), and (f); and

(2) A concise explanation of why each patent, publication, or other material is listed.

(b) The information disclosure statement shall be accompanied by:

(1) A legible copy of:

(i) Each U.S. Patent;

(ii) Each publication or foreign patent or that portion of which caused it to be listed; and

(iii) All other material, except patent application files, or that portion of which caused it to be listed; or

(2) A statement that a copy is not in the possession, custody, or control or is

not readily available to any individual designated in § 1.57(a).

(c) Each U.S. patent listed in an information disclosure statement shall be identified by patentee(s), patent number and issue date. Any foreign patent or published foreign patent application shall be identified by the country or patent office which issued the patent or published the application, an appropriate document number, and a publication date indicated on the patent or published application. Each publication shall be identified by author(s), if any, title of publication, relevant pages of the publication, date and place of publication.

(d) When the disclosures of two or more patents or publications required to be reported in an information disclosure statement are substantively cumulative, a single copy of one patent or publication may be submitted and the other patents or publications merely listed in the statement provided that an explanation is included about the omission of the copies of the cumulative information. If an English language translation of a foreign language document, or portion thereof, is within the possession, custody or control of, or is readily available to any individual designated in § 1.57(a), a copy of the translation shall accompany the statement.

[OMB Control No. 0651-0011]

11. Section 1.99 is proposed to be removed and reserved.

§ 1.99 [Reserved]

12. Section 1.175(a)(7) is proposed to be revised to read as follows:

§ 1.175 Reissue oath or declaration.

(a) * * *

(7) Acknowledging a duty to disclose information in accordance with § 1.57.

* * * * *

13. Section 1.193(c) is proposed to be removed and reserved:

§ 1.193 Examiner's answer.

* * * * *

(c) [Reserved]

14. Section 1.291 (a) and (c) are proposed to be revised to read as follows:

§ 1.291 Protests by the public against pending applications.

(a) Protests by a member of the public against pending applications will be referred to the examiner having charge of the subject matter involved. A protest specifically identifying the application to which the protest is directed will be entered in the application file if (1) the protest is timely submitted; and (2) the protest is either served upon the applicant in accordance with § 1.248, or filed with the Office in duplicate in the event service is not possible. Protests raising duty of disclosure issues will be placed in the application file without comment on these issues. Further, protests which do not adequately identify a pending patent application will not be considered by the Office but will be disposed of.

* * * * *

(c) An acknowledgment of the entry of a protest under paragraph (a) of this section in a reissue application file will be sent to the member of the public filing the protest. A member of the public filing a protest under paragraph (a) of this section in an application for an original patent will not receive any communications from the Office relating to the protest, other than the return of a self-addressed postcard which the member of the public may include with the protest in order to receive an acknowledgment by the Office that the protest has been received. The Office will communicate with the applicant regarding any protest entered in the application file and may require the applicant to supply information, including responses to specific questions raised by the protest, in order for the Office to decide any issues raised by the protest. The active participation of the member of the public filing a protest pursuant to paragraph (a) of this section ends with the filing of the protest and no further submission on behalf of the protestor will be acknowledged or considered unless such submission raises new issues which could not have been earlier presented, and thereby constitutes a new protest.

15. Section 1.313(b) is proposed to be revised to read as follows:

§ 1.313 Withdrawal from issue.

* * * * *

(b) When the issue fee has been paid, and the patent to be issued has received its issue date and patent number, the application will not be withdrawn from issue for any reason except (1) a mistake on the part of the Office; (2) an illegality in the application; (3) unpatentability of one or more claims; or (4) consideration of identified information under § 1.57 in a continuing application.

16. Section 1.555 is proposed to be revised to read as follows:

§ 1.555 Duty of disclosure in reexamination proceedings.

(a) The duty of candor and good faith owed to the Office in a reexamination proceeding is the same as that provided in § 1.57, but the duty is not violated unless a claim either confirmed or allowed in a reexamination certificate would be rendered unpatentable by the withheld information known at the time a notice of intent to issue a reexamination certificate under § 1.570 is mailed. Any information disclosure statement bringing patents or printed publications to the attention of the Office shall be in the form required by § 1.98 and may be filed without a fee within two months of the date of the order for reexamination under § 1.525. An information disclosure statement limited to information not of record as of the date of the order for reexamination will not be considered to be a patent owner's statement pursuant to § 1.530.

(b) Upon payment of the fee set forth in § 1.17(p), an information disclosure statement may be filed after two months from the date of the order for reexamination but no later than the mailing of the intent to issue a reexamination certificate. The fee in § 1.17(p) will not be required if the statement certifies that, within two months prior to the date the statement is filed in the Office, the date of either one of the following events occurred:

(1) The mailing of a communication from a foreign patent office in a counterpart foreign patent application first citing all the patents, publications, and other material disclosed in the statement; or

(2) The first knowledge by any person charged with the duty of disclosure in § 1.57(a) of all the patents, publications, and other material disclosed in the statement if they were not cited earlier by a foreign patent office in a counterpart foreign patent application.

(c) No extensions of time are permitted under either paragraph (a) or (b) of this section except that, if a *bona fide* attempt has been made to comply with § 1.98 but part of the required information was inadvertently omitted, additional time may be given to enable full compliance.

PART 10—REPRESENTATION OF OTHERS BEFORE THE PATENT AND TRADEMARK OFFICE

17. The authority citation for Part 10 continues to read as follows:

Authority: 5 U.S.C. 500; 15 U.S.C. 1123; 35 U.S.C. 6, 31, 32, 41.

18. Section 10.23(c), paragraphs (10) and (11) are proposed to be revised to read as follows:

§ 10.23 Misconduct.

* * * * *

(c) * * *

(10) Violating the duty of candor or good faith requirements of § 1.57 (a) and (b) and § 1.555(a) of this subchapter.

(11) Knowingly filing, or causing to be filed, an application containing any material alteration made in the application papers after the signing of the accompanying oath or declaration.

* * * * *

Date: February 2, 1989.

Donald J. Quigg,

Assistant Secretary and Commissioner of Patents and Trademarks.

[FR Doc. 89-6223 Filed 3-16-89; 8:45 am]

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Friday
March 17, 1989

Part IV

Environmental Protection Agency

40 CFR Part 471

Nonferrous Metals Forming and Metal Powders Point Source Category Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Part 471]

[OW-FRL-3491-2]

Nonferrous Metals Forming and Metal Powders Point Source Category Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final regulation.

SUMMARY: EPA is promulgating amendments to 40 CFR Part 471 which limits discharges to waters of the United States and the introduction of pollutants into publicly owned treatment works by existing and new sources in the nonferrous metals forming and metals powders point source category. Today's amendments only affect facilities that conduct tube reducing operations in the nickel-cobalt forming subcategory (Subpart C) and in the zirconium-hafnium forming subcategory (Subpart I). EPA agreed to propose these amendments in a settlement agreement with General Electric Company and INCO Alloys International. The agreement settles a dispute between these companies and EPA that was the subject of petitions for review of the final nonferrous metals forming regulation promulgated by EPA on August 23, 1985 (50 FR 34242). The proposed amendments were published in the **Federal Register** on July 11, 1988, (53 FR 21774). EPA is today finalizing the amendments as proposed, except for corrections of typographical errors.

The final amendments include: (1) Certain modifications of the effluent limitations for "best practicable technology" (BPT), "best available technology economically achievable" (BAT), and "new source performance standards" (NSPS) for direct dischargers; and (2) certain modifications to the pretreatment standards for new and existing indirect dischargers (PSNS and PSES).

ADDRESS: Address questions to Mr. George M. Jett, Industrial Technology Division (WH-552), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Attention: Attention Nonferrous Metals Forming Rule (WH-552).

The basis for this amendment is detailed in the record. The record for the fnal rule will be available for inspection and copying at the EPA Public Information Reference Unit, Room 2404 (Rear) (EPA Library) 401 M Street, SW., Washington, DC. The EPA information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Questions regarding this notice may be addressed to Mr. Ernst P. Hall at (202) 382-7126.

SUPPLEMENTARY INFORMATION:

Organization of this notice:

I. Legal Authority

The amendments described in this notice are promulgated under authority of sections 301, 304, 306, 307, 308, and 501 of the Clean Water Act (the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 et seq., as amended by the Clean Water Act of 1977, Pub. L. 95-217 as amended by the Water Quality Act of 1987 Pub. L. 100-4.).

II. Background

A. Rulemaking

On March 5, 1984, EPA proposed a regulation to establish Best Practicable Control Technology Currently Available (BPT) and Best Available Technology Economically Achievable (BAT) effluent limitations guidelines, New Source Performance Standards (NSPS), Pretreatment Standards for Existing Sources (PSES), and Pretreatment Standards for New Sources (PSNS) for the nonferrous metals forming and metal powders (nonferrous metals forming) point source category (49 FR 8112). The final regulation for the nonferrous metals forming point source category was promulgated on August 23, 1985 (50 FR 34242) and established effluent limitations guidelines and standards to control specific toxic, nonconventional and conventional pollutants for ten subcategories in the nonferrous metals forming and metal powders point source category. Only two of these subcategories, the nickel-cobalt forming subcategory (Subpart C) and the zirconium-hafnium forming subcategory (Subpart I), are affected by today's promulgation.

The subcategories are comprised of various elements or building blocks which are used to calculate the final effluent limits for each discharger. Today's promulgation only affects the tube reducing building blocks in subparts C and I. Tube reducing is a forming operation which may combine amines and nitrates or nitrites in the coolant-lubricant with the high energy input of the process to generate nitrosamine compounds in the wastewater discharge. In sampling conducted by the Agency, nitrosamines have been found in tube reducing process wastewaters. Accordingly, in the final regulation the Agency required that there be no discharge of process wastewater pollutants from tube reducing operations in Subparts C and I. The Agency costed contract hauling as the model treatment technology for these subcategories.

B. Settlement Agreement for Nonferrous Metals Forming

After publication of the nonferrous metals forming regulation, Inco Alloys International, General Electric Co., Oregon Metallurgical Corporation, Teledyne WaChang, AMAX Inc. and Westinghouse Corp. filed petitions for review of the regulation.

Oregon Metallurgical Corp., Westinghouse and Teledyne WaChang subsequently dismissed their petitions for review of the regulation. AMAX Inc. entered into a settlement agreement with EPA on June 29, 1987. That agreement is not the subject of this promulgation. The two remaining petitioners, INCO Alloys International and General Electric Company entered into a settlement agreement with the Agency on November 5, 1986, which resolved all issues raised by these petitioners. That agreement, which is the subject of this rulemaking, only affects the nickel-cobalt forming subcategory (Subpart C) and the zirconium-hafnium forming subcategory (Subpart I). Copies of the Settlement Agreement have been sent to all EPA Regional Offices and to applicable State permitting authorities.

As part of this Settlement Agreement, on November 5, 1986 the parties jointly requested the United States Court of Appeals for the Sixth Circuit to stay the effectiveness of those portions of 40 CFR Part 471 which EPA proposed to amend, pending final action by EPA on the proposed amendments. On February 17, 1987, the Court entered an order staying the following sections of the regulation promulgated on August 23, 1985: 40 CFR 471.31(d); 471.32(d); 471.33(d); 471.34(d); 471.35(d); 471.91(g); 471.92(g); 471.93(g); 471.94(g); and 471.95(g). All limitations and standards contained in the final nonferrous metals forming regulation published on August 23, 1985, which are not specifically listed in today's amendments are not affected by today's rulemaking and are unchanged.

The Agency proposed the amendments based on the settlement agreement on July 11, 1988, (53 FR 21774). EPA is now finalizing those amendments as proposed (except typographical corrections). Under the settlement agreement, the petitioners have the obligation to seek voluntary dismissal of their petitions for review. The petitioners have also agreed not to seek judicial review of any of these amendments as they are consistent with the Settlement Agreement.

III. Amendments to the Nonferrous Metals Forming and Metal Powders Regulation

The regulation promulgated in 1985 stated that there shall be no discharge of process wastewater pollutants from tube reducing spent lubricants. Because EPA found a nitrosamine compound (N-nitrosodiphenylamine) in a sample taken from a tube reducing spent lubricant used at one facility at a concentration of 28.2 mg/1, EPA established a zero discharge requirement to prevent the release of nitrosamine compounds into the environment from tube reducing spent lubricant wastewater. GE and Inco expressed concern that this regulation would require contract hauling of the process waste stream even in cases where there are no measurable amounts of nitrosamines. EPA is amending the regulation to allow the discharge of tube reducing spent lubricant in the nickel-cobalt and zirconium-hafnium forming subcategories, as an alternative limitation, provided that the spent lubricant process wastewater is analyzed once per month and found not to contain concentrations of three nitrosamines in excess of the method detection limits established for EPA's approved test method 1625 (40 CFR Part 136). These nitrosamines and corresponding limits of 0.050 mg/1 of N-nitrosodimethylamine, 0.020 mg/1 of N/nitrosodiphenylamine, and 0.020 mg/1 of N-nitrosodi-n-propylamine. These three nitrosamines are members of the family of nitrosamine compounds that are referenced in Section 307(a) of the Clean Water Act of 1977. The Agency believes that demonstrating the presence or absence of these three nitrosamine compounds should indicate the presence or absence of the other nitrosamine compounds because they all are formed from the same precursors, i.e., nitrates or nitrites and amines. If, after six months of sampling, none of the samples of the tube reducing lubricant wastewater is found to contain nitrosamines above the concentrations stated above, the frequency of sampling may be reduced to once per quarter. Under the alternative limitation there is no mass allowance for any pollutant discharged.

Nitrosamines can be formed in the presence of precursors under the conditions created by the tube reducing process. If nitrosamines are found in tube reducing spent lubricant, the best method to remove them is to change the tube reducing lubricant to a new formulation in which the precursors are not present; if the precursors are absent, then nitrosamines are not likely to be formed. The Agency believes this control method is technically feasible and should not result in any economic impact beyond that expected under the original regulation. The cost of the new tube reducing lubricant should not be significantly more than the cost of the old tube reducing lubricant. In any case, the facility retains the option of complying with the current regulation (i.e., no discharge of process wastewater pollutants), which as stated earlier, is based on contract hauling. EPA determined that this technology was economically achievable during the initial nonferrous metals forming rulemaking. For all these reasons, EPA finds that this amendment is economically achievable. This alternative limitation should result in similar effluent reduction benefits as the previously promulgated limitation because plants will be prevented from discharging measurable amounts of nitrosamines. The amendment has the additional advantage of creating an incentive to avoid the formation of nitrosamine compounds in the tube reducing process. All other relevant findings made in the original rulemaking are incorporated by reference into this amendment.

Subparagraph (5) of the amendment specifies that the concentration limits for the three nitrosamine compounds listed in subparagraph (2) apply at the point of discharge from the tube reducing process. This provision is intended to make clear that the discharge limits of subparagraph (2), which are expressed in terms of concentration, are not to be met merely by means of dilution. It does not mean, however, that the wastewater must be *sampled* at the point of discharge from the tube reducing process. Nor does it imply that the wastewater must be sampled before being treated or commingled with other wastewater.

To the contrary, because of difficulties in analyzing for nitrosamines at very low concentration levels in an oily matrix, it may very well be necessary to treat the tube reducing spent lubricant wastewater before sampling to determine compliance with subparagraph (2). And, in order to treat the wastewater in an economical manner, it may very well be necessary to commingle it with other wastewater before treatment. Subparagraph (5) allows commingling or treatment of the tube reducing spent lubricant wastewater before sampling. However, if commingling occurs before sampling, any dilution caused by the other wastewater must be taken into account in determining compliance with the concentration limits of subparagraph (2). This would mean that the concentrations of the three nitrosamine compounds in the commingled wastewater would have to be sufficiently lower than the discharge concentrations specified in subparagraph (2), so that, after back-calculating to account for the dilution, it can be determined that the concentrations of the three nitrosamine compounds at the point of discharge from the tube reducing process did not exceed the concentration limits set forth in subparagraph (2). Subparagraph (5) provides that, where sampling occurs after commingling, the analytical method used must be sensitive enough to measure the three nitrosamine compounds at levels sufficiently low as to permit a back-calculation to account for the dilution.

IV. Environmental Impact of the Amendments to the Nonferrous Metals Forming Regulation

The amendment described above may affect 58 facilities in the nickel-cobalt forming and zirconim-hafnium forming subcategories. Under this amendment, tube-reducing operations would be allowed to discharge wastewater under controlled conditions but would not be allowed to increase that mass of pollutants allowed to be discharged by the August 1985 regulation. Therefore, this regulation should not have any significant environmental impact.

V. Economic Impact of the Amendments

The amendments do not alter the model technologies for complying with the nonferrous metals forming regulation. The Agency considered the economic impact of the regulation when the final regulation was promulgated (see 50 FR 34242). EPA concluded at that time that the regulation was economically achievable. Because today's amendments are based on the same model technologies, EPA's conclusions as to economic impact and achievability are unaffected.

VI. Public Participation and Response to Major Comments

Since proposal of these amendments two commenters have submitted comments on the proposal. These commenters are: General Electric Company and Inco International Alloys. The most significant of these comments are summarized below:

1. Both commenters generally supported the amendments proposed by the Agency and recommended that these amendments be promulgated.

2. Both commenters pointed out typographical errors in the proposal. The Agency has made these corrections.

VII. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. Major rules are defined as rules that impose an annual cost to the economy of $100 million or more, or meet other economic criteria. This proposed regulation, which modestly reduces regulatory requirements, is not a major rule.

VIII. Regulatory Flexibility Analysis

Pub. L. 96–354 requires that EPA prepare a Regulatory Flexibility Analysis for regulations that have a significant impact on a substantial number of small entities. In the preamble to the August 23, 1985 final nonferrous metals forming regulation, the Agency concluded that there would not be a significant impact on a substantial number of small entities (49 FR 8775). for the reason, the Agency determined that a formal regulatory flexibility analysis was not required. That conclusion is equally applicable to these amendments, because the amendments slightly reduce the regulatory requirements.

IX. OMB Review

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291. Any comments from OMB to EPA and any EPA response to those comments are available for public inspection at Room M2404, U.S. EPA, 401 M Street SW., Washington, DC 20460 from 9:00 a.m. to 4:00 p.m. Monday through Friday, excluding Federal holidays.

List of Subjects in 40 CFR Part 471

Metals, nonferrous metals forming, water pollution control, waste treatment and disposal.

Dated: March 9, 1989.

William K. Reilly,

Administrator.

For the reasons set out in the preamble EPA amends Title 40 CFR Part 471 as follows:

PART 471—NONFERROUS METALS FORMING AND METAL POWDERS POINT SOURCE CATEGORY

1. The authority citation for Part 471 continues to read as follows:

Authority: Secs. 301, 304 (b), (c), (e), and (g), 306 (b) and (c), 307, 308, and 501 of the Clean Water Act (the Federal Water Pollution Control Act Amendment of 1972, as amended by the Clean Water Act of 1977) (the "Act") 33 U.S.C. 1311, 1314 (b), (c), (e), and (g), 1316 (b) and (c), and 1361; 86 Stat. 816, Pub. L. 92–500; 91 Stat. 1567, Pub. L. 95–217.

§ 471.31 [Amended]

2. Section 471.31 is amended by revising paragraph (d) to read as follows:

* * * * *

(d) Tube Reducing Spent Lubricant—Subpart C—BPT.

(1) There shall be no discharge of process wastewater pollutants except as provided under paragraph (d)(2) of this section.

(2) Process wastewater pollutants may be discharged, with no allowance for any pollutants discharged, provided the facility owner or operator demonstrates, on the basis of analytical methods set forth in or approved pursuant to 40 CFR Part 136, that the concentrations of nitrosamine compounds in the wastewater discharged from the tube reducing process do not exceed 0.050 mg/l of N-nitrosodimethylamine, 0.020 mg/l of N-nitrosodiphenylamine, and 0.020 mg/l of N-nitrosodi-n-propylamine.

(3) The demonstration required under paragraph (d)(2) of this section shall be made once per month until the demonstration has been made for all three nitrosamine compounds for six consecutive months, after which time the demonstration may be made once per quarter. If a sample is found to contain any of the foregoing nitrosamine compounds at concentrations greater than those specified in paragraph (d)(2) of this section, the actions described in paragraph (d)(4) of this section shall be taken, and the demonstration required under paragraph (d)(2) of this section shall be made once per month until it has been made for all three nitrosamine compounds for six consecutive months.

(4) If sampling results show that any of the foregoing nitrosamine compounds is present in the process wastewater at concentrations greater than those specified in paragraph (d)(2) of this section, the facility owner or operator shall ensure that, within thirty days of receiving written notification of the sampling results, there is no further discharge of tube reducing spent lubricant wastewater until the owner or operator:

(i) Performs a subsequent analysis which demonstrates that the concentrations of the foregoing nitrosamine compounds do not exceed the levels specified in paragraph (d)(2) of this section; or

(ii) Substitutes a new tube reducing lubricant and thereafter complies with the requirements of paragraph (d)(3) of this section; or

(iii) Determines the source of the pollutant whose concentration exceeded the level specified in paragraph (d)(2) of this section and demonstrates to the satisfaction of the NPDES issuing authority that such source has been eliminated.

(5) The concentration limits specified in paragraph (d)(2) of this section apply at the point of discharge from the tube reducing process. However, sampling after the tube reducing wastewater has been commingled with other wastewaters is permitted if:

(i) Any dilution caused by the other wastewaters is taken into account in determining the appropriate (i.e., lower) allowable discharge concentration; and

(ii) An analytical method of sufficient sensitivity is used to measure the levels of each of the foregoing nitrosamine compounds in the wastewaters being sampled.

§ 471.32 [Amended]

* * * * *

3. Section 471.32 is amended by revising paragraph (d) to read as follows:

* * * * *

(d) Tube Reducing Spent Lubricant—Subpart C—BAT.

(1) There shall be no discharge of process wastewater pollutants except as provided under paragraph (d)(2) of this section.

(2) Process wastewater pollutants may be discharged, with no allowance for any pollutants discharged, provided the facility owner or operator demonstrates, on the basis of analytical methods set forth in or approved pursuant to 40 CFR Part 136, that the concentrations of nitrosamine

compounds in the wastewater discharged from the tube reducing process do not exceed 0.050 mg/l of N-nitrosodimethylamine, 0.020 mg/l of N-nitrosodiphenylamine, and 0.020 mg/l of N-nitrosodi-n-propylamine.

(3) The demonstration required under paragraph (d)(2) of this section shall be made once per month until the demonstration has been made for all three nitrosamine compounds for six consecutive months, after which time the demonstration may be made once per quarter. If a sample is found to contain any of the foregoing nitrosamine compounds at concentrations greater than those specified in subparagraph (d)(2) of this section, the actions described in paragraph (d)(4) of this section shall be taken, and the demonstration required under subparagraph (d)(2) of this section shall be made once per month until it has been made for all three nitrosamine compounds for six consecutive months.

(4) If sampling results show that any of the foregoing nitrosamine compounds is present in the process wastewater at concentrations greater than those specified in subparagraph (d)(2) of this section, the facility owner or operator shall ensure that, within thirty days of receiving written notification of the sampling results, there is not further discharge of tube reducing spent lubricant wastewater until the owner or operator:

(i) Performs a subsequent analysis which demonstrates that the concentrations of the foregoing nitrosamine compounds do not exceed the levels specified in paragraph (d)(2) of this section; or

(ii) Substitutes a new tube reducing lubricant and thereafter complies with the requirements of paragraph (d)(3) of this section; or

(iii) Determines the source of the pollutant whose concentration exceeded the level specified in paragraph (d)(2) of this section and demonstrates to the satisfaction of the NPDES issuing authority that such source has been eliminated.

(5) The concentration limits specified in paragraph (d)(2) of this section apply at the point of discharge from the tube reducing process. However, sampling after the tube reducing wastewater has been commingled with other wastewaters is permitted if:

(i) Any dilution caused by the other wastewaters is taken into account in determining the appropriate (i.e., lower) allowable discharge concentration; and

(ii) An analytical method of sufficient sensitivity is used to measure the levels of each of the foregoing nitrosamine compounds in the wastewaters being sampled.

* * * * *

§ 471.33 [Amended]

4. Section 471.33 is amended by revising paragraph (d) to read as follows:

* * * * *

(d) Tube Reducing Spent Lubricant—Subpart C—NSPS.

(1) There shall be no discharge of process wastewater pollutants except as provided under paragraph (d)(2) of this section.

(2) Process wastewater pollutants may be discharged, with no allowance for any pollutants discharged, provided the facility owner or operator demonstrates, on the basis of analytical methods set forth in or approved pursuant to 40 CFR Part 136, that the concentrations of nitrosamine compounds in the wastewater discharged from the tube reducing process do not exceed 0.050 mg/l of N-nitrosodimethylamine, 0.020 mg/l of N-nitrosodimethylamine, and 0.020 mg/l of N-nitrosodi-n-propylamine.

(3) The demonstration required under paragraph (d)(2) of this section shall be made once per month until the demonstration has been made for all three nitrosamine compounds for six consecutive months, after which time the demonstration may be made once per quarter. If a sample is found to contain any of the foregoing nitrosamine compounds at concentrations greater than those specified in paragraph (d)(2) of this section, the actions described in paragraph (d)(4) of this section shall be taken, and the demonstration required under paragraph (d)(2) of this section shall be made once per month until it has been made for all three nitrosamine compounds for six consecutive months.

(4) If sampling results show that any of the foregoing nitrosamine compounds is present in the process wastewater at concentrations greater than those specified in paragraph (d)(2) of this section, the facility owner or operator shall ensure that, within thirty days of receiving written notification of the sampling results, there is no further discharge of tube reducing spent lubricant wastewater until the owner or operator:

(i) Performs a subsequent analysis which demonstrates that the concentrations of the foregoing nitrosamine compounds do not exceed the levels specified in paragraph (d)(2) of this section; or

(ii) Substitutes a new tube reducing lubricant and thereafter complies with the requirements of paragraph (d)(3) of this section; or

(iii) Determines the source of the pollutant whose concentration exceeded the level specified in paragraph (d)(2) of this section and demonstrates to the satisfaction of the NPDES issuing authority that such source has been eliminated.

(5) The concentration limits specified in paragraph (d)(2) of this section apply at the point of discharge from the tube reducing process. However, sampling after the tube reducing wastewater has been commingled with other wastewaters is permitted if:

(i) Any dilution caused by the other wastewaters is taken into account in determining the appropriate (i.e., lower) allowable discharge concentration; and

(ii) An analytical method of sufficient sensitivity is used to measure the levels of each of the foregoing nitrosamine compounds in the wastewaters being sampled.

* * * * *

§ 471.34 [Amended]

5. Section 471.34 is amended by revising paragraph (d) to read as follows:

* * * * *

(d) Tube Reducing Spent Lubricant—Subpart C—PSES.

(1) There shall be no discharge of process wastewater pollutants except as provided under paragraph (d)(2) of this section.

(2) Process wastewater pollutants may be discharged, with no allowance for any pollutants discharged, provided the facility owner or operator demonstrates, on the basis of analytical methods set forth in or approved pursuant to 40 CFR Part 136, that the concentrations of nitrosamine compounds in the wastewater discharged from the tube reducing process do not exceed 0.050 mg/l of N-nitrosodimethylamine, 0.020 mg/l of N-nitrosodimethylamine, and 0.020 mg/l of N-nitrosodi-n-propylamine.

(3) The demonstration required under paragraph (d)(2) of this section shall be made once per month until the demonstration has been made for all three nitrosamine compounds for six consecutive months, after which time the demonstration may be made once per quarter. If a sample is found to contain any of the foregoing nitrosamine compounds at concentrations greater than those specified in paragraph (d)(2) of this section, the actions described in paragraph (d)(4) of this section shall be taken, and the demonstration required under paragraph (d)(2) of this section shall be made once per month until it

has been made for all three nitrosamine compounds for six consecutive months.

(4) If sampling results show that any of the foregoing nitrosamine compounds is present in the process wastewater at concentrations greater than those specified in paragraph (d)(2) of this section, the facility owner or operator shall ensure that, within thirty days of receiving written notification of the sampling results, there is not further discharge of tube reducing spent lubricant wastewater until the owner or operator:

(i) Performs a subsequent analysis which demonstrates that the concentrations of the foregoing nitrosamine compounds do not exceed the levels specified in paragraph (d)(2) of this section; or

(ii) Substitutes a new tube reducing lubricant and thereafter complies with the requirements of paragraph (d)(3) of this section; or

(iii) Determines the source of the pollutant whose concentration exceeded the level specified in paragraph (d)(2) of this section and demonstrates to the satisfaction of the POTW control authority that such source has been eliminated.

(5) The concentration limits specified in paragraph (d)(2) of this section apply at the point of discharge from the tube reducing process. However, sampling after the tube reducing wastewater has been commingled with other wastewaters is permitted if:

(i) Any dilution caused by the other wastewaters is taken into account in determining the appropriate (i.e., lower) allowable discharge concentration; and

(ii) An analytical method of sufficient sensitivity is used to measure the levels of each of the foregoing nitrosamine compounds in the wastewaters being sampled.

§ 471.35 [Amended]

* * * * *

6. Section 471.35 is amended by revising paragraph (d) to read as follows:

* * * * *

(d) Tube Reducing Spent Lubricant—Subpart C—PSNS.

(1) There shall be no discharge of process wastewater pollutants except as provided under paragraph (d)(2) of this section

(2) Process wastewater pollutants may be discharged, with no allowance for any pollutants discharged, provided the facility owner or operator demonstrates, on the basis of analytical methods set forth in or approved pursuant to 40 CFR Part 136, that the concentrations of nitrosamine compounds in the wastewater discharged from the tube reducing process do not exceed 0.050 mg/l of N-nitrosodimethylamine, 0.020 mg/l of N-nitrosodiphenylamine, and 0.020 mg/l of N-nitrosodi-n-propylamine.

(3) The demonstration required under subparagraph (d)(2) of this section shall be made once per month until the demonstration has been made for all three nitrosamine compounds for six consecutive months, after which time the demonstration may be made once per quarter. If a sample is found to contain any of the foregoing nitrosamine compounds at concentrations greater than those specified in paragraph (d)(2) of this section, the actions described in paragraph (d)(4) of this section shall be taken, and the demonstration required under paragraph (d)(2) of this section shall be made once per month until it has been made for all three nitrosamine compounds for six consecutive months.

(4) If sampling results show that any of the foregoing nitrosamine compounds is present in the process wastewater at concentrations greater than those specified in subparagraph (d)(2) of this section, the facility owner or operator shall ensure that, within thirty days of receiving written notification of the sampling results, there is no further discharge of tube reducing spent lubricant wastewater until the owner or operator:

(i) Performs a subsequent analysis which demonstrates that the concentrations of the foregoing nitrosamine compounds do not exceed the levels specified in paragraph (d)(2) of this section (2); or

(ii) Substitutes a new tube reducing lubricant and thereafter complies with the requirements of paragraph (d)(3) of this section; or

(iii) Determines the source of the pollutant whose concentration exceeded the level specified in subparagraph (2) above and demonstrates to the satisfaction of the POTW control authority that such source has been eliminated.

(5) The concentration limits specified in paragraph (d)(2) of this section apply at the point of discharge from the tube reducing process. However, sampling after the tube reducing wastewater has been commingled with other wastewaters is permitted if:

(i) Any dilution caused by the other wastewaters is taken into account in determining the appropriate (i.e., lower) allowable discharge concentration; and

(ii) An analytical method of sufficient sensitivity is used to measure the levels of each of the foregoing nitrosamine compounds in the wastewaters being sampled.

§ 471.91 [Amended]

* * * * *

7. Section 471.91 is amended by revising paragraph (g) to read as follows:

* * * * *

(g) Tube Reducing Spent Lubricant—Subpart I—BPT.

(1) There shall be no discharge of process wastewater pollutants except as provided under paragraph (g)(2) of this section.

(2) Process wastewater pollutants may be discharged, with no allowance for any pollutants discharged, provided the facility owner or operator demonstrates, on the basis of analytical methods set forth in or approved pursuant to 40 CFR Part 136, that the concentrations of nitrosamine compounds in the wastewater discharged from the tube reducing process do not exceed 0.050 mg/l of N-nitrosodimethylamine, 0.020 mg/l of N-nitrosodiphenylamine, and 0.020 mg/l of N-nitrosodi-n-propylamine.

(3) The demonstration required under subparagraph (g)(2) of this section shall be made once per month until the demonstration has been made for all three nitrosamine compounds for six consecutive months, after which time the demonstration may be made once per quarter. If a sample is found to contain any of the foregoing nitrosamine compounds at concentrations greater than those specified in subparagraph (g)(2) of this section, the actions described in paragraph (g)(4), of this section shall be taken, and the demonstration required under paragraph (g)(2) of this section shall be made once per month until it has been made for all three nitrosamine compounds for six consecutive months.

(4) If sampling results show that any of the foregoing nitrosamine compounds is present in the process wastewater at concentrations greater than those specified in subparagraph (g)(2) of this section, the facility owner or operator shall ensure that, within thirty days of receiving written notification of the sampling results, there is no further discharge of tube reducing spent lubricant wastewater until the owner or operator:

(i) Performs a subsequent analysis which demonstrates that the concentrations of the foregoing nitrosamine compounds do not exceed the levels specified in paragraph (g)(2) of this section; or

(ii) Substitutes a new tube reducing lubricant and thereafter complies with the requirements of paragraph (g)(3) of this section; or

(iii) Determines the source of the pollutant whose concentration exceeded the level specified in paragraph (g)(2) of this section and demonstrates to the satisfaction of the NPDES issuing authority that such source has been eliminated.

(5) The concentration limits specified in paragraph (g)(2) of this section apply at the point of discharge from the tube reducing process. However, sampling after the tube reducing wastewater has been commingled with other wastewaters is permitted if:

(i) Any dilution caused by the other wastewaters is taken into account in determining the appropriate (i.e., lower) allowable discharge concentration; and

(ii) An analytical method of sufficient sensitivity is used to measure the levels of each of the foregoing nitrosamine compounds in the wastewaters being sampled.

§ 471.92 [Amended]

* * * * *

8. Section 471.92 is amended by revising paragraph (g) to read as follows:

* * * * *

(g) Tube Reducing Spent Lubricant—Subpart I—BAT.

(1) There shall be no discharge of process wastewater pollutants except as provided under paragraph (g)(2) of this section.

(2) Process wastewater pollutants may be discharged, with no allowance for any pollutants discharged, provided the facility owner or operator demonstrates, on the basis of analytical methods set forth in or approved pursuant to 40 CFR Part 136, that the concentrations of nitrosamine compounds in the wastewater discharged from the tube reducing process do not exceed 0.050 mg/l of N-nitrosodimethylamine, 0.020 mg/l of N-nitrosodiphenylamine, and 0.020 mg/l of N-nitrosodi-n-propylamine.

(3) The demonstration required under paragraph (g)(2) of this section shall be made once per month until the demonstration has been made for all three nitrosamine compounds for six consecutive months, after which time the demonstration may be made once per quarter. If a sample is found to contain any of the foregoing nitrosamine compounds at concentrations greater than those specified in paragraph (g)(2) of this section, the actions described in paragraph (g)(4) of this section shall be taken, and the demonstration required under paragraph (g)(2) of this section shall be made once per month until it has been made for all three nitrosamine compounds for six consecutive months.

(4) If sampling results show that any of the foregoing nitrosamine compounds is present in the process wastewater at concentrations greater than those specified in paragraph (g)(2) of this section, the facility owner or operator shall ensure that, within thirty days of receiving written notification of the sampling results, there is no further discharge of tube reducing spent lubricant wastewater until the owner or operator:

(i) Performs a subsequent analysis which demonstrates that the concentrations of the foregoing nitrosamine compounds do not exceed the levels specified in paragraph (g)(2) of this section; or

(ii) Substitutes a new tube reducing lubricant and thereafter complies with the requirements of paragraph (g)(3) of this section; or

(iii) Determines the source of the pollutant whose concentration exceeded the level specified in paragraph (g)(2) of this section and demonstrates to the satisfaction of the NPDES issuing authority that such source has been eliminated.

(5) The concentration limits specified in paragraph (g)(2) of this section apply at the point of discharge from the tube reducing process. However, sampling after the tube reducing wastewater has been commingled with other wastewaters is permitted if:

(i) Any dilution caused by the other wastewaters is taken into account in determining the appropriate (i.e., lower) allowable discharge concentration; and

(ii) An analytical method of sufficient sensitivity is used to measure the levels of each of the foregoing nitrosamine compounds in the wastewaters being sampled.

§ 471.93 [Amended]

* * * * *

9. Section 471.93 is amended by revising paragraph (g) to read as follows:

* * * * *

(g) Tube Reducing Spent Lubricant—Subpart I—NSPS:

(1) There shall be no discharge of process wastewater pollutants except as provided under paragraph (g)(2) of this section.

(2) Process wastewater pollutants may be discharged, with no allowance for any pollutants discharged, provided the facility owner or operator demonstrates, on the basis of analytical methods set forth in or approved pursuant to 40 CFR Part 136, that the concentrations of nitrosamine compounds in the wastewater discharged from the tube reducing process do not exceed 0.050 mg/l of N-nitrosodimethylamine, 0.020 mg/l of N-nitrosodiphenylamine, and 0.020 mg/l of N-nitrosodi-n-propylamine.

(3) The demonstration required under paragraph (g)(2) of this section shall be made once per month until the demonstration has been made for all three nitrosamine compounds for six consecutive months, after which time the demonstration may be made once per quarter. If a sample is found to contain any of the foregoing nitrosamine compounds at concentrations greater than those specified in paragraph (g)(2) of this section, the actions described in paragraph (g)(4) of this section shall be taken, and the demonstration required under paragraph (g)(2) of this section shall be made once per month until it has been made for all three nitrosamine compounds for six consecutive months.

(4) If sampling results show that any of the foregoing nitrosamine compounds is present in the process wastewater at concentrations greater than those specified in paragraph (g)(2) of this section, the facility owner or operator shall ensure that, within thirty days of receiving written notification of the sampling results, there is no further discharge of tube reducing spent lubricant wastewater until the owner or operator:

(i) Performs a subsequent analysis which demonstrates that the concentrations of the foregoing nitrosamine compounds do not exceed the levels specified in paragraph (g)(2) of this section; or

(ii) Substitutes a new tube reducing lubricant and thereafter complies with the requirements of paragraph (g)(3) of this section; or

(iii) Determines the source of the pollutant whose concentration exceeded the level specified in paragraph (g)(2) of this section and demonstrates to the satisfaction of the NPDES issuing authority that such source has been eliminated.

(5) The concentration limits specified in paragraph (g)(2) of this section apply at the point of discharge from the tube reducing process. However, sampling after the tube reducing wastewater has been commingled with other wastewaters is permitted if:

(i) Any dilution caused by the other wastewaters is taken into account in determining the appropriate (i.e., lower) allowable discharge concentration; and

(ii) An analytical method of sufficient sensitivity is used to measure the levels of each of the foregoing nitrosamine compounds in the wastewaters being sampled.

* * * * *

§ 471.94 [Amended]

10. Section 471.94 is amended by revising paragraph (g) to read as follows:

* * * * *

(g) Tube Reducing Spent Lubricant—Subpart I—PSES.

(1) There shall be no discharge of process wastewater pollutants except as provided under paragraph (g)(2) of this section.

(2) Process wastewater pollutants may be discharged, with no allowance for any pollutants discharged, provided the facility owner or operator demonstrates, on the basis of analytical methods set forth in or approved pursuant to 40 CFR Part 136, that the concentrations of nitrosamine compounds in the wastewater discharged from the tube reducing process do not exceed 0.050 mg/l of N-nitrosodimethylamine, 0.020 mg/l of N-nitrosodiphenylamine, and 0.020 mg/l of N-nitrosodi-n-propylamine.

(3) The demonstration required under paragraph (g)(2) of this section shall be made once per month until the demonstration has been made for all three nitrosamine compounds for six consecutive months, after which time the demonstration may be made once per quarter. If a sample is found to contain any of the foregoing nitrosamine compounds at concentrations greater than those specified in subparagraph (g)(2) of this section, the actions described in paragraph (g)(4) of this section shall be taken, and the demonstration required under subparagraph (g)(2) of this section shall be made once per month until it has been made for all three nitrosamine compounds for six consecutive months.

(4) If sampling results show that any of the foregoing nitrosamine compounds is present in the process wastewater at concentrations greater than those specified in subparagraph (g)(2) of this section, the facility owner or operator shall ensure that, within thirty days of receiving written notification of the sampling results, there is no further discharge of tube reducing spent lubricant wastewater until the owner or operator:

(i) Performs a subsequent analysis which demonstrates that the concentrations of the foregoing nitrosamine compounds do not exceed the levels specified in paragraph (g)(2) of this section; or

(ii) Substitutes a new tube reducing lubricant and thereafter complies with the requirements of paragraph (g)(3) of this section; or

(iii) Determines the source of the pollutant whose concentration exceeded the level specified in paragraph (g)(2) of this section and demonstrates to the satisfaction of the POTW control authority that such source has been eliminated.

(5) The concentration limits specified in paragraph (g)(2) of this section apply at the point of discharge from the tube reducing process. However, sampling after the tube reducing wastewater has been commingled with other wastewaters is permitted if:

(i) Any dilution caused by the other wastewaters is taken into account in determining the appropriate (i.e., lower) allowable discharge concentration; and

(ii) An analytical method of sufficient sensitivity is used to measure the levels of each of the foregoing nitrosamine compounds in the wastewaters being sampled.

§ 471.95 [Amended]

* * * * *

11. Section 471.95 is amended by revising paragraph (g) to read as follows:

* * * * *

(g) Tube Reducing Spent Lubricant—Subpart I—PSNS.

(1) There shall be no discharge of process wastewater pollutants except as provided under paragraph (g)(2) of this section.

(2) Process wastewater pollutants may be discharged, with no allowance for any pollutants discharged, provided the facility owner or operator demonstrates, on the basis of analytical methods set forth in or approved pursuant to 40 CFR Part 136, that the concentrations of nitrosamine compounds in the wastewater discharged from the tube reducing process do not exceed 0.050 mg/l of N-nitrosodimethylamine, 0.020 mg/l of N-nitrosodiphenylamine, and 0.020 mg/l of N-nitrosodi-n-propylamine.

(3) The demonstration required under subparagraph (g)(2) of this section shall be made once per month until the demonstration has been made for all three nitrosamine compounds for six consecutive months, after which time the demonstration may be made once per quarter. If a sample is found to contain any of the foregoing nitrosamine compounds at concentrations greater than those specified in subparagraph (g)(2) of this section, the actions described in paragraph (g)(4) of this section shall be taken, and the demonstration required under paragraph (g)(2) shall be made once per month until it has been made for all three nitrosamine compounds for six consecutive months.

(4) If sampling results show that any of the foregoing nitrosamine compounds is present in the process wastewater at concentrations greater than those specified in subparagraph (g)(2) of this section, the facility owner or operator shall ensure that, within thirty days of receiving written notification of the sampling results, there is no further discharge of tube reducing spent lubricant wastewater until the owner or operator:

(i) Performs a subsequent analysis which demonstrates that the concentrations of the foregoing nitrosamine compounds do not exceed the levels specified in paragraph (g)(2) of this section; or

(ii) Substitutes a new tube reducing lubricant and thereafter complies with the requirements of paragraph (g)(3) of this section; or

(iii) Determines the source of the pollutant whose concentration exceeded the level specified in paragraph (g)(2) of this section and demonstrates to the satisfaction of the POTW control authority that such source has been eliminated.

(5) The concentration limits specified in paragraph (g)(2) of this section apply at the point of discharge from the tube reducing process. However, sampling after the tube reducing wastewater has been commingled with other wastewaters is permitted if:

(i) Any dilution caused by the other wastewaters is taken into account in determining the appropriate (i.e., lower) allowable discharge concentration; and

(ii) An analytical method of sufficient sensitivity is used to measure the levels of each of the foregoing nitrosamine compounds in the wastewaters being sampled.

* * * * *

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