

List of Subjects in 7 CFR Part 907

Marketing agreements, Oranges, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 907 is amended as follows:

1. The authority citation for 7 CFR part 907 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 907.1022 is added to read as follows:

Note: This section will not appear in the Code of Federal Regulations.

§ 907.1022 Navel Orange Regulation 722.

The quantity of navel oranges grown in California and Arizona which may be handled during the period from November 29 through December 5, 1991, is established as follows:

- (a) District 1: 1,553,800 cartons;
- (b) District 2: unlimited cartons;
- (c) District 3: 146,200 cartons;
- (d) District 4: unlimited cartons.

Dated: November 27, 1991.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

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DEPARTMENT OF JUSTICE**Immigration and Naturalization Service****8 CFR Part 214**

[INS No. 1417-91]

RIN 1115-AC72

Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This final rule implements provisions of the Immigration Act of 1990 (IMMACT), Public Law No. 101-649, November 29, 1990, and the Armed Forces Immigration Adjustment Act of 1991, Public Law No. 102-110, October 1, 1991, as they relate to temporary alien workers seeking nonimmigrant classification and admission to the United States under sections 101(a)(15)(H), (L), (O), and (P) of the Immigration and Nationality Act (Act), 8 U.S.C. 1101. This rule also contains technical amendments which reflect the Service's operating experience under the H and L classifications. This rule will conform

Service policy to the intent of Congress as it relates to these classifications, implement new nonimmigrant classifications and requirements established by Public Law 101-649 and Public Law No. 102-110, and clarify for businesses and the general public requirements for classification, admission, and maintenance of status.

EFFECTIVE DATE: October 1, 1991.

FOR FURTHER INFORMATION CONTACT:

John W. Brown, Senior Immigration Examiner, Adjudications Division, Immigration and Naturalization Service, 425 I Street, NW., room 7223, Washington, DC 20536, telephone (202) 514-3946.

SUPPLEMENTARY INFORMATION: On July 11, 1991, at 56 FR 31553-31576, the Immigration and Naturalization Service (Service) published a proposed rule with request for comments, in order to implement the provisions of Public Law No. 101-649. Public Law No. 101-649 dramatically altered the H-1B nonimmigrant classification by removing the prominent alien standard completely from the classification and created, among other things, the new O and P nonimmigrant classifications. Public Law No. 101-649 also required that petitions for H-1B classification contain an approved Labor Condition Application issued by the Department of Labor. Many of the prominent artists, athletes and entertainers who were previously eligible for H-1B status would be eligible for O and P nonimmigrant status under Public Law No. 101-649. The statute imposed a number of requirements and restrictions on these prominent aliens which were not contained in prior legislation. However, on October 1, 1991, the President signed into law the Armed Forces Immigration Adjustment Act of 1991 (Pub. L. No. 102-110). This law delays the implementation of certain provisions of the O and P nonimmigrant classifications until April 1, 1992. Aliens seeking nonimmigrant admission to the United States as artists, athletes, entertainers or fashion models before April 1, 1992 will not be admitted as O-1 P-1 or P-3 nonimmigrants, but may be admitted as H-1B nonimmigrants of distinguished merit and ability under the provisions of 8 U.S.C. 101(a)(15)(H)(i)(b) effective on September 30, 1991. Aliens seeking nonimmigrant admission for the purpose of accompanying or assisting in artistic or athletic performances by aliens of distinguished merit and ability for specific events will not be admitted as O-2 nonimmigrants, but may be admitted as H-1B nonimmigrants until April 1, 1992. Provisions of the proposed rule relating to the admission of artists,

athletes and entertainers under the O and P classifications have been modified to conform to this change. Public Law No. 101-649 also altered the L-1 nonimmigrant classification.

Interested persons were invited to submit written comments on or before August 12, 1991. In the preamble to the proposed rule, the Service indicated that it desired comments and suggestions on how to streamline and facilitate the petitioning process. The Service also advised the public that many provisions in the proposed rule were statutory in nature and had to be included in the regulations.

This final rule will address only comments which relate to the nonimmigrant categories which will be in effect prior to April 1, 1992. Additionally, in order to accommodate the artists, entertainers, athletes, and fashion models in the H-1B category, the final regulation relating to the H-1B category now includes provisions to process petitions filed in their behalf.

Discussion of Comments on Proposed Regulations

A number of commenters offered suggestions and improvements for the proposed rule, some of which have been adopted. A number of comments were received which addressed issues which are more appropriate for inclusion in the Service's Operations Instructions. Additionally, there were a number of comments relating to areas that were not affected by IMMACT, such as the H-2A nonimmigrant classification, and were not discussed in the proposed rule. These comments were not considered in the drafting of the final rule. The following discussion: groups the comments into the various nonimmigrant classifications; discusses the issues raised; provides the Service's position on the issues; and, indicates the revisions adopted in the final rule, based on the public's concerns. A general provision section is also included in which topics relating to more than one nonimmigrant category are discussed.

H-1B Nonimmigrant Classification—Labor Condition Application for H-1B Petitions—Section 214.2(h)(4)(i)(B)(1)

The proposed regulation contains the requirement that H-1B petitions for aliens employed in a specialty occupation must be accompanied by an approved labor condition application from the Department of Labor. This provision generated one hundred and thirty-nine comments, the vast majority of which suggested that the labor condition application merely be required to be filed with the Department of

Labor, not approved. A number of academic institutions commented that, due to the nature of their hiring procedures, they would experience difficulty in hiring professors if the labor condition application had to be approved prior to the filing of the petition.

The Service recognizes that obtaining an approved labor condition application may create difficulties for certain types of employers. However, the provision that the labor condition application be approved prior to the alien's admission to the United States is found in the statutory definition of the H-1B classification in section 205(c)(1) of Public Law No. 101-649. Further, in order to ensure that the labor condition application is approved prior to entry, it is only logical that the approved labor condition application be a part of the petition package.

One commenter suggested that academic institutions be permitted to file one approved blanket labor condition application covering all H-1B petitions filed by the school for the year. The proposed rule at § 214.2(h)(4)(i)(B)(3) already provides for such a situation and therefore the final rule does not need to be amended to implement this suggestion.

One commenter suggested that physical therapists should be exempt from the labor condition application process due to the demonstrated shortage of individuals employed in this occupation. As the statute does not provide for an exception to this provision, this suggestion will not be adopted. Further, it must be noted that the labor condition application process does not contain a requirement that the labor market be tested.

Two commenters also suggested that the Service delete the requirement that the validity of an H-1B petition coincide with the validity of the labor condition application. The Service believes that this is a reasonable requirement in view of the streamlined labor condition application process proposed by the Department of Labor. To provide otherwise would serve to dilute the requirement that an employer post a notice of filing of the application in the workplace pursuant to 8 U.S.C. 212(n)(1)(C)(i).

Twenty-seven commenters suggested that the labor condition application is burdensome for employers who wish to substitute employees. The Service has historically required the filing of new I-129 petitions for substitute employees and does not believe that the proposed regulations will make this process any more difficult. The provision at § 214.2(h)(4)(i)(B)(3) of the proposed rule

permits the filing of labor condition applications for multiple unnamed beneficiaries. The Service suggests that petitioners avail themselves of this provision where all beneficiaries of a labor condition application have not been identified at the time of filing the petition.

The proposed rule contains a requirement that only United States employers can file an H-1B petition. Six commenters suggested that foreign employers should also be permitted to file H-1B petitions. The labor condition application requires that a petitioner post a notice of the filing of a labor condition application at its place of employment. This obviously requires the petitioner to have a legal presence in the United States. As a result, this requirement will be retained in the final rule. In order to provide clarification, the Service has included a definition of the term "United States employer" in the final rule.

One commenter suggested that a permanent labor certification may be used in lieu of a labor condition application. As the procedures for obtaining these two documents are dramatically different, they may not be interchanged.

Three commenters suggested that the penalty for misrepresentations on labor condition applications is too severe. The penalties for misrepresentations are contained in the statute and must be included in the final rule.

One commenter also objected to the notification requirements required for the issuance of labor condition applications. The notification requirements are found in the statute and are within the jurisdiction of the Department of Labor. As a result, the Service will not respond to this objection.

Prominent Businessmen as Specialty Workers—Section 214.2(h)(4)(iii)

Fifty-two commenters suggested that prominent businessmen should be included in the definition of specialty occupation. Additionally, some commenters suggested that petitioners be permitted to file for labor condition applications for prominent businessmen.

A labor condition application can be issued to an employer for any occupation. However, an approved labor condition application issued for an occupation does not mean that the occupation is a specialty occupation. An approved labor condition application is not a factor in determining whether a position is a specialty occupation.

The definition of a specialty occupation is specifically set forth in the statute. Business may be accorded

classification as H-1B aliens as long as the statutory requirements for the classification are met. That determination will be made based on a case-by-case review of the position. The regulation, in providing examples of recognized fields of endeavor, does include "business specialties." We also note that the list of fields of endeavor are included in the regulation as examples. That list is by no means exhaustive. Businessmen who lack the required degree or its equivalent should be able to obtain classification as O-1 aliens of extraordinary ability or as H-2B nonimmigrants, depending on their qualifications.

Thirty-one commenters suggested that the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations. Most of these commenters suggested that the definition should be expanded to include those occupations which did not require a bachelor's degree in the specific specialty. The definition of specialty occupation contained in the statute contains this requirement. Accordingly, the requirement may not be amended in the final rule.

Equivalency to Completion of a College Degree—Section 214.2(h)(4)(iii)(D)

Thirty-one commenters stated that the equivalency requirements for master's and doctorate degrees were too restrictive.

The Service maintains that the equivalent provided in the regulation for an advanced degree—a baccalaureate degree plus five years of progressive experience in the professions—is comparable to the educational level required for a master's degree. However, the final rule has been amended to reflect that the Service will accept foreign degrees determined to be equivalent to doctorate degrees granted by academic institutions in the United States.

One comment was received which suggested that the Service's formula for equating experience and/or training to education, three years of experience to one year of education, be replaced. It was suggested that the Service adopt the Department of Labor's requirement which equates two years of experience to one year of education.

The Service's present policy of equating three years of experience and/or training to each year of education has been codified in regulation since February 26, 1990. It was placed into regulation for the benefit of petitioners and applicants who may have difficulty in seeking and obtaining a

determination of equivalency through authoritative sources. The three-to-one formula is based on a survey of relevant precedent decisions which reflect the number of years of experience held by alien beneficiaries who did not hold degrees but were regarded by the Service as having the equivalent of a degree. *Matter of Bienkowski*, 12 I&N Dec. 17 (D.D. 1966); *Matter of Yaakov*, 13 I&N Dec. 203 (R.C. 1969); *Matter of Devnani*, 11 I&N Dec. 800 (D.D. 1966); *Matter of Arjani*, 12 I&N Dec. 649 (R.C. 1967).

Based on these precedent decisions, the Service will continue its present policy of utilizing the three-to-one formula.

One commenter also suggested that the Service's requirement that the petitioner establish that the beneficiary has been employed in "progressively responsible positions" is unnecessarily restrictive. The regulatory definition of the term "specialty occupation" is based on the definition of that term found in the statute. The statute clearly requires that the beneficiary be employed in progressively responsible positions. As a result, the Service will not alter this requirement in the final rule.

H-1B Petitions for Physicians—Section 214.2(h)(4)(vii)

As IMMACT removed the restrictions on graduates of foreign medical schools found in the current statute, graduates of foreign medical schools are now eligible to perform direct patient care and are eligible for H-1B nonimmigrant classification. These aliens, however, are subject to the same requirements as other H-1B nonimmigrants, including the labor condition application process.

One commenter suggested that foreign doctors should remain within the jurisdiction of the Educational Commission for Foreign Medical Graduates (ECFMG) to ensure that the American public is protected from unqualified physicians. In order to ensure that foreign medical graduates are competent to perform patient care in the United States, the final rule now includes an additional requirement that petitions for foreign physicians must be accompanied by an ECFMG certificate or by evidence that the beneficiary is exempt therefrom. Additionally, the final rule now contains language that petitions for foreign medical graduates must be accompanied by evidence that the alien is authorized by the state of intended employment to perform the duties described in the petition.

Return Travel Expenses—Section 214.2(h)(6)(vi)(E)

Eighty-two comments were received concerning this provision. Seventy-two commenters suggested that the provision should not apply to those situations where the beneficiary is dismissed for cause such as poor work performance. Two commenters suggested that the provision be made applicable only to aliens dismissed during the first three months of employment while five comments were received regarding those situations where the beneficiary was dismissed from employment as a result of lack of funding. Additionally, seven commenters suggested that the employer should be liable only if the alien intends to stay in the United States unlawfully. Five commenters stated that the provision should apply only in those situations where the alien comes to the United States on the basis of the employer's petition. One commenter also noted that it would be difficult to determine if the alien used the money to return home. Finally, six commenters suggested that the provision should be eliminated as it is unreasonable and excessive and may make it difficult for some employers to hire aliens.

In response to the above comments, the final rule relating to this provision has been expanded and includes more detail. The final rule will be amended to reflect that this provision will be complaint-driven. Complaints concerning noncompliance with this provision should be submitted in writing to the Service Center which adjudicated the petition and will be included in the file relating to the petition. The final rule will also indicate that the term "dismissed" requires some action by the employer. If the alien opts to terminate his or her employment prior to the expiration of the period of authorized admission, he or she is not considered to have been dismissed.

The final rule does not include a penalty provision for those employers who fail to comply with the statute as none was included in the statute. However, the Service may consider the fact that an employer has not complied with this provision when adjudicating future nonimmigrant visa petitions.

Eleven commenters also suggested that the final rule contain a definition of the term "aboard" as some employers could simply provide the beneficiary with return transportation to Canada or Mexico in order to comply with the statutory requirement. This suggestion will be adopted in the final rule. The definition will require the petitioner to be liable for the beneficiary's return

transportation to the alien's last place of residence outside the United States.

Numerical Limits on H-1B Nonimmigrant—section 214.2(h)(8)(i)(A)

The proposed rule contains the requirement that aliens who may be accorded nonimmigrant classification (excluding those in DOD research) shall be limited to 65,000 for each fiscal year. Eleven comments were received relating to this provision. Two commenters suggested that the cap should be higher. Two commenters suggested that numbers should be assigned when the petition is approved. One commenter suggested that the numerical cap should not apply to extensions of stay while two suggested that a system should be established to keep track of the backlog of numbers similar to that presently in use by the Department of State for permanent visa numbers. Four commenters suggested that aliens, not petitions, should be counted as some aliens may be employed by two separate employers within the same fiscal year.

The 65,000 numerical limitation is a statutory requirement and must therefore be retained in the final rule. The Service has no authority to raise the cap beyond the limits imposed by Congress. The proposed rule clearly states that the numerical limitation applies only to new petitions and not extensions of stay. Further, the statute requires that aliens are to be issued visas in the order in which petitions are filed. The Service will not institute a backlog system since H-1B nonimmigrants are coming temporarily to the United States and the need for the beneficiary's service may dissipate over the course of time. The Service will also retain in the final rule its proposal to assign a number to each petition even if the beneficiary was previously accorded H-1B status in the same fiscal year. The Service believes that this provision will result in more efficient adjudication of H-1B petitions as it will not be required to review prior records relating to a prospective beneficiary when adjudicating a new petition.

The Service also received two comments suggesting that the language in the proposed rule at § 214.2(h)(8)(ii)(C) which provides for the allocation of numbers to Guam is in conflict with § 214.2(h)(8)(ii)(B) which requires numbers to be assigned when filed. The Service agrees with the comments and § 214.2(h)(8)(ii)(C) has been amended in the final rule.

Transition for Current H-1B Nonimmigrant

Fifty-three comments were received suggesting that H-1B nonimmigrant aliens in the United States on the date of enactment be exempt from the labor condition application requirements and that this provision should be stated in the final rule.

The Service will institute a policy that only those petitions and applications filed after October 1, 1991, will be affected by the new provisions. Further, any H-1B alien in the United States on the date of enactment will be entitled to their current H-1B classification and can be readmitted to the United States in that category. This policy and other transitional issues are more appropriately handled through policy issuances rather than formal rulemaking since they are great in number and short-lived in relevance.

L-1 Nonimmigrant Classification—Definition of the Term "doing business"—Section 214.2(l)(ii)(H)

One comment was received which noted that the definition of the term "doing business" contained in the proposed rule made reference to the staffing levels of the entity. As section 123 of Public Law No. 101-649 states that staffing levels alone are not to be used in determining whether an individual is performing in a managerial or executive capacity, the reference to staffing levels in the definition appears to be inconsistent. Therefore, the reference to staffing levels will be removed from the definition.

Definition of the Term "Affiliate"—Section 214.2(l)(1)(ii)(L)

The proposed rule contains a definition of the term "affiliate" at § 214.2(l)(1)(ii)(L) which is more restrictive than the definition currently in use. Forty-six commenters stated that this definition was more restrictive and did not reflect the reality of the business world. A number of commenters stated that the definition would exclude a number of legitimate businesses from classification as qualifying organizations. Several of the commenters suggested that the current definition should be expanded to allow firms which are owned by different groups of individuals to qualify.

The Service had proposed to amend this definition as a result of certain operational difficulties encountered using the current definition. Given the objections raised by various commenters, the Service will retain the definition currently in use in the final rule. In drafting IMMACT, Congress

altered the "L-1" nonimmigrant classification with the intention of making the classification easier for businesses to utilize. IMMACT also added an additional criterion for establishing an affiliate relationship so that additional types of businesses could utilize the nonimmigrant category. The Service will confine this regulatory effort to areas directly affected by IMMACT.

The Service will not expand the definition of the term "affiliate" in the final rule. In drafting Pub. L. No. 101-649, Congress created a number of statutory definitions for the L-1 nonimmigrant category but chose not to define the term "affiliate". Arguably, if Congress wanted to expand the Service's definition of "affiliate," it could have done so in the statute. Since the definition was not altered by Congress, the Service believes that the current definition comports with Congressional intent.

One commenter from a major worldwide accounting firm also stated that the definition of "affiliate" at § 214.2(l)(2)(ii)(L)(3) should be altered to clarify that the term also includes those qualifying accounting firms which provide only consulting services. The definition included in the proposed rule could be interpreted to require that these firms perform both consulting and managerial duties. As the legislative history of this provision supports this commenter's suggestion, the definition of "affiliate" has been amended to include accounting firms which provide only consulting services.

Evidence Required To Support a Petition for a New Office—Section 214.2(l)(3)(v)

Section 123 of Public Law No. 101-649 states that staffing levels alone are not to be used in determining whether an individual is performing in a managerial or executive capacity. Therefore, the reference to staffing levels in the description of the evidence required to support a new office petition has been deleted in the final rule. Petitioners will still be required to establish that the new office will support a managerial position within one year of the filing of the petition. The final rule has been amended to require the petitioner to submit evidence of the organizational structure of the U.S. and foreign firms.

Extension of Stay Provision—Section 214.2(l)(15)

The Service realized that some aliens accorded L-1 status on the basis of specialized knowledge may subsequently be promoted or transferred to a managerial or executive position. In

order to accommodate this situation and to allow the alien to be accorded the maximum period of stay in the United States, the proposed rule indicated that an alien accorded L-1 nonimmigrant status on the basis of specialized knowledge could be granted an extension of stay for a sixth and seventh year, but only if the alien has been employed in a managerial or executive capacity for two prior years. This provision generated thirty-one comments. Several commenters stated that there was no statutory basis for this requirement. Additionally, commenters stated that the two year requirement was entirely too long and did not reflect the realities of the business world.

In response to these comments, the Service has reconsidered this portion of the proposed rule. The final rule will be amended to require that the alien beneficiary be employed in a managerial capacity for only six months in order to be granted an extension for a sixth and seventh year. The petitioner will be required to document this change of duties through the filing of a new or amended petition. The Service deems the requirement of six months previous managerial or executive employment to be an appropriate indicator of the legitimacy of the managerial position.

O Nonimmigrant Category—Definition of O-1 Nonimmigrant—Section 214.2(o)(1)(ii)(A)

As a result of the passage of the Armed Forces Immigration Adjustment Act of 1991, the O-1 nonimmigrant classification is now limited until April 1, 1992 to aliens who have extraordinary ability in the sciences, education, or business. Aliens seeking nonimmigrant admission to the United States who are artists, athletes, or entertainers and who would have been eligible to apply for admission under the O-1 classification may be admitted under the H-1B classification until April 1, 1992. In addition, aliens seeking nonimmigrant admission for the purpose of accompanying or assisting in artistic or athletic performances by aliens of distinguished merit and ability will not be admitted as O-2 nonimmigrants but may be admitted as H-1B nonimmigrants until April 1, 1992. Comments relating to O-1 artists, athletes, or entertainers and to O-2 nonimmigrants will not be addressed in this rule.

There were a number of general comments on the definition of the O-1 nonimmigrant category. One commenter suggested that the category include groups. However, as the statute limits

this classification to individuals, this comment will not be adopted.

Eight commenters recommended that the foreign residence requirement for O-1 aliens be removed as it is not found in the statute. Upon further consideration, the Service concurs with these commenters and will remove this requirement from the final rule.

One commenter stated that an alien employer should be permitted to file an O-1 petition. There is no provision in the statute or regulation precluding an alien employer from filing an O-1 petition.

Seven commenters also suggested that the Service delete the requirement that the O-1 alien should be coming to perform services relating to a specific event. The Service has not deleted this provision in the final rule as section 207(b)(2)(A) of IMMACT clearly limits the admission period of an O-1 to the length of time of the "event."

Services for More Than One Employer—Section 214.2(o)(2)(ii)(B)

Thirty-one commenters suggested that the final rule contain a provision permitting an O-1 alien to work for concurrent employers without requiring the employers to file separate petitions for the alien. The statute requires that, prior to according an alien O-1 status, the Attorney General must determine if the alien's entry into the United States will prospectively substantially benefit the United States and that the alien will continue to be employed in the area of extraordinary ability. These determinations can only be made by the Service through the adjudication of a petition. As a result, no revision will be made in the final rule.

Definition of "Event" or "Performance"—Section 214.2(o)(3)(ii)

One hundred fifty-three comments were received stating that the definition of "event" should be broadened and expanded. Specifically, commenters suggested the inclusion of engagements, layoffs, vacations and promotional appearances in the definition. Some commenters suggested the Service include a business event in the definition. Several commenters also submitted to the Service their own proposed definitions.

The Service acknowledges that short vacations often occur which are incidental and/or related to the event or performance. The Service is reluctant to include the term "layoffs," as it commonly implies a negative and adverse action of unemployment. However, the definition will include language which allows for short stopovers between performances, such as in a tour. The Service believes that

business events are adequately considered in the definition as business projects.

Definition of "Extraordinary Ability"—Section 214.2(o)(3)(ii)

The Service has amended the definition of extraordinary ability in order to conform with the language of the House Committee Report on the Judiciary, H.R. Rep. No. 723, 101st Cong., at 59.

Definition of "Substantially Benefits Prospectively the United States"—Section 214.2(o)(3)(ii)

The Service has reconsidered the definition of "substantially benefits prospectively the United States" found in the proposed rule. Based on the high standards for the O-1 nonimmigrant category, the mere presence of any O-1 alien in the United States would substantially benefit prospectively the United States. Therefore, the definition serves no useful purpose and has been removed.

Standards for Establishing That a Position Substantially Benefits Prospectively the United States—Section 214.2(o)(3)(iii)

IMMACT requires that an O-1 alien's admission to the United States substantially benefit prospectively the United States. In order to implement this requirement, the Service proposed criteria for establishing that a position substantially benefits the United States. A number of commenters suggested that these criteria be amended or deleted as they do not establish how the position substantially benefits the United States and do not include such criteria as the creation of jobs for United States workers. Further, a number of commenters questioned why the Service had departed from its long standing policy of requiring aliens of extraordinary ability or achievement to be coming to the United States to continue to perform services requiring such ability or achievement. These commenters noted that the statute requires that O-1 aliens be coming to the United States to continue to be employed in the area of extraordinary ability. They suggested that the Service include a provision requiring the petitioner to establish that the position must also require the services of such an alien.

Based upon these comments, the Service has reevaluated this section of the proposed rule. The standards listed in the proposed rule would have restricted the ability of many petitioners to establish that the alien's employment will substantially benefit prospectively

the United States as the criteria are not all-inclusive, and omit a number of valid criteria such as the creation of jobs for United States workers. As a result, this standard will be removed from the final rule.

Additionally, in response to the above mentioned comments, the Service will include in the final rule the long standing requirement that an alien of extraordinary ability must be coming to the United States to perform services requiring such ability. This provision is consistent with the language of the statute.

Evidentiary Requirements for O-1 Nonimmigrant Aliens of Extraordinary Ability—Section 214.2(o)(3)(iv)

The proposed rule describes the evidentiary requirements for O-1 aliens of extraordinary ability in the sciences, education, or business. The Service received five hundred eighty-seven comments in response to these provisions. Five hundred fifty-six commenters stated that the standards were too high or stringent and would make the nonimmigrant category difficult to utilize. Two commenters suggested that the standards were not stringent enough.

The Service agrees that the standards for this category are very high. However, the basis for the proposed regulatory language was derived from the House Committee report which indicated that the O-1 extraordinary ability category was comparable to the category of priority workers for permanent immigration. The report indicated that extraordinary ability may be established through a one-time achievement such as receiving a Nobel Prize. The report also stated that the category is reserved for those individuals who have risen to the very top of their field of endeavor. As a result, it is the opinion of the Service that the standards for this category as described in the proposed rule reflect the intent of Congress and will therefore be retained in the final rule.

Nine commenters stated that the standards in the proposed rule are not appropriate for all occupations and that some individuals employed in certain occupations will have difficulty in meeting the standards. Nineteen commenters also suggested that the Service develop separate standards for the different occupations covered in the nonimmigrant category such as career business people. A number of commenters also supplied the Service with their own proposed standards for various fields of endeavor.

The Service has given careful consideration to the comments received concerning the standards for the O-1 category. The Service believes that the standards in the proposed rule are sufficiently flexible so that the highest achieving individuals in any occupational area may be accommodated. The final rule also retains the "catch-all" provision which guarantees that the standard applies to all occupations. The adoption of separate standards for separate occupations could result in the exclusion of certain aliens from O-1 classification. Further, the Service believes that the standards as contained in the proposed rule reflect Congressional intent that the category be reserved for only those individuals who have reached the pinnacle of their respective field of endeavor.

Length of Admission for O-1 Nonimmigrant—Section 214.2(o)(7)(iii)(A)

Thirteen individuals provided comments concerning the length of admission for O-1 nonimmigrant aliens. Ten commenters suggested that an O-1 alien should not be limited to three years but should be admitted for a longer period of time.

The three year period of time discussed in the proposed rule relates only to the alien's initial period of admission. It is an administrative procedure established by the Service to ensure that the alien is still employed by the petitioning entity in an appropriate capacity. The alien's total period of stay in the United States will be limited to the duration of the event. There is no absolute time limit on the O-1's total stay in the United States.

The P Nonimmigrant Classification—Definition of P-2 Nonimmigrant—Section 214.2(p)(1)(ii)(B)

As a result of the passage of the Armed Forces Immigration Adjustment Act of 1991, implementation of the P-1 and P-3 nonimmigrant classifications for artists, athletes, and entertainers is delayed until April 1, 1992. Therefore, only the P-2 and P-4 nonimmigrant classifications are being implemented at this time. These nonimmigrant classifications are limited to artists and entertainers (both individuals and groups) who are under reciprocal exchange programs between the U.S. and foreign organizations which provide for the temporary exchange of artists and entertainers and their accompanying spouses or children. Comments relating to P-1 and P-3 classifications will not be addressed in this rule.

Twenty-seven comments were received concerning this nonimmigrant category. Three commenters suggested that existing reciprocal agreements should be "grandfathered" into the new classification. Eight commenters suggested that the definition is too restrictive and should be liberalized. Seven commenters stated that it should be made clear in the regulation that a P-2 alien does not have to be a performer.

The definition of the P-2 nonimmigrant classification found in the proposed rule is based on statutory language and the House Committee report. The definition includes both performing artists and those individuals who are also an integral part of the performance. The P-2 classification is not limited only to performing artists. The final rule provides that the P-2 classification may be granted to the actual performer or performers and that essential support personnel who are integral to the performance may also be granted P-2 status.

The Committee report clearly indicates that the exchange of artists in this area should be group for group or individual for individual. As a result, the Service will not "grandfather" in any existing reciprocal agreement unless the agreement complies with the statute and regulation.

Definition of "Event" or "Performance"—Section 214.2(p)(3)

Six commenters have brought to the Service's attention that the definition of "event" or "performance" should be included in the regulations for the P-2 classification as this was clearly indicated as the period of authorized status by statute. The Service concurs and will include the definition of "event" or "performance" in the final rule for purposes of this section.

Length of Admission—Section 214.2(p)(6)(iii)

Twelve individuals commented on the period of admission and period of extensions for aliens in the P nonimmigrant category. In response to these comments, the Service will amend the final rule to provide for a maximum period of initial admission of one year for all categories in the P nonimmigrant classification. Additionally, extensions of stay may be granted for periods of one year to complete the event.

Limitation on Admission of P-2 Aliens—Section 214.2(p)(6)(iv)

Fifteen comments were received stating that the 90-day limitation on re-admission should be removed. As the 90-day limitation on admission for P-2

nonimmigrant aliens is statutory, it must remain in the final rule.

General Provisions

A number of comments were received addressing long-standing Service policy such as the filing requirements for groups utilizing different consulates to obtain nonimmigrant visas, filings by foreign agents, and the H-2A nonimmigrant classification. The Service has insufficient information upon which to base such changes and would prefer to address such changes in a separate proposed rule with an adequate public comment period.

Revocation

Two commenters suggested that the language found in the proposed rule concerning the revocation of the H, L, O and P nonimmigrant classifications was cumbersome and contradictory. Based on these comments, the Service will amend the sections in the four nonimmigrant classifications relating to revocations to make it clear that the Service may revoke a petition at any time even after its validity has expired.

Emergent Filings

The proposed rule contained the provision that petitions for the H, L, O and P nonimmigrant classifications shall be filed only at the four Service Centers, even in emergent circumstances. Sixty people commented on this provision, suggesting that the Service retain its current policy of allowing for emergent filings at local offices. A majority of the commenters indicated that the current policy provides petitioners with an "escape-valve" to allow them to petition for aliens on short notice.

The Service proposed this provision to assure that petitions would be adjudicated in a consistent fashion and to enable the Service to track the number of petitions filed for those nonimmigrant classifications which are subject to numerical limitations. The Service is aware that situations may develop which will necessitate the filing of petitions in emergent situations. However, the Service believes that these petitions can be processed in acceptable time frames at the Service Centers. It should be pointed out that since union consultations or outside advisories are mandatory, even cases receiving the most expeditious treatment will require more time than in the past. Upon consideration, these filing limitations are retained in the final rule.

Sixty-six commenters also suggested that the Service describe the emergent filing process for the Service Centers in the final rule. The Service does not

believe that the final regulation is an appropriate forum to detail such processes. Each Service Center will develop its own system for accepting and processing these cases, depending upon local operating conditions. The Service will be developing various options in order to assist in the expeditious processing of these applications.

Essential Support Personnel

One commenter took exception to the Service's statement in the preamble to the proposed rule that the H-2B category was not appropriate for essential support personnel. In creating the essential support personnel category, the Service sought to continue its long standing practice of providing for the admission of accompanying aliens for whom the H-2B category is unworkable due to Department of Labor regulations which preclude the issuance of a temporary labor certification. The Service continues to believe this policy is correct and in accord with the statute, and will retain it in the final rule.

Periods of Admission

A number of commenters stated that all H, O, and P aliens should be admitted for up to thirty days before and thirty days after the need for the alien's services. The Service feels that the ten-day period of time for the O and P classifications is sufficient and will be retained in the final rule. Further, for consistency, the proposed rule will be modified for the H nonimmigrant category to comport with the O and P classifications. Local Service officials retain the authority to grant a period of voluntary departure beyond ten days in individual cases, where warranted.

Consultation Requirements for the O and P Nonimmigrant Classification

Five hundred seventy-seven comments were received concerning the consultation process for these nonimmigrant classifications. Almost all commenters either objected to the concept of requiring a consultation or provided suggestions on how to modify the process. One hundred fifty comments were received concerning the entities from which the Service should seek consultation. Additionally, numerous comments were received concerning the actual consultation process itself.

Three hundred twenty-five commenters suggested that management organizations, not labor organizations, should provide consultations for entertainers and that labor organizations could not possibly provide a consultation for every conceivable

type of activity. For example, one hundred twenty-one comments were received stating that consultations could not be obtained concerning circus variety acts while eight comments were received stating that no United States organization could provide consultations for ethnic or cultural groups. Four commenters stated that consultations for visual artists would be difficult to obtain. Seventy-nine commenters stated that no consultation should be required where there is no collective bargaining unit. On the other hand, one commenter suggested that labor organizations be required to comment on every petition. Twenty-five people suggested that the consultation process be eliminated. Finally, two commenters stated that ethnic advisory boards should be established to provide consultations for certain ethnic groups.

The statute requires the Attorney General to consult with a peer group for aliens of extraordinary ability. The statute also requires the Service to consult with a labor organization for P petitions. The Service is bound by these statutory requirements. However, the Service is aware that a labor organization or peer group may not exist for every proposed employment situation. The final rule will contain a provision which accommodates this situation to ensure that a petition will not be denied simply because an appropriate consulting entity does not exist.

Comments were received suggesting modification to the actual consultation process itself. Twenty-six commenters feared that a consulting organization could "kill" a petition merely by delaying its response to the petitioner's request for a consultation. The rule provides, however, that the Service can adjudicate the petition without a response from a consulting organization if a timely response is not forthcoming.

Forty-two commenters also suggested that consulting organizations be given a deadline to respond to requests for consultations from petitioning employers similar to the fifteen-day requirement when the Service requests the consultation. The Service cannot mandate a specific time frame for consultations from consulting organizations because many of the organizations which have volunteered to provide consultations have small staffs and may not be able to provide a consultation as quickly as the petitioner would like. Additionally, several commenters suggested that the petitioner's request for a consultation be considered adequate evidence of consultation. The Service will not adopt this suggestion as it has no way of

verifying that the consulting organization ever received the request for consultation or ever responded to the request.

Twenty-one commenters also suggested that notice to a labor organization should be adequate evidence of consultation and that no response should be required. The Service views the consultation process as an avenue to obtain information concerning the merits of a beneficiary in order to adjudicate a petition properly. The consultation process is not a notification process for the industry where the beneficiary intends to work. A mere notification to a consulting organization does not provide the Service with the information required to adjudicate the petition. Therefore, this proposal will be rejected.

Three commenters suggested that the final rule state that consultations be given considerable weight in the adjudication of petitions. In light of the intent of Congress to facilitate the admission of these aliens and the overwhelming public comment that the consultation requirement be eliminated altogether, the language in the proposed rule, which does give appropriate weight to the opinion of the consulting organization, is preferable.

Thirty-four commenters also suggested that consultations should be substantive, not conclusory, and expressed concern as to the contents. The proposed rule contains language that consultations must contain a specific statement of facts upon which the consultation was based.

Sixty-three comments were received suggesting that petitioners will be forced to engage in pre-filing consultations. The Service stated in the proposed rule that a substantially longer adjudication time would be required in instances where the Service would have to obtain the required consultation. This language was not placed in the proposed regulation to require petitioners to obtain the consultation before filing the petition, but merely to advise petitioners of a faster method of obtaining an adjudication of their petition.

Two commenters suggested that a consultation state whether the position requires the services of an alien of extraordinary ability. As the Service considers the consultation process to be a vehicle to obtain information, this suggestion will be adopted in the final rule.

Eight commenters suggested that the petitioner should receive a copy of any negative consultation. The proposed rule contains such a provision, which will be retained in the final rule. One

commenter suggested that the petitioner be given an opportunity to rebut a negative consultation. The final rule requires the Service to serve the petitioner with a notice of intent to deny if the Service intends to deny the petition on the basis of a negative consultation. This provides opportunity for response before a denial is issued.

Nine commenters suggested that the consulting entity should receive a copy of the decision on the petition. The Service has no objection to the consulting organization obtaining information concerning the petition. However, a consulting organization is not a party to the petition proceedings and is not entitled to notification of the Service's action on a particular petition.

One commenter suggested that preeminent petitioners should not be required to submit consultations with their petitions since the offer of employment should be sufficient to establish the beneficiary's abilities. One commenter suggested that membership in a peer group should constitute a consultation. One commenter suggested that the consultation should be waived for those aliens who were accorded H-1B or O status within the previous five years. As the statute does not provide for waivers of the consultation process, these comments will not be adopted.

Eight commenters suggested that more than one consultation should be required if more than one consulting entity exists. This suggestion would further complicate the process as it would increase the amount of paperwork and associated costs required to adjudicate the petition. The regulations do not preclude a petitioner from filing more than one consultation, but the Service will not mandate this requirement in the final rule.

Four commenters also stated that the proposed rule should contain a definition of "peer group." In response to these comments, the Service has drafted a definition of the term "peer group" in the final rule.

Three commenters also provided the Service with an alternate consultation process. This alternate consultation process has been carefully considered but the Service does not view it as being a viable alternative.

In response to the comments concerning the consultation process, the Service has made a minor alteration in the process as described in the proposed rule. The Service has added language to accommodate situations where the petitioner does not have knowledge of a consulting organization. The final rule contains language enabling the petitioner to submit those petitions to

the Service, which will attempt to obtain its own consultation.

Extensions of Stay

One hundred twenty-eight commenters suggested that aliens be permitted to travel outside the United States during the pendency of the adjudication of their request for an extension of stay. The commenters stated that beneficiaries are often required to travel on short notice and are inconvenienced by the current process.

It has been long standing Service policy that requests for extensions of stay should be processed only while the alien is in the United States. However, in order to accommodate those aliens who were required to travel outside the United States while the extension of stay was pending, the Service devised a procedure to convert the request for an extension of stay to a request for an extension of the underlying visa petition. Under the proposed rule, in order to obtain an extension of stay for a beneficiary, the petitioner must also request (on the same application form) an extension of the petition. The petitioner will simply be required to notify the Service when the alien desires to travel and, when applicable, the consular post to which the alien will apply for a visa.

Time Frames for Adjudications

One hundred twenty-four commenters suggested that the final rule provide a maximum time frame for the adjudication of petitions. Some stated that the Service should be required to adjudicate petitions within 45 days while eighty-six others suggested 15 days for emergency cases. The Service believes that there is little to be gained by imposing a required processing time. When local conditions at the Service Centers adversely affect the processing time, an artificially set time limit will do little to correct the situation. The Service is aware of the legitimacy of these concerns and will make every effort to process and adjudicate petitions in a timely manner. However, such management controls are more properly within the bounds of policy guidance and operating instructions rather than regulations.

Repeat Adjudications for O and P Nonimmigrant Petitions

In the proposed rule, the Service solicited comments concerning the processing of petitions where the beneficiary had previously been accorded the benefit sought. The Service received four hundred eighty-four comments in this area stating that some

sort of procedure should be developed to process repeat petitions in a rapid fashion. Most of the commenters suggested that if a petition had been approved in the beneficiary's behalf within a certain time frame, then the new petitioner should not be required to fully document the subsequent petition. The Service has considered these comments and has made changes to the consultation process which should streamline the process. For example, the final rule now contains a provision where the Service will attempt to obtain the required consultation when a petitioner is unaware of the existence of an appropriate consulting organization. The Service will also accept consultations from closely related consulting organizations to assist petitioners in obtaining a timely adjudication of their petitions. The Service is also prepared to amend the consultation and the adjudication process if they are found to be too cumbersome for petitioners.

The Service, however, will not adopt the suggestion that petitioners should not be required to document fully subsequent petitions for the same beneficiary. As the consultation must address both the beneficiary's qualifications and the particulars of the offered position, a new consultation must accompany each petition. Further, if the Service is required to adjudicate subsequent petitions which are not fully documented, a substantially longer adjudication time may be required in order to allow the Service to review the prior petition relating to the beneficiary.

90-Day Filing Window

In the Supplementary Information section of the proposed rule, the Service requested and received five hundred forty-six comments regarding the issue that petitions for O and P nonimmigrant classifications be filed no more than 90 days prior to the need of the alien's services. The purpose of this restriction is to ensure orderly processing of petitions for these classifications. The commenters were requested by the Service to determine whether a time limitation is desirable for H petitions as well as O and P petitions, whether the 90-day time frame is a realistic requirement, and whether some other time frame (e.g., 180 days or 270 days) would be more advantageous. Overwhelmingly, commenters responded that the 90-day filing window should be removed. Most preferred that no filing window be imposed for O classification as it is not subject to any limiting cap. Two hundred fifty-two commenters indicated that the 90-day

filing window should be removed for P classification as well. Only three commenters indicated a preference for a 180-day filing window and ten commenters preferred 270 days.

In the existing regulation, § 214.2(h)(9)(i)(B) states: "The petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services or training." Service experience based on this requirement indicates very few problems arise and that most petitions are filed within 30 to 60 days prior to the date of actual need; an insignificant number are filed earlier than 60 days. Seldom has a petitioner indicated a need to file earlier than 180 days. However, due to the overwhelming comments that a 90-day early filing restriction is problematic, the final rule will be amended to provide a six month filing window for H, O, and P nonimmigrant classifications. This will also be consistent with current H-1B requirements.

In accordance with 5 U.S.C. 605(b), the Commissioner of the Immigration and Naturalization Service certifies that this rule does not have a significant adverse economic impact on a substantial number of small entities. This rule is not considered to be a major rule within the meaning of section 1(b) of E.O. 12291, nor does this rule have Federalism implications warranting the preparation of a Federalism Assessment in accordance with E.O. 12612.

The information collection requirements contained in this rule have been forwarded to the Office of Management and Budget, under the provisions of the Paperwork Reduction Act, for review and clearance.

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Authority delegation (Government agencies), Employment, Organization and functions (Government agencies), Passports and visas.

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1186a, 1187; 8 CFR part 2.

2. Section 214.2 is amended by:
 - a. Revising paragraphs (h)(1), (h)(2)(i), (A), (C), (D), (E), and (h)(2)(ii);
 - b. Revising paragraph (h)(4) heading;
 - c. Revising paragraph (h)(4)(i) through (h)(4)(iii);
 - d. Removing paragraphs (h)(4)(iv) and (h)(4)(v);
 - e. Redesignating paragraphs (h)(4)(vi) and (h)(4)(vii) as (h)(4)(iv) and (h)(4)(v);

f. Revising newly redesignated paragraph (h)(4)(iv);

g. Adding new paragraphs (h)(4)(vi), (h)(4)(vii), (h)(4)(viii), (h)(4)(ix), (h)(6)(vi)(E), and (h)(7)(iv);

h. Revising paragraph (h)(8);

i. Redesignating paragraphs (h)(9)(iii)(A) through (h)(9)(iii)(C) as (h)(9)(iii)(B) through (h)(9)(iii)(D);

j. Adding a new paragraph (h)(9)(iii)(A);

k. Revising newly designated paragraphs (h)(9)(iii)(B) and (h)(9)(iii)(D);

1. Revising paragraphs (h)(10)(ii), (h)(10)(iii), (h)(11)(i), (h)(13) through (h)(16) and (h)(18) to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(h) Temporary employees—(1)

Admission of temporary employees—(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from an employer, if petitioned for by that employer. Under this nonimmigrant category, the alien may be classified as follows: under section 101(a)(15)(H)(i)(a) of the Act as a registered nurse; under section 101(a)(15)(H)(i)(b) of the Act as an alien who is coming to perform services in a specialty occupation, services relating to a Department of Defense (DOD) cooperative research and development project or coproduction project, services of an exceptional nature requiring distinguished merit and ability as artists, athletes, entertainers, and fashion models, or as an alien who is accompanying or assisting in the artistic or athletic performance by an alien of distinguished merit and ability; under section 101(a)(15)(H)(ii)(a) of the Act as an alien who is coming to perform agricultural labor or services of a temporary or seasonal nature; under section 101(a)(15)(H)(ii)(b) of the Act as an alien coming to perform other temporary services or labor; or under section 101(a)(15)(H)(iii) of the Act as an alien who is coming as a trainee or participant in a special education exchange visitor program. These classifications are commonly called H-1A, H-1B, H-2A, H-2B, and H-3, respectively. The employer must file a petition with the Service for review of the services or training and for determination of the alien's eligibility for classification as a temporary employee or trainee, before the alien may apply for a visa or seek admission to the United States. This paragraph sets

forth the standards and procedures applicable to these classifications.

(ii) *Description of classifications.* (A) An H-1A classification applies to an alien who is coming temporarily to the United States to perform services as a registered nurse, meets the requirements of section 212(m)(1) of the Act, and will perform services at a facility for which the Secretary of Labor has determined and certified to the Attorney General that an unexpired attestation is on file and in effect under section 212(m)(2) of the Act.

(B) An H-1B classification applies to an alien who is coming temporarily to the United States:

(1) To perform services in a specialty occupation (except registered nurses, agricultural workers, and aliens of extraordinary ability or achievement in the sciences, education, or business) described in section 214(i)(1) of the Act, that meets the requirements of section 214(i)(2) of the Act, and for whom the Secretary of Labor has determined and certified to the Attorney General that the prospective employer has an approved labor condition application under section 212(n)(1) of the Act;

(2) To perform services of an exceptional nature requiring exceptional merit and ability relating to a cooperative research and development project or a coproduction project provided for under a Government-to-Government agreement administered by the Secretary of Defense;

(3) To perform services of an exceptional nature requiring distinguished merit and ability as artists, entertainers, athletes, or fashion models; or

(4) To accompany and assist in the artistic or athletic performance by an alien who is admitted under paragraph (h)(1)(ii)(B)(3) of this section.

(C) An H-2A classification applies to an alien who is coming temporarily to the United States to perform agricultural work of a temporary or seasonal nature.

(D) An H-2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, if unemployed persons capable of performing such service or labor cannot be found in this country. This classification does not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession. The temporary or permanent nature of the services or labor to be performed must be determined by the service. This classification requires a temporary labor certification issued by the Secretary of Labor or the Governor of Guam, or a

notice from one of these individuals that such a certification cannot be made, prior to the filing of a petition with the Service.

(E) An H-3 classification applies to an alien who is coming temporarily to the United States:

(1) As a trainee, other than to receive graduate medical education or training, or training provided primarily at or by an academic or vocational institution, or

(2) As a participant in a special education exchange visitor program which provides for practical training and experience in the education of children with physical, mental, or emotional disabilities.

(2) * * *

(i) * * *

(A) *General.* A United States employer seeking to classify an alien as an H-1A, H-1B, H-2A, H-2B, or H-3 temporary employee shall file a petition on Form I-129, Petition for Nonimmigrant Worker, only with the Service Center which has jurisdiction in the area where the alien will perform services or receive training, even in emergent situations, except as provided in this section. Petitions in Guam and the Virgin Islands, and petitions involving special filing situations as determined by Service Headquarters, shall be filed with the local Service Office or a designated Service Office. The petitioner may submit a legible photocopy of a document in support of the visa petition in lieu of the original document. However, the original document shall be submitted if requested by the Service.

(C) *Services or training for more than one employer.* If the beneficiary will perform nonagricultural services for, or receive training from, more than one employer, each employer must file a separate petition with the Service Center that has jurisdiction over the area where the alien will perform services or receive training, unless an established agent files the petition.

(D) *Change of employers.* If the alien is in the United States and decides to change employers, the new employer must file a petition on Form I-129 requesting classification and extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay shall conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. The alien is not authorized to begin the new employment until the petition is approved.

(E) *Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the beneficiary's eligibility as specified in the original approved petition. An amended or new H-1A, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

(ii) *Multiple beneficiaries.* More than one beneficiary may be included in an H-2A, H-2B, or H-3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period of time and in the same location. If the beneficiaries will be applying for visas at more than one consulate, the petitioner shall file a separate petition for each consulate. If visa-exempt beneficiaries will be applying for admission at more than one port of entry, the petitioner shall file a separate petition for each port of entry.

(4) *Petition for alien to perform services in a specialty occupation, services relating to a DOD cooperative research and development project or coproduction project, services of distinguished merit and ability in the fields of art, entertainment, athletics or fashion modeling and accompanying aliens (H-1B)—(i)(A) Types of H-1B classification.* An H-1B classification may be granted to an alien who:

(1) Will perform services in a specialty occupation which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree or its equivalent as a minimum requirement for entry into the occupation in the United States, and who is qualified to perform services in the specialty occupation because he or she has attained a baccalaureate or higher degree or its equivalent in the specialty occupation;

(2) Based on reciprocity, will perform services of an exceptional nature requiring exceptional merit and ability relating to a DOD cooperative research and development project or a coproduction project provided for under a Government-to-Government agreement administered by the Secretary of Defense;

(3) To perform services of an exceptional nature, either individually or as part of a group, in the fields of art, entertainment, athletics, or fashion

modeling and who is of distinguished merit and ability, or

(4) To perform services as an accompanying alien in the artistic or athletic performance of an alien of distinguished merit and ability.

(B) *General requirements for petitions involving a specialty occupation.* (1) Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain approval of a labor condition application from the Department of Labor in the occupational specialty in which the alien(s) will be employed.

(2) Approval by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

(3) If all of the beneficiaries covered by an H-1B labor condition application have not been identified at the time a petition is filed, petitions for newly identified beneficiaries may be filed at any time during the validity of the approved labor condition application using photocopies of the same approval. Each petition must reference all previously approved petitions by file number for that labor condition application.

(4) When petitions have been approved for the total number of workers specified in the approved labor condition application, substitution of aliens against previously approved openings shall not be made and a new labor condition application shall be required.

(5) If the Secretary of Labor notifies the Service that the petitioning employer has failed to meet a condition in its labor condition application, that the petitioning employer has substantially failed to meet a condition described in subparagraphs (C) or (D) of section 212(n)(1) of the Act, or that there was a misrepresentation of a material fact in the application, the Service shall not approve new petitions in specialty occupations for that employer or extend the stay of aliens employed in specialty occupations by that employer for a period of one year from the date of receipt of such notice.

(6) If approval of the employer's labor condition application is suspended or

invalidated by the Department of Labor, the Service will not suspend or revoke the employer's approved petitions for aliens already employed in specialty occupations, if the employer has agreed to comply with the terms of the labor condition application for the duration of the authorized stay of aliens it employs.

(C) *General requirements for petitions involving an alien of distinguished merit and ability.* H-1B classification may be granted to an alien as an individual or as a member of a group, or to accompanying alien as defined in paragraph (h)(4)(ii)(A) of this section. The petition must indicate the capacity in which the alien is seeking H-1B classification at the time of filing.

(1) *H-1B classification in individual capacity.* H-1B classification may be granted to an alien who is of distinguished merit and ability. An alien of distinguished merit and ability is one who is prominent in the field of arts, entertainment, athletics, or fashion modeling. The alien must be coming to the United States to perform services which require a person of prominence.

(2) *H-1B classification as a member of a group.* A group of distinguished merit and ability consists of two or more persons who function as a unit, such as an athletic team or performing ensemble. The group as a whole must be prominent in its field and must be coming to the United States to perform services which require a group of prominence. A person who is a member of a group of distinguished merit and ability may be granted H-1B classification based on that relationship but may not perform services separate and apart from the group unless he or she is granted H-1B classification in an individual capacity.

(D) *General requirements for H-1B classification as an accompanying alien.* A person who is an accompanying alien as defined in paragraph (h)(4)(ii)(A) of this section may be granted H-1B classification based on providing essential support to an individual or group of distinguished merit and ability. The H-1B classification derived from the individual or group of distinguished merit and ability does not entitle an accompanying alien to perform services separate and apart from the individual or group of distinguished merit and ability.

(ii) *Definitions:*

(A) *Accompanying alien* means a support person such as a manager, trainer, musical accompanist, or other highly skilled, essential person determined by the director to be coming to the United States to perform support services which cannot readily be

performed by a United States worker and which are essential to the successful performance of the services to be rendered by an H-1B individual or group in the arts, entertainment or sports field. Such alien must possess appropriate qualifications, significant prior experience with the H-1B individual or group, and critical knowledge of the specific type of services to be performed so as to render success of the services dependent upon his or her participation. A highly skilled alien meeting the above criteria may be accorded H-1B classification based on this relationship with the H-1B individual or group to whom his or her services are essential.

(B) *Group* means two or more persons established as one entity to provide some form of service or activity. The reputation of the group, not that of individual members, is considered in according H-1B classification.

(C) *Prominence* means a high level of achievement in the fields of arts, entertainment, athletics, or fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of endeavor.

(D) *Recognized authority* means a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:

(1) The writer's qualifications as an expert;

(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;

(3) How the conclusions were reached; and

(4) The basis for the conclusions, including copies or citations of any research material used.

(E) *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

(F) *United States employer* means:

(1) A person, firm, corporation, contractor, or other association, or

organization in the United States which suffers or permits a person to work within the United States;

(2) Which has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

(3) Which has an Internal Revenue Service Tax identification number.

(iii) *Criteria for H-1B petitions involving a specialty occupation.—(A) Standards for specialty occupation position.* To qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

(B) *Petitioner requirements.* The petitioner shall submit the following with an H-1B petition involving a specialty occupation:

(1) An approved labor condition application from the Department of Labor in the specialty occupation, valid for the dates of intended employment,

(2) A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,

(3) Evidence that the alien qualifies to perform services in the specialty occupation as described in paragraph (h)(4)(iii)(A) of this section, and

(C) *Beneficiary qualifications.* To qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted State license, registration or certification which

authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

(D) *Equivalence to completion of a college degree.* For purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSIS);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For

equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

(E) *Liability for transportation costs.* The employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act. If the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition, the alien has not been dismissed. If the beneficiary believes that the employer has not complied with this provision, the beneficiary shall advise the Service Center which adjudicated the petition in writing. The complaint will be retained in the file relating to the petition. Within the context of this paragraph, the term "abroad" refers to the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for an alien obtaining or continuing H-1B status.

(iv) *General documentary requirements for H-1B classification in a specialty occupation.* An H-1B petition involving a specialty occupation shall be accompanied by:

(A) Documentation, certifications, affidavits, declarations, degrees,

diplomas, writings, reviews, or any other required evidence sufficient to establish that the beneficiary is qualified to perform services in a specialty occupation as described in paragraph (h)(4)(i) of this section and that the services the beneficiary is to perform are in a specialty occupation. The evidence shall conform to the following:

(1) School records, diplomas, degrees, affidavits, declarations, contracts, and similar documentation submitted must reflect periods of attendance, courses of study, and similar pertinent data, be executed by the person in charge of the records of the educational or other institution, firm, or establishment where education or training was acquired.

(2) Affidavits or declarations made under penalty of perjury submitted by present or former employers or recognized authorities certifying as to the recognition and expertise of the beneficiary shall specifically describe the beneficiary's recognition and ability in factual terms and must set forth the expertise of the affiant and the manner in which the affiant acquired such information.

(B) Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

(vi) *Criteria and documentary requirements for H-1B petitions involving DOD cooperative research and development projects or coproduction projects.*—(A) *General.* (1) For purposes of H-1B classification, services of an exceptional nature relating to DOD cooperative research and development projects or coproduction projects shall be those services which require a baccalaureate or higher degree, or its equivalent, to perform the duties. The existence of this special program does not preclude the DOD from utilizing the regular H-1B provisions provided the required guidelines are met.

(2) The requirement for approval of a labor condition application from the Department of Labor shall not apply to petitions involving DOD cooperative research and development projects or coproduction projects.

(B) *Petitioner requirements.* (1) The petition must be accompanied by a verification letter from the DOD project manager for the particular project stating that the alien will be working on a cooperative research and development project or a coproduction project under a reciprocal Government-to-Government agreement administered by DOD.

Details about the specific project are not required.

(2) The petitioner shall provide a general description of the alien's duties on the particular project and indicate the actual dates of the alien's employment on the project.

(3) The petitioner shall submit a statement indicating the names of aliens currently employed on the project in the United States and their dates of employment. The petitioner shall also indicate the names of aliens whose employment on the project ended within the past year.

(C) *Beneficiary requirement.* The petition shall be accompanied by evidence that the beneficiary has a baccalaureate or higher degree or its equivalent in the occupational field in which he or she will be performing services in accordance with paragraph (h)(4)(iii)(C) and/or (h)(4)(iii)(D) of this section.

(vii) *Criteria and documentary requirements for H-1B petitions for aliens of distinguished merit and ability in the fields of arts, entertainment, athletics, and fashion modeling—(A) General.* Prominence in the fields of arts, entertainment, and athletics may be established by an individual or a group. Prominence in the field of fashion modeling may be established by an individual. The reputation of the group as an entity, not the qualifications or accomplishments of individual members, shall be evaluated for H-1B classification. The work which a prominent alien or group is coming to perform in the United States must require the services of a prominent alien or group. A petition for an H-1B alien of distinguished merit and ability in the fields of arts, entertainment, athletics, and fashion modeling shall be accompanied by:

(1) Documentation, certifications, affidavits, writings, reviews, or any other required evidence sufficient to establish that the beneficiary is a person of distinguished merit and ability as described in paragraph (h)(4)(i) of this section, and that the services the beneficiary is to perform require a person of such merit and ability. Affidavits submitted by present or former employers or recognized experts certifying to the recognition and outstanding ability of the beneficiary shall specifically describe the beneficiary's recognition and ability in factual terms and must set forth the expertise of the affiant and the manner in which the affiant acquired such information.

(2) Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral

agreement under which the beneficiary will be employed, if there is no written contract.

(B) *Petitioner's requirements.* To qualify as a position requiring prominence, the petitioner must establish the position meets one of the following criteria:

(1) The position or services to be performed involve an event, production, or activity which has a distinguished reputation;

(2) The services to be performed are as a lead or starring participant in a distinguished activity for an organization or establishment that has a distinguished reputation or record of employing prominent persons; or

(3) The services primarily involve educational or cultural events sponsored by educational, cultural, or governmental organizations which promote international educational or cultural activities.

(C) *Beneficiary's requirements.* An alien or group may establish prominence in either one of the following categories. The alien(s) must:

(1) Have sustained national (foreign or U.S.) or international acclaim and recognition for achievements in the particular field, as evidenced by at least three different types of documentation showing that the alien or group:

(i) Has performed and will perform services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, or contracts;

(ii) Has been the recipient of significant national or international awards or prizes for services performed;

(iii) Has achieved national or international recognition for achievements evidenced by critical reviews or other published material by or about the individual or group in major newspapers, trade journals, or magazines;

(iv) Has performed and will perform services as a lead or starring participant for organizations and establishments that have a distinguished reputation;

(v) Has a record of major commercial or critically acclaimed successes, as evidenced by such indicators as title, rating, or standing in the field, box office receipts, record sales, and other occupational achievements reported in trade journals, major newspapers, or other publications;

(vi) Has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien or group is engaged. Such testimonials must be in a

form that clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

(vii) Has commanded and now commands a high salary or other substantial remuneration for services in relation to others in the field, evidenced by contracts or other reliable evidence.

(2) Be an artist who, or an artistic group that, is recognized by governmental agencies, cultural organizations, scholars, arts administrators, critics, or other experts in the particular field for excellence in developing, interpreting, or representing a unique or traditional ethnic, folk, cultural, musical, theatrical, or other artistic performance or presentation; be coming to the United States primarily for an educational or cultural event(s) to further the understanding of or development of that art form; and be sponsored primarily by educational, cultural, or governmental organizations which promote such international cultural activities and exchanges. An artist or group which seeks H-1B classification under this provision must provide affidavits, testimonials, or letters from recognized experts attesting to the authenticity and excellence of the alien's or group's skills in performing or presenting the unique or traditional art form, explaining the level of recognition accorded the alien or group in the native country and the United States, and giving the credentials of the expert, including the basis of his or her knowledge of the alien's or group's skill and recognition. The alien or group must provide at a minimum:

(i) Evidence that most of the performances or presentations will be educational or cultural events sponsored by educational, cultural, or governmental agencies; and

(ii) Both an affidavit or testimonial from the Ministry of Culture, USIA Cultural Affairs Officer, the academy for the artistic discipline, a leading scholar, a cultural institution, or a major university in the alien's own country or from a third country, and a letter from a United States expert who has knowledge in the particular field, such as a scholar arts administrator, critic, or representative of a cultural organization or government agency; or

(iii) A letter or certification from a U.S. Government cultural or arts agency such as the Smithsonian Institution, the National Endowment for the Arts, the National Endowment for the Humanities, or the Library of Congress.

(D) *Special requirements for aliens of distinguished merit and ability in the fields of arts, entertainment, athletics, and fashion modeling—(1) Adjudication*

of petition. (i) In determining whether an alien in the fields of art, entertainment, athletics, or fashion modeling is prominent and whether the services require a person of prominence, the director shall consider, but not be limited to, evidence described in paragraph (h)(4)(vii)(A), (B) and (C) of this section, and where he or she deems necessary, may require further evidence on any of those or other appropriate factors.

(ii) The director may decide not to require full documentation of any of the factors in paragraph (h)(4)(vii)(A), (B) and (C) of this section, if the alien or group is of such distinguished merit and ability that the name or reputation standing by itself would be sufficient to establish without any question that the alien or group is of distinguished merit and ability and that the alien or group is coming to the United States to perform services which require such merit and ability. In such a case, the petitioner's statement which describes the beneficiary's standing and achievements in the field of endeavor may be accepted as sufficient for approval of the petition.

(iii) The director shall approve or deny the petition based on the information in the record when that information clearly establishes H-1B eligibility or ineligibility in accordance with paragraph (h)(4)(vii)(A), (B) and (C) of this section. In all other cases, before making a decision, the director shall consult with the appropriate union and a management organization, or recognized critics or experts in the appropriate field, for an advisory opinion regarding the qualifications of the alien and the nature of the services to be performed.

(2) *Advisory opinions.* An advisory opinion may be furnished orally by an appropriate official, subject to later confirmation in writing, when requested by the director. The written opinion shall be signed by a duly authorized and responsible official of the organization consulted. Advisory opinions shall be non-binding upon the Service.

(3) *Accompanying alien or member of a group.* When an alien is entitled to H-1B classification as an accompanying alien or as a member of a group, the phrase "Accompanying Alien" or the name of the group shall be noted on the approved petition, the alien's travel documents, and arrival-departure record, Form I-94.

(viii) *Criteria and documentary requirements for H-1B petitions for accompanying aliens.*—(A) *General.* Accompanying support personnel are highly skilled aliens coming temporarily to the United States as an essential and integral part of an artistic or athletic performance of an H-1B alien because

they perform services which cannot be readily performed by a United States worker and which are essential to performances or services of the H-1B alien.

(B) *Petitioner's requirements.* The petition must be filed in conjunction with the employment of the H-1B alien and must be accompanied by:

(1) A statement describing the alien's prior and current essentiality, critical skills, and experience with the H-1B alien;

(2) Statements or affidavits from persons with first-hand knowledge that the alien has had substantial experience performing the critical skills and essential support service for the H-1B alien; and

(3) a copy of any written contract or a summary of the terms of the oral agreement under which the H-1B alien will be employed.

(ix) *Criteria and documentary requirements for H-1B petitions for physicians.* An H-1B petition filed for a physician shall be accompanied by:

(A) An approved labor condition application;

(B) Evidence that the beneficiary has received a certificate issued by the Educational Commission for Foreign Medical Graduates (ECFMG) or is exempt therefrom; and

(C) Evidence that the beneficiary has authorization from the state of intended employment to perform the duties of the proffered position.

* * *

(6) * * *

(vi) * * *

(E) *Liability for transportation costs.* The employer will be liable for the reasonable costs of return transportation of the alien abroad, if the alien is dismissed from employment for any reason by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act. If the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition, the alien has not been dismissed. If the beneficiary believes that the employer has not complied with this provision, the beneficiary shall advise the Service Center which adjudicated the petition in writing. The complaint will be retained in the file relating to the petition. Within the context of this paragraph, the term "abroad" means the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for the alien obtaining or continuing H-2B status.

(7) * * *

(iv) *Petition for participant in a special education exchange visitor program.*—(A) *General Requirements.* (1) The H-3 participant in a special education training program must be coming to the United States to participate in a structured program which provides for practical training and experience in the education of children with physical, mental, or emotional disabilities.

(2) The petition must be filed by a facility which has professionally trained staff and a structured program for providing education to children with disabilities, and for providing training and hands-on experience to participants in the special education exchange visitor program.

(3) The requirements in this section for alien trainees shall not apply to petitions for participants in a special education exchange visitor program.

(B) *Evidence.* An H-3 petition for a participant in a special education exchange visitor program shall be accompanied by:

(1) A description of the training program and the facility's professional staff and details of the alien's participation in the training program (any custodial care of children must be incidental to the training), and

(2) Evidence that the alien participant is nearing completion of a baccalaureate or higher degree in special education, or already holds such a degree, or has extensive prior training and experience in teaching children with physical, mental, or emotional disabilities.

(8) *Numerical limits.*—(i) *Limits on affected categories.* During each fiscal year, the total number of aliens who can be provided nonimmigrant classification is limited as follows:

(A) Aliens classified as H-1B nonimmigrants, excluding those involved in DOD research and development projects or coproduction projects, may not exceed 65,000.

(B) Aliens classified as H-1B nonimmigrants to work for DOD research and development projects or coproduction projects may not exceed 100 at any time.

(C) Aliens classified as H-2B nonimmigrants may not exceed 66,000.

(D) Aliens classified as H-3 nonimmigrant participants in a special education exchange visitor program may not exceed 50.

(ii) *Procedures.* (A) Each alien issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of the Act shall be counted for purposes of the numerical limit. Requests for petition extension or extension of an alien's stay shall not be

counted for the purpose of the numerical limit. The spouse and children of principal aliens classified as H-4 nonimmigrants shall not be counted against the numerical limit.

(B) Numbers will be assigned temporarily to each alien (or job opening(s) for aliens in petitions with unnamed beneficiaries) included in a new petition in the order that petitions are filed. If a petition is denied, the number(s) originally assigned to the petition shall be returned to the system which maintains and assigns numbers.

(C) For purposes of assigning numbers to aliens on petitions filed in Guam and the Virgin Islands, Service Headquarters Adjudications shall assign numbers to these locations from the central system which controls and assigns numbers to petitions filed in other locations of the United States.

(D) When an approved petition is not used because the beneficiary(ies) does not apply for admission to the United States, the petitioner shall notify the Service Center Director who approved the petition that the number(s) has not been used. The petition shall be revoked pursuant to paragraph (h)(11)(ii) of this section and the unused number(s) shall be returned to the system which maintains and assigns numbers.

(E) If the total numbers available in a fiscal year are used, new petitions and the accompanying fee shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year.

(9) * * *

(iii) * * *

(A) *H-1A petition.* An approved petition for an alien classified under section 101(a)(15)(H)(i)(a) of the Act shall be valid for a period of up to three years.

(B)(1) *H-1B petition in a specialty occupation.* An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the approval period of the labor condition application.

(2) *H-1B petition involving a DOD research and development or coproduction project.* An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien involved in a DOD research and development project or a coproduction project shall be valid for a period of up to five years.

(3) *H-1B petition involving an alien of distinguished merit and ability in the fields of art, entertainment, athletics, or fashion modeling.* An approved petition classified under section

101(a)(15)(H)(i)(b) of the Act for an alien of distinguished merit and ability in the fields of art, entertainment, athletics, or fashion modeling shall be valid for a period of up to three years.

(4) *H-1B petition for an accompanying alien.* The validity period of an approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an accompanying alien shall coincide with that of the principal alien or group.

(D)(1) *H-3 petition for alien trainee.*

An approved petition for an alien trainee classified under section 101(a)(15)(H)(iii) of the Act shall be valid for a period of up to two years.

(2) *H-3 petition for alien participant in a special education training program.*

An approved petition for an alien classified under section 101(a)(15)(H)(iii) of the Act as a participant in a special education exchange visitor program shall be valid for a period of up to 18 months.

(10) * * *

(ii) *Notice of intent to deny.* When an adverse decision is proposed on the basis of derogatory information of U.S. action of which the petitioner is unaware, the director shall notify the petitioner of the intent to deny the petition and the basis for the denial. The petitioner may inspect and rebut the evidence and will be granted a period of 30 days from the date of the notice in which to do so. All relevant rebuttal material will be considered in making a final decision.

(iii) *Notice of denial.* The petitioner shall be notified of the reasons for the denial, and of his or her right to appeal the denial of the petition under 8 CFR part 103. There is no appeal from a decision to deny an extension of stay to the alien.

(11) * * *

(i) *General.* (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition.

(B) The director may revoke a petition at any time, even after the expiration of the petition

(13) *Admission—(i) General.* (A) A beneficiary shall be admitted to the United States for the validity period of

the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition.

(B) When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad. The petitioner shall provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to spend time abroad.

(ii) *H-1A limitation on admission.* An H-1A alien who has spent five, or in certain extraordinary circumstances, six years in the United States under section 101(a)(15)(H) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for pleasure or business, for the immediate prior year.

(iii) *H-1B limitation on admission—*
(A) *Alien in a specialty occupation, alien of distinguished merit and ability, or an accompanying alien.* An H-1B alien in a specialty occupation, an alien of distinguished merit and ability, or an accompanying alien, who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

(B) *Alien involved in a DOD research and development or coproduction project.* An H-1B alien involved in a DOD research and development or coproduction project who has spent 10 years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act to perform services involving a DOD

research and development project or coproduction project. A new petition or change of status under section 101(a)(15) (H) or (L) of the Act may not be approved for such an alien unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

(iv) *H-2B and H-3 limitation on admission.* An H-2B alien who has spent three years in the United States under section 101(a)(15) (H) and/or (L) of the Act or an H-3 alien who has spent 18 months in the United States under section 101(a)(15) (H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15) (H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediate prior six months.

(v) *Exceptions.* The limitations in paragraph (h)(13)(ii) through (h)(13)(iv) of this section shall not apply to H-1A, H-1B, H-2B, and H-3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of six months or less per year. In addition, the limitations shall not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

(14) *Extension of visa petition validity.* The petitioner shall file a request for a petition extension on Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. Supporting evidence is not required unless requested by the director. A request for a petition extension may be filed only if the validity of the original petition has not expired.

(15) *Extension of stay—(i) General.* The petitioner shall apply for extension of an alien's stay in the United States by filing a petition extension on Form I-129 accompanied by the documents described for the particular classification in paragraph (h)(15)(ii) of this section. The petitioner must also request a petition extension. The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. Even though the requests to

extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each. If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may request the director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa. When the total period of stay in an H classification has been reached, no further extensions may be granted.

(ii) *Extension periods—(A) H-1A extension of stay.* An extension of stay may be authorized for a period of up to two years for a beneficiary of an H-1A petition. The alien's total period of stay may not exceed five years, except in extraordinary circumstances. Beyond five years, an extension of stay not to exceed one year may be granted under extraordinary circumstances. Extraordinary circumstances shall exist when the director finds that termination of the alien's services will impose extreme hardship on the petitioner's business operation or that the alien's services are required in the national welfare, safety, or security interests of the United States. Each request for an extension of stay for the beneficiary of an H-1A petition must be accompanied by a current copy of the Department of Labor's notice of acceptance of the petitioner's attestation on Form ETA 9029.

(B) *H-1B extension of stay—(1) Alien in a specialty occupation, an alien of distinguished merit and ability or an accompanying alien.* An extension of stay may be authorized for a period of up to three years for a beneficiary of an H-1B petition in a specialty occupation, an alien of distinguished merit and ability or an accompanying alien. The alien's total period of stay may not exceed six years. The request for extension must be accompanied by an approved labor condition application for the specialty occupation valid for the period of time requested.

(2) *Alien in a DOD research and development or coproduction project.* An extension of stay may be authorized for a period up to five years for the beneficiary of an H-1B petition involving a DOD research and development project or coproduction project. The total period of stay may not exceed 10 years.

(C) *H-2A or H-2B extension of stay.* An extension of stay for the beneficiary of an H-2A or H-2B petition may be authorized for the validity of the labor certification or for a period of up to one year, except as provided for in paragraph (h)(5)(x) of this section. The

alien's total period of stay as an H-2A or H-2B worker may not exceed three years, except that in the Virgin Islands, the alien's total period of stay may not exceed 45 days.

(D) *H-3 extension of stay.* An extension of stay may be authorized for the length of the training program for a total period of stay as an H-3 trainee not to exceed two years, or for a total period of stay as a participant in a special education training program not to exceed 18 months.

(16) *Effect of approval of a permanent labor certification or filing of a preference petition on H classification—*

(i) *H-1A or H-1B classification.* The approval of a permanent labor certification or the filing of a preference petition for an alien shall not be a basis for denying an H-1A or H-1B petition or a request to extend such a petition, or the alien's admission, change of status, or extension of stay. The alien may legitimately come to the United States for a temporary period as an H-1A or H-1B nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States.

(ii) *H-2A, H-2B, and H-3 classification.* The approval of a permanent labor certification, or the filing of a preference petition for an alien currently employed by or in a training position with the same petitioner, shall be a reason, by itself, to deny the alien's extension of stay.

(18) *Use of approval notice, Form I-797.* The Service shall notify the petitioner on Form I-797 whenever a visa petition, an extension of a visa petition, or an alien's extension of stay is approved under the H classification. The beneficiary of an H petition who does not require a nonimmigrant visa may present a copy of the approval notice at a port of entry to facilitate entry into the United States. A beneficiary who is required to present a visa for admission and whose visa will have expired before the date of his or her intended return may use a copy of Form I-797 to apply for a new or revalidated visa during the validity period of the petition. The copy of Form I-797 shall be retained by the beneficiary and presented during the validity of the petition when reentering the United States to resume the same employment with the same petitioner.

§ 214.2 [Amended]

3. In § 214.2, paragraph (h)(2)(iii) is amended by removing the reference to "I-129H" in the first sentence.

§ 214.2 [Amended]

4. In § 214.2, paragraph (h)(2)(iv) is amended by removing the term "H-1B and" in the first sentence.

§ 214.2 [Amended]

5. In § 214.2, paragraph (h)(2)(v)(E) is amended by adding the phrase "in the same state" immediately after the word "valid" in the last sentence of the paragraph.

§ 214.2 [Amended]

6. In § 214.2, paragraph (h)(5)(i)(A) is amended by revising the reference to "Form I-129H" to "Form I-129".

§ 214.2 [Amended]

7. In § 214.2, paragraph (h)(6)(iii)(E) is amended by removing the term "on I-129H," after the word "petition", and removing the term "for I-129Hs" after the word "jurisdiction".

§ 214.2 [Amended]

8. In § 214.2, paragraph (h)(6)(vi) introductory text is amended by revising the phrase "filed on Form I-129H".

§ 214.2 [Amended]

9. In § 214.2, paragraph (h)(7) is amended by revising the heading of this paragraph to read: "*Petition for alien trainee or participant in a special education exchange visitor program (H-3)*".

§ 214.2 [Amended]

10. In § 214.2, paragraph (h)(7)(i) is amended by revising the heading of this paragraph to read "*Alien trainee*", and revising the word "instruction" in the first sentence to "training".

§ 214.2 [Amended]

11. In § 214.2, paragraph (h)(7)(ii) is amended by revising the heading of paragraph to read "*Evidence required for petition involving alien trainee*".

§ 214.2 [Amended]

12. In § 214.2, paragraph (h)(7)(iii) is amended by revising the heading of this paragraph to read "*Restrictions on training program for alien trainee*".

§ 214.2 [Amended]

13. In § 214.2, paragraph (h)(9)(i) is amended by removing the term "Form I-171C, Notice of Approval or" in the second sentence of introductory text.

§ 214.2 [Amended]

14. In § 214.2, paragraph (h)(9)(ii) (A), (B), and (C) are amended by revising the reference to "(h)(9)(ii)" to "(h)(9)(iii)".

15. Section § 214.2, amended by:

a. Revising paragraphs (l)(1)(i), (l)(1)(ii) (A), (B), (C), (D), (F), (G), (H), (K), and (L);

b. Revising paragraph (l)(2)(i) and (l)(3)(iii);

c. Redesignating paragraphs (l)(3)(vi) and (l)(3)(vii) as paragraphs (l)(3)(vii) and (l)(3)(viii);

d. Revising paragraph (l)(3)(v);

e. Adding a new paragraph (l)(3)(vi);

f. Revising paragraphs (l)(5)(ii)(C) and (l)(6);

g. Revising paragraph (l)(7)(i) introductory text;

h. Revising paragraph (l)(7)(i)(C), (l)(7)(ii), (l)(8)(ii) and (l)(8)(iii), (l)(9)(i), (l)(10)(i), (l)(12), (l)(14)(i), (l)(15); and (l)(16) to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

(l) * * *

(1) * * *

(i) *General.* Under section 101(a)(15)(L) of the Act, an alien who within the preceding three years has been employed abroad for one continuous year by a qualifying organization may be admitted temporarily to the United States to be employed by a parent, branch, affiliate, or subsidiary of that employer in a managerial or executive capacity, or in a position requiring specialized knowledge. An alien transferred to the United States under this nonimmigrant classification is referred to as an intracompany transferee and the organization which seeks the classification of an alien as an intracompany transferee is referred to as the petitioner. The Service has responsibility for determining whether the alien is eligible for admission and whether the petitioner is a qualifying organization. These regulations set forth the standards applicable to these classifications. They also set forth procedures for admission of intracompany transferees and appeal of adverse decisions. Certain petitioners seeking the classification of aliens as intracompany transferees may file blanket petitions with the Service. Under the blanket petition process, the Service is responsible for determining whether the petitioner and its parent, branches, affiliates, or subsidiaries specified are qualifying organizations. The Department of State or, in certain cases, the Service is responsible for determining the classification of the alien.

(ii) * * *

(A) *Intracompany transferee* means an alien who, within three years

preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

(B) *Managerial capacity* means an assignment within an organization in which the employee primarily:

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(4) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(C) *Executive capacity* means an assignment within an organization in which the employee primarily:

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

(D) *Specialized knowledge* means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

(F) *New office* means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

(H) *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or

(3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services

under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

(2) * * *

(i) Except as provided in paragraph (1)(2)(ii) and (1)(17) of this section, a petitioner seeking to classify an alien as an intracompany transferee shall file a petition on Form I-129, Petition for Nonimmigrant Worker, only at the Service Center which has jurisdiction over the area where the alien will be employed, even in emergent situations. The petitioner shall advise the Service whether it has filed a petition for the same beneficiary with another office, and certify that it will not file a petition for the same beneficiary with another office, unless the circumstances and conditions in the initial petition have changed. Failure to make a full disclosure of previous petitions filed may result in a denial of the petition.

(3) * * *

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(v) * * *

(i) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii) (B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

(vi) If the petition indicates that the beneficiary is coming to the United States in a specialized knowledge capacity to open or to be employed in a new office, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The business entity in the United States is or will be a qualifying organization as defined in paragraph (1)(1)(ii)(G) of this section; and

(C) The petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

(5) * * *

(ii) * * *

(C) When the alien is a visa-exempt nonimmigrant seeking L classification under a blanket petition, or when the alien is in the United States and is seeking a change of status from another nonimmigrant classification to L classification under a blanket petition, the petitioner shall submit Form I-129S, Certificate of Eligibility, and a copy of the approval notice, Form I-797, to the Service Center with which the blanket petition was filed.

(6) *Copies of supporting documents.* The petitioner may submit a legible photocopy of a document in support of the visa petition, in lieu of the original document. However, the original document shall be submitted if requested by the Service.

(7) * * *

(i) *General.* The director shall notify the petitioner of the approval of an individual or a blanket petition within 30 days after the date a completed petition has been filed. If additional information is required from the petitioner, the 30 day processing period shall begin again upon receipt of the information. Only the Director of a Service Center may approve individual and blanket L petitions. The original Form I-797 received from the Service with respect to an approved individual or blanket petition may be duplicated by the petitioner for the beneficiary's use

as described in paragraph (I)(13) of this section.

(C) *Amendments.* The petitioner shall file an amended petition, with fee, at the Service Center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e., from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

(ii) *Spouse and dependents.* The spouse and unmarried minor children of the beneficiary are entitled to L nonimmigrant classification, subject to the same period of admission and limits as the beneficiary, if the spouse and unmarried minor children are accompanying or following to join the beneficiary in the United States. Neither the spouse nor any child may accept employment unless he or she has been granted employment authorization.

(8) * * *

(ii) *Individual petition.* If an individual is denied, the petitioner shall be notified within 30 days after the date a completed petition has been filed of the denial, the reasons for the denial, and the right to appeal the denial.

(iii) *Blanket petition.* If a blanket petition is denied in whole or in part, the petitioner shall be notified within 30 days after the date a completed petition has been filed of the denial, the reasons for the denial, and the right to appeal the denial. If the petition is denied in part, the Service Center issuing the denial shall forward to the petitioner, along with the denial, a Form I-797 listing those organizations which were found to qualify. If the decision to deny is reversed on appeal, a new Form I-797 shall be sent to the petitioner to reflect the changes made as a result of the appeal.

(9) * * *

(i) *General.* The director may revoke a petition at any time, even after the expiration of the petition.

(10) * * *

(i) A petition denied in whole or in part may be appealed under 8 CFR part 103. Since the determination on the Certificate of Eligibility, Form I-129S, is part of the petition process, a denial or revocation of approval of an I-129S is appealable in the same manner as the petition.

(12) *L-1 limitation on period of stay—*
(i) *Limits.* An alien who has spent five years in the United States in a

specialized knowledge capacity or seven years in the United States in a managerial or executive capacity under section 101(a)(15) (L) and/or (H) of the Act may not be readmitted to the United States under section 101(a)(15) (L) or (H) of the Act unless the alien has resided and been physically present outside the United States, except for brief visits for business or pleasure, for the immediate prior year. Such visits do not interrupt the one year abroad, but do not count towards fulfillment of that requirement. In view of this restriction, a new individual petition may not be approved for an alien who has spent the maximum time period in the United States under section 101(a)(15) (L) and/or (H) of the Act, unless the alien has resided and been physically present outside the United States, except for brief visits for business or pleasure, for the immediate prior year. The petitioner shall provide information about the alien's employment, place of residence, and the dates and purpose of any trips to the United States for the previous year. A consular or Service officer may not grant L classification under a blanket petition to an alien who has spent five years in the United States as a professional with specialized knowledge or seven years in the United States as a manager or executive, unless the alien has met the requirements contained in this paragraph.

(ii) *Exceptions.* The limitations of paragraph (I)(12)(i) of this section shall not apply to aliens who do not reside continually in the United States and whose employment in the United States is seasonal, intermittent, or consists of an aggregate of six months or less per year. In addition, the limitations will not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. The petitioner and the alien must provide clear and convincing proof that the alien qualifies for an exception. Clear and convincing proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

(14) *Extension of visa petition validity—*(i) *Individual petition.* The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

(15) *Extension of stay.* (i) In individual petitions, the petitioner must apply for the petition extension and the alien's extension of stay concurrently on Form I-129. When the alien is a beneficiary under a blanket petition, a new certificate of eligibility, accompanied by a copy of the previous approved certificate of eligibility, shall be filed by the petitioner to request an extension of the alien's stay. The petitioner must also request a petition extension. The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time the extension of stay is filed. Even though the requests to extend the visa petition and the alien's stay are combined on the petition, the director shall make a separate determination on each. If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may request the director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa.

(ii) An extension of stay may be authorized in increments of up to two years for beneficiaries of individual and blanket petitions. The total period of stay may not exceed five years for aliens employed in a specialized knowledge capacity. The total period of stay for an alien employed in a managerial or executive capacity may not exceed seven years. No further extensions may be granted. When an alien was initially admitted to the United States in a specialized knowledge capacity and is later promoted to a managerial or executive position, he or she must have been employed in the managerial or executive position for at least six months to be eligible for the total period of stay of seven years. The change to managerial or executive capacity must have been approved by the Service in an amended, new, or extended petition at the time that the change occurred.

(16) *Effect of approval of a permanent labor certification or filing of a preference petition on L-1 classification.* The approval of a permanent labor certification or the filing of a preference petition for an alien shall not be a basis for denying an L petition, a request to extend an L petition, or the alien's application for admission, change of status, or extension of stay. The alien may legitimately come to the United States as a nonimmigrant under the L classification and depart voluntarily at the end of his or her authorized stay.

and at the same time, lawfully seek to become a permanent resident of the United States.

§ 214.2 [Amended]

16. Section 214.2 is amended by revising the reference to "Form I-129L" to "Form I-129" whenever it appears in the following paragraphs:

- (l)(2)(i)
- (l)(2)(ii)
- (l)(3) introductory text
- (l)(4)(iv) introductory text
- (l)(14)(ii) introductory text
- (l)(14)(iii)(A)
- (l)(17)(i)

§ 214.2 [Amended]

17. Section 214.2 is amended by revising the reference to "Form I-171C" to "Form I-797" whenever it appears in the following paragraphs:

- (l)(5)(ii)(A)
- (l)(5)(ii)(B)
- (l)(7)(i)(A)(1)
- (l)(7)(i)(B)(1)
- (l)(9)(iii)(B)
- (l)(13) heading
- (l)(13)(i)
- (l)(13)(ii)
- (l)(17)(ii)

§ 214.2 [Amended]

18. In § 214.2, paragraph (l)(17)(ii) is amended by removing the term "(or Form I-797)" in the second sentence.

§ 214.2 [Amended]

19. In § 214.2, paragraph (l)(1)(ii)(M) is amended by revising the reference to "district director or Regional Service Center director" to "Service Center director".

§ 214.2 [Amended]

20. In § 214.2, paragraph (l)(2)(ii) is amended by revising the reference to "Regional Service Center" to "Service Center" whenever it appears in the paragraph.

§ 214.2 [Amended]

21. In § 214.2, paragraph (l)(3)(iii) is amended by revising the word "immediately" to the phrase "within the three years".

§ 214.2 [Amended]

22. In § 214.2, paragraph (l)(3)(v) is amended in the introductory text by inserting the phrase "to the United States as a manager or executive" immediately after the word "coming".

§ 214.2 [Amended]

23. In § 214.2, paragraph (l)(14)(ii)(D) is amended by adding the phrase "when the beneficiary will be employed in a managerial or executive capacity"

immediately after the phrase "wages paid to employees" and before the ";".

§ 214.2 [Amended]

24. In § 214.2, paragraph (l)(17)(iv) is amended by removing the phrase "on Form I-292" in the third sentence, by revising the reference to "Regional Service Center (RSC)" in the fourth sentence to "Service Center", and by revising the reference to "RSC" in the last sentence to "Service Center".

§ 214.2 [Amended]

25. In § 214.2, paragraphs (l)(17)(V)(A) and (B) are amended by inserting the phrase "subject to the same limits" immediately after the phrase "length of stay".

26. Section 214.2 is amended by redesignating paragraph (o) as paragraph (s), adding new paragraphs (o) and (p) and adding and reserving paragraph (r) to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(o) Aliens of extraordinary ability.—

(1) *Classification*—(i) *General*. Under section 101(a)(15)(O) of the Act, a qualified alien may be authorized to come to the United States to perform services relating to a specific event. Under this nonimmigrant category, the alien may be classified under section 101(a)(15)(O)(i) of the Act as an alien who has extraordinary ability in the sciences, education, or business or under section 101(a)(15)(O)(iii) of the Act as the spouse or child of an alien described in section 101(a)(15)(O)(i) of the Act who is accompanying or following to join the alien. These classifications are called the O-1 and O-3 category, respectively. The petitioner must file a petition with the Service for a determination of the alien's eligibility for O-1 classification before the alien may apply for a visa or seek admission to the United States. This paragraph sets forth the standards and procedures applicable to these classifications.

(ii) *Description of classification*. An O-1 classification applies to an individual alien who has extraordinary ability in the sciences, education, or business which has been demonstrated by sustained national or international acclaim; who is coming temporarily to the United States or continue work in the area of extraordinary ability; and whose admission will substantially benefit the United States.

(2) *Filing of petitions*. (i) *General*. A petitioner seeking to classify an alien as an O-1 shall file a petition on Form I-

129, Petition for Nonimmigrant Worker, only with the Service Center which has jurisdiction in the area where the alien will work. The petition may not be filed more than six months before the actual need for the alien's services. An O-1 petition shall be adjudicated at the appropriate Service Center, even in emergent situations. The petition shall be accompanied by the evidence specified in this section for the classification. A legible photocopy of a document in support of the petition may be submitted in lieu of the original. However, the original document shall be submitted if requested by the director.

(ii) *Other filing situations*.—(A) *Services in more than one location*. A petition which requires the alien to work in more than one location must include an itinerary with the dates and locations of work and must be filed with the Service Center which has jurisdiction in the area where the petitioner is located. The address which the petitioner specifies as its location on the petition shall be where the petitioner is located for purposes of this paragraph. If the petitioner is a foreign employer with no United States location, the petition shall be filed with the Service Center having jurisdiction over the area where the work will begin.

(B) *Services for more than one employer*. If the beneficiary will work concurrently for more than one employer within the same time period, each employer must file a separate petition with the Service Center that has jurisdiction over the area where the alien will perform services, unless an established agent files the petition.

(C) *Change of employer*. If an O-1 alien in the United States seeks to change employers, the new employer must file a petition with the Service Center having jurisdiction over the new place of employment.

(D) *Amended petition*. The petitioner shall file an amended petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or the beneficiary's eligibility as specified in the original approved petition.

(E) *Agents as petitioners*. An established United States agent may file a petition in cases involving an alien who is traditionally self-employed or uses agents to arrange short-term employment in his or her behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act in its behalf. A petition filed by an agent is subject to the following conditions:

(1) A person or company in business as an agent may file the petition involving multiple employers as the representative of both the employers and the beneficiary if the supporting documentation includes a complete itinerary of the event or events. The itinerary must specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues, or locations where the services will be performed. A contract between the employers and the beneficiary is required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

(2) An agent performing the function of an employer must provide the contractual agreement between the agent and the beneficiary which specify the wage offered and the other terms and conditions of employment of the beneficiary.

(3) *Petition for alien of extraordinary ability (O-1)*—(i) *General*. Extraordinary ability in the sciences, education, or business must be established for an individual alien. An O-1 petition must be accompanied by evidence that the work which the alien is coming to the United States to continue is in the area of extraordinary ability, that the alien meets the criteria in paragraph (o)(3)(iv) or (v) of this section, and that the alien's admission will substantially benefit the United States.

(ii) *Definitions*.

Event means an activity such as, but not limited to, a scientific project, conference, convention, lecture series, tour, exhibit, business project, academic year, or an engagement. Such activity could include short vacations, promotional appearances and stopovers which are incidental and/or related to the event. A group of related activities will also be considered an event.

Extraordinary ability in the sciences, education, or business means a level of expertise indicating that the individual is one of the small percentage who have risen to the very top of the field of endeavor.

Peer group means a group or organization comprising practitioners of the alien's occupation who are of similar standing with the alien and which is governed by such practitioners. If there is a collective bargaining representative of an employer's employees in the occupational classification for which the alien is being sought, such a representative may be considered the appropriate peer group for purposes of consultation.

(iii) *Standards for establishing that a position requires the services of an*

alien of extraordinary ability. To establish that a position requiring the services of an alien of extraordinary ability, the position must meet one of the following criteria:

(A) The position or services to be performed involve an event or activity which has a distinguished reputation or is a comparable newly organized event or activity;

(B) The services to be performed are in a lead or critical role in an activity for an organization or establishment that has a distinguished reputation or record of employing extraordinary persons;

(C) The services primarily involve a specific scientific or educational project, conference, convention, lecture, or exhibit sponsored by bona fide scientific or educational organizations or establishments; or

(D) The services consist of a specific business project that is appropriate for an extraordinary executive, manager, or highly technical person due to the complexity of the business project.

(iv) *Standards for an O-1 alien of extraordinary ability*. An alien of extraordinary ability in the sciences, education, or business must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

(A) Receipt of a major, internationally-recognized award, such as the Nobel Prize; or

(B) At least three of the following forms of documentation:

(1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(2) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;

(4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;

(5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;

(6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;

(7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;

(8) Evidence that the alien has commanded and now commands a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

(C) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

(4) *Consultation*—(i) *General*. (A) Written evidence of consultation with an appropriate peer group regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for an O-1 classification can be approved.

(B) Evidence of consultation shall be a written advisory opinion from the peer group. If the director requests an advisory opinion and no response is received within the time period specified, the director shall make a decision without the advisory opinion. The director's written request for an opinion shall be evidence of consultation.

(C) To facilitate adjudication of an O-1 petition, the petitioner should obtain a written advisory opinion from an appropriate peer group and submit it when the petition is filed. The written opinion should set forth a specific statement of facts upon which the conclusion was reached. When the Service must obtain an advisory opinion, considerably longer adjudication time may be required. Consultation is not required if the petition will be denied on another ground.

(D) Written evidence of consultation shall be included in the record in every approved O petition. Consultations are advisory in nature and not binding on the Service. If a petition is denied because of the opinion provided by a peer group, it shall be attached to the director's decision.

(E) When a petition is filed without the required evidence of consultation but the petitioner names an appropriate peer group, the petitioner shall send a copy of the petition and supporting documents to the appropriate peer group at the same time that the petition is filed with the Service. The petitioner shall explain to the peer group that it will be contacted by the Service for an advisory

opinion regarding the services to be performed and the alien's qualifications. The name and address of the peer group where the copy of the petition was sent shall be indicated in the petition that is filed with the Service. If the director determines that the petition was sent to the appropriate peer group, the director shall request, in writing, a written advisory opinion from that group before approving a petition.

(F) When a petition is filed without the required evidence of consultation and the petitioner does not designate an appropriate peer group, the Service will obtain the consultation.

(G) In those cases where it is established by the petitioner that an appropriate peer group does not exist, the Service may render a decision on the evidence of record. This does not preclude the Service from obtaining a consultation from a closely related peer group.

(H) In those cases where the Service determines that the consultation submitted by the petitioner was provided by an inappropriate peer group, the Service may seek a new consultation from an appropriate peer group.

(I) If the record of proceeding in a case contains conflicting consultations, the director shall render a decision on the evidence of record.

(ii) *Consultation requirements for an O-1 alien of extraordinary ability.* Written consultation with a peer group in the area of the alien's ability is required in an O-1 petition. The peer group shall be an appropriate association or entity with expertise in that area. The advisory opinion provided by the peer group must describe the alien's ability and achievements in the field of endeavor and state whether the position requires the services of an alien of extraordinary ability. The written opinion must be signed by an authorized official of the organization.

(iii) *Procedures for advisory opinions.* (A) The Service will list in its Operations Instructions for O classification those peer groups which agree to provide advisory opinions to the Service and/or petitioners. The list will not be exclusive. The Service and petitioners may use other sources, such as publications, to identify appropriate peer groups.

(B) The director's request for an advisory opinion shall specify the information needed. The peer group to which the request is being made should be advised that a written opinion is needed within 15 days of the date of the director's letter. If a response is not received within 15 days, the director

shall make a decision without the advisory opinion. The director may shorten the 15 day period in his or her discretion.

(5) *General documentary requirements for O classification.* The evidence submitted with an O petition shall conform to the following:

(i) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by the person in charge of the institution, firm, establishment, or organization where the work was performed.

(ii) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability shall specifically describe the alien's recognition and ability or achievement in factual terms and must set forth the expertise of the affiant and the manner in which the affiant acquired such information.

(iii) Copies of any written contracts between the petitioner and the alien beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the alien will be employed.

(iv) An explanation of the nature of the event or activity, the beginning and ending date for the event or activity, and a copy of any itinerary for the event or activity.

(6) *Approval and validity of petition.*

(i) *Approval.* The director shall consider all of the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication. The director shall notify the petitioner of the approval of the petition on Form I-797, Notice of Action. The approval notice shall include the alien beneficiary's name and classification and the petition's period of validity.

(ii) *Recording the validity of petitions.* Procedures for recording the validity period of petitions are as follows:

(A) If a new O petition is approved after the date the petitioner indicates the services will begin, the approved petition and approval notice shall show a validity period commencing with the date of approval and ending with the date requested by the petitioner, not to exceed the limit specified by paragraph (o)(6)(iii) of this section or other Service policy.

(B) If a new O petition is approved after the date the petitioner indicates the services will begin, the approved petition and approval notice shall show a validity period commencing with the date of approval and ending with the date requested by the petitioner, not to exceed the limit specified by paragraph

(o)(6)(iii) of this section or other Service policy.

(C) If the period of services requested by the petitioner exceeds the limit specified in paragraph (o)(6)(iii) of this section, the petition shall be approved only up to the limit specified in that paragraph.

(iii) *Validity.* An approved petition for an alien classified under section 101(a)(15)(O)(i) of the Act shall be valid for a period of time determined by the director to be necessary to accomplish the event or activity, not to exceed three years.

(iv) *Spouse and dependents.* The spouse and unmarried minor children of the O-1 alien beneficiary are entitled to O-3 nonimmigrant classification, subject to the same period of admission and limitations as the alien beneficiary, if they are accompanying or following to join the alien beneficiary in the United States. Neither the spouse nor a child of the alien beneficiary may accept employment unless he or she has been granted employment authorization.

(7) *Denial of petition.*—(i) *Notice of intent to deny.* When an adverse decision is proposed on the basis of derogatory information of which the petitioner is unaware, the director shall notify the petitioner of the intent to deny the petition and the basis for the denial. The petitioner may inspect and rebut the evidence and will be granted a period of 30 days from the date of the notice in which to do so. All relevant rebuttal material will be considered in making a final decision.

(ii) *Notice of denial.* The petitioner shall be notified of the decision, the reasons for the denial, and the right to appeal the denial under Part 103 of this chapter. There is no appeal from a decision to deny an extension of stay to the alien.

(8) *Revocation of approval of petition.*

(i) *General.*—(A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(O) of the Act and paragraph (o) of this section. An amended petition should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition.

(B) The director may revoke a petition at any time, even after the validity of the petition has expired.

(ii) *Automatic revocation.* The approval of an unexpired petition is automatically revoked if the petitioner goes out of business, files a written

withdrawal of the petition, or notifies the Service that the beneficiary is no longer employed by the petitioner.

(iii) *Revocation on notice—(A) Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;
- (2) The statement of facts contained in the petition was not true and correct;
- (3) The petitioner violated the terms or conditions of the approved petition;
- (4) The petitioner violated the requirements of section 101(a)(15)(O) of the Act or paragraph (o) of this section; or
- (5) The approval of the petition violated paragraph (o) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of the date of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition.

(9) *Appeal of a denial or a revocation of a petition—(i) Denial.* A denied petition may be appealed under Part 103 of this chapter.

(ii) *Revocation.* A petition that has been revoked on notice may be appealed under part 103 of this chapter. Automatic revocations may not be appealed.

(10) *Admission.* A beneficiary may be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition.

(11) *Extension of visa petition validity.* The petitioner shall file a request to extend the validity of the original petition under section 101(a)(15)(O) of the Act on Form I-129 in order to continue or complete the same activity or event specified in the original petition. Supporting documents are not required unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

(12) *Extension of stay—(i) Extension procedure.* The petitioner shall request extension of the alien's stay to continue or complete the same event or activity by filing Form I-129, accompanied by a statement explaining the reasons for the extension. The petitioner must also request a petition extension. The dates

of extension shall be the same for the petition and the beneficiary's extension of stay. The alien beneficiary must be physically present in the United States at the time of filing of the extension of stay. Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each. If the alien leaves the United States for business or personal reasons while the extension requests are pending, the petitioner may request the director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa.

(ii) *Extension period.* An extension of stay may be authorized in increments of up to one year for an O-1 beneficiary to continue or complete the same event or activity for which he or she was admitted plus an additional ten days.

(13) *Effect of approval of a permanent labor certification or filing of a preference petition on O classification.* The approval of a permanent labor certification or the filing of a preference petition for an alien shall not be a basis for denying an O petition, a request to extend such a petition, or the alien's application for admission, change of status, or extension of stay. The alien may legitimately come to the United States for a temporary period as an O nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States.

(14) *Effect of a strike.* (i) If the Secretary of Labor certifies to the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress in the occupation at the place where the beneficiary is to be employed, and that the employment of the beneficiary would adversely affect the wages and working conditions of U.S. citizens and lawful resident workers:

(A) A petition to classify an alien as a nonimmigrant as defined in section 101(a)(15)(O) of the Act shall be denied; or

(B) If a petition has been approved, but the alien has not yet entered the United States, or has entered the United States but has not commenced employment, the approval of the petition is automatically suspended, and the application for admission on the basis of the petition shall be denied.

(ii) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (o)(15)(i) of this section, the

Commission shall not deny a petition or suspend an approved petition.

(iii) If the alien has already commenced employment in the United States under an approved petition and is participating in a strike or labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Secretary of Labor, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers but is subject to the following terms and conditions:

(A) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act and regulations promulgated thereunder in the same manner as are all other O nonimmigrants;

(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers; and

(C) Although participation by an O nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, an alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.

(15) *Use of approval notice, Form I-797.* The Service shall notify the petitioner on Form I-797 whenever a visa petition or an extension of a visa petition is approved under the O classification. The beneficiary of an O petition who does not require a nonimmigrant visa may present a copy of the approval notice at a port of entry to facilitate entry into the United States. A beneficiary who is required to present a visa for admission and whose visa will have expired before the date of his or her intended return may use Form I-797 to apply for a new or revalidated visa during the validity period of the petition. The copy of Form I-797 shall be retained by the beneficiary and presented during the validity of the petition when reentering the United States to resume the same employment with the same petitioner.

(p) *Artists and entertainers under a reciprocal exchange program—(1) Classification.* (i) *General.* Under section 101(a)(15)(P) of the Act, an alien having a residence in a foreign country which he or she has no intention of abandoning may be authorized to come to the United States temporarily to perform services for an employer or a

sponsor. Under this nonimmigrant category, the alien may be classified under section 101(a)(15)(P)(ii) or the Act as an alien who is coming to perform as an artist or entertainer under a reciprocal exchange program or under section 101(a)(15)(P)(iv) of the Act as the spouse or child of an alien described in section 101(a)(15)(P)(ii) of the Act who is accompanying or following to join the alien. These classifications are called P-2 and P-4, respectively. The employer or sponsor must file a petition with the Service for review of the services and for determination of the alien's eligibility for P-2 classification before the alien may apply for a visa or seek admission to the United States. This paragraph sets forth the standards and procedures applicable to these classifications.

(ii) *Description of classification*—A P-2 classification applies to an alien who is coming temporarily to the United States to perform as an artist or entertainer, individually or as part of a group, or to perform as an integral part of the performance of such a group, and seeks to perform under a reciprocal exchange program which is between an organization or organizations in the United States and an organization in one or more foreign states, and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers between the United States and the foreign states involved.

(2) *Filing of petitions*—(i) *General*. A P-2 petition for an artist or entertainer in a reciprocal exchange program shall be filed by the sponsoring organization or an employer in the United States. The petitioning employer or sponsoring organization shall file a P petition on Form I-129, Petition for Nonimmigrant Worker, with the Service Center which has jurisdiction in the area where the alien will work. The petition may not be filed more than six months before the actual need for the alien's services. A P-2 petition shall be adjudicated at the appropriate Service Center, even in emergent situations. The petition shall be accompanied by the evidence specified in this section. A legible photocopy of a document in support of the petition may be submitted in lieu of the original. However, the original document shall be submitted if requested by the director.

(ii) *Other filing situations*—(A) *Services in more than one location*. A petition which requires the alien to work in more than one location (i.e., a tour) must include an itinerary with the dates and locations of the performances and must be filed with the Service Center

which has jurisdiction in the area where the petitioner is located. The address which the petitioner specifies as its location on the petition shall be where the petitioner is located for purposes of this section. If the petitioner is a foreign employer with no United States location, the petition shall be filed with the Service office that has jurisdiction over the area where the employment will begin.

(B) *Services for more than one employer*. If the beneficiary(ies) will work for more than one employer within the same time period, each employer must file a separate petition with the Service Center that has jurisdiction over the area where the alien will perform the services, unless an established agent files the petition.

(C) *Change of employer*. If a P-2 alien in the United States seeks to change employers or sponsors, the new employer must file a petition and a request to extend the alien's stay in the United States. A P-2 petition must be accompanied by an explanation of why it would be a hardship on the petitioner for the alien(s) to remain outside the United States for a three month period pursuant to paragraph (p)(6)(iv) of this section, before engaging in a new activity or performance in the United States.

(D) *Amended petition*. The petitioner shall file an amended petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or the beneficiary's eligibility as specified in the original approved petition.

(E) *Agents as petitioners*. An established United States agent may file a petition in cases involving workers who traditionally are self-employed or use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act in its behalf. A petition filed by an agent is subject to the following conditions:

(1) A person or company in business as an agent may file the P petition involving multiple employers as the representative of both the employers and the beneficiary(ies) if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues, or locations where the services will be performed. In questionable cases, a contract between the employer(s) and the beneficiary(ies)

may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

(2) An agent performing the function of an employer must specify the wage offered and the other terms and conditions of employment by contractual agreement with the beneficiary(ies). The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

(F) *Multiple beneficiaries*. More than one beneficiary may be included in a P petition if they are members of a group seeking classification based on a reciprocal exchange program or they are essential support aliens to P-2 beneficiaries performing in the same location and in the same occupation. If visa-exempt beneficiaries will be applying for visas at more than one consulate, the petitioner shall submit a separate petition for each consulate. If the beneficiaries will be applying for admission at more than one port of entry, the petitioner shall submit a separate petition for each port of entry.

(G) *Named beneficiaries*. Petitions for P classification must include the names of beneficiaries and other required information at the time of filing.

(3) *Definitions*: *Arts* includes fields of creative activity or endeavor such as, but not limited to, fine arts, visual arts, and performing arts.

Contract means the written agreement between the petitioner and the beneficiary(ies) that explains the terms and conditions of employment. The contract shall describe the services to be performed, and specify the wages, hours of work, working conditions, and any fringe benefits.

Event or performance means an activity such as a tour, exhibit, project, entertainment event, or an engagement. Such activity could include short vacations, promotional appearances, and stopovers which are incidental and/or related to the event or performance. An entertainment event could include an entire season of performances. A group of related activities will also be considered an event.

Essential support alien means skilled, essential person determined by the director to be an integral part of the performance of a P-2 alien because he or she performs support services which cannot be readily performed by a United States worker and which are essential to the successful performance of services by the P-2 alien. Such alien must have appropriate qualifications to perform the services, critical knowledge

of the specific services to be performed, and experience in providing such support to the P-2 alien.

Group means two or more persons established as one entity or unit to provide a service or performance.

Member of a group means a person who is actually performing the entertainment services.

Sponsor, as used in this paragraph, means an established organization in the United States which will not directly employ a P-2 alien but will assume responsibility for the accuracy of the terms and conditions specified in the petition.

(4) *Petition for an artist or entertainer under a reciprocal exchange program (P-2)*—(i) *General.* (A) A P-2 classification shall be accorded to artists or entertainers, individually or as a group, who will be performing under a reciprocal exchange program which is between an organization or organizations in the United States and an organization in one or more foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers, between the United States and the foreign states involved.

(B) The exchange of artists or entertainers shall be similar in terms of caliber of artists or entertainers, terms and conditions of employment, such as length of employment, and numbers of artists or entertainers involved in the exchange. However, this requirement does not preclude individual for group exchanges.

(C) An alien who is an essential support person as defined in paragraph (p)(3) of this section may be accorded P-2 classification based on a support relationship to a P-2 artist or entertainer under a reciprocal exchange program.

(ii) *Documentary requirements for petition involving a reciprocal exchange program.* A petition for P-2 classification shall be accompanied by:

(A) A copy of the formal reciprocal exchange agreement between the United States organization or organizations which is sponsoring the aliens and an organization or organizations in a foreign country which will receive the United States artist or entertainers;

(B) A statement from the sponsoring organization describing the reciprocal exchange of United States artists or entertainers as it relates to the specific petition for which P-2 classification is being sought;

(C) Evidence that an appropriate labor organization in the United States was involved in negotiating, or has occurred with, the reciprocal exchange of United States and foreign artists or entertainers; and

(D) Evidence that the aliens for whom P-2 classification is being sought and the United States artists or entertainers subject to the reciprocal exchange agreement are experienced artists or entertainers with comparable skills, that the terms and conditions of employment are similar. The exchange may be individual for individual or group for group.

(5) *Consultation*—(i) *General.* (A) Written evidence of consultation with an appropriate labor organization regarding the nature of the work to be done and the alien's qualifications are mandatory before a petition for P-2 classification can be approved.

(B) Evidence of consultation shall be a written advisory opinion from an official of the labor organization. If the director makes a written request for an advisory opinion and no response is received within the time period requested, the director shall make a decision without the advisory opinion. The director's written request for an opinion shall be evidence of consultation.

(C) To facilitate timely adjudication of a P-2 petition, the petitioner should obtain a written advisory opinion from an appropriate labor organization and submit it when the petition is filed. When a petition is filed without the required evidence of such consultation, the Service will request the consultation on its own from the appropriate labor organization. If the petitioner desires the Service to obtain a consultation, the petitioner must submit an additional copy of the petition and supporting documentation.

(D) If the petition is filed without the required consultation but the petitioner has indicated on the petition the name of the appropriate labor organization, the petitioner shall send a copy of the petition and supporting documents to an appropriate labor organization at the same time the petition is filed with the Service. The petitioner shall explain to the labor organization that it will be contacted by the Service for an advisory opinion regarding the services to be performed and the alien's qualifications. The name and address of the labor organization where the copy of the petition was sent shall be indicated in the petition that is filed with the Service. If the director determines that a copy of the petition was sent to an appropriate agency, the director shall request, in writing, a written advisory opinion from the labor organization before approving the petition. When the Service must obtain an advisory opinion, considerably longer adjudication time may be required.

(E) If the petition is filed without the required consultation and the petitioner

does not list or designate a consulting entity, the Service will attempt to obtain a consultation.

(F) Written evidence of consultation shall be included in the record in every approved P petition. A single consultation may be submitted in conjunction with multiple essential support personnel or a group of principal aliens even though more than one petition is filed in their behalf. The advisory opinion should set forth a specific statement of facts on which the opinion is based. Consultations are advisory in nature and not binding on the Service. If a petition is denied because of the opinion provided by a labor organization, it shall be attached to the director's decision. Consultation is not required if the petition will be denied on other grounds.

(G) If the petitioner establishes that an appropriate labor organization does not exist, the Service shall render a decision on the evidence of record. This does not preclude the Service from obtaining a consultation from a closely related labor organization.

(H) If the Service determines that the consultation submitted by the petitioner was provided by an inappropriate labor organization, the Service may seek a new consultation from the appropriate organization.

(I) If the record of proceeding in a case contains conflicting consultations, the director shall render a decision on the evidence of record.

(ii) *Consultation requirements for P-2 alien in a reciprocal exchange program.* In P-2 petitions where an artist or entertainer is coming to the United States under a reciprocal exchange program, consultation with the appropriate labor organization is required to verify the existence of a viable exchange program. The advisory opinion from the labor organization shall comment on the bona fides of the reciprocal exchange program and specify whether the exchange meets the requirements of paragraph (p)(4)(ii) of this section.

(iii) *Consultation requirements for essential support aliens.* Written consultation on petitions for P-2 essential support aliens must be made with a labor organization with expertise in the skill area involved. The opinion provided by the labor organization shall evaluate the alien's essentiality to and working relationship with the artist or entertainer and state whether there are available U.S. workers who can perform the support services.

(iv) *Procedures for advisory opinions.* (A) The Service shall list in its Operations Instructions for P

classification those organizations which agree to provide advisory opinions to the Service and/or petitioners. The list will not be exclusive. The Service and petitioners may use other sources, such as publications, to identify appropriate labor organizations.

(B) The director's request for an advisory opinion shall specify the information needed. The organization to which the request is being made should be advised that a written opinion is needed within 15 days of the date of the director's letter. If a response is not received within 15 days, the director shall make a decision without the advisory opinion. The director may shorten the 15-day period in his or her discretion.

(6) *Approval and validity of petition—*

(i) *Approval.* The director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist in his or her adjudication. The director shall notify the petitioner of the approval of the petition on Form I-797, Notice of Action. The approval notice shall include the alien beneficiary's name and classification and the petition's period of validity.

(ii) *Recording the validity of petitions.* Procedures for recording the validity period of petitions are:

(A) If a new P petition is approved before the date the petitioner indicates the services will begin, the approved petition and approval notice shall show the actual dates requested by the petitioner as the validity period, not to exceed the limit specified in paragraph (p)(6)(iii) of this section or other Service policy.

(B) If a new P petition is approved after the date the petitioner indicates the services will begin, the approved petition and approval notice shall show a validity period commencing with the date of approval and ending with the date requested by the petitioner, not to exceed the limit specified in paragraph (p)(6)(iii) of this section or other Service policy.

(C) If the period of services requested by the petitioner exceeds the limit specified in paragraph (p)(6)(iii) of this section, the petition shall be approved only up to the limit specified in that paragraph.

(iii) *Validity of P-2 petitions for artists or entertainers in reciprocal exchange programs.* An approved petition for an artist or entertainer under section 101(a)(15)(P)(ii) of the Act shall be valid for a period of time determined by the director to be necessary to complete the event, activity, or performance for which the P-2 aliens are admitted, not to exceed one year.

(iv) *P-2 limitation on admission.* An alien who has been admitted as a P-2 nonimmigrant may not be readmitted as a P-2 nonimmigrant unless the alien has remained outside the United States for at least three months after the date of his or her most recent admission. The director may waive this requirement in cases of individual tours where application of this requirement would cause undue hardship.

(v) *Spouse and dependents.* The spouse and unmarried minor children of a P-2 alien beneficiary are entitled to P-2 alien beneficiary are entitled to P-4 nonimmigrant classification, subject to the same period of admission and limitations as the alien beneficiary, if they are accompanying or following to join the alien beneficiary in the United States. Neither the spouse nor a child of the alien beneficiary may accept employment unless he or she has been granted employment authorization.

(7) *Denial of petition—*(i) *Notice of intent to deny.* When an adverse decision is proposed on the basis of derogatory information of which the petitioner is unaware, the director shall notify the petitioner of the intent to deny the petition and the basis for the denial. The petitioner may inspect and rebut the evidence and will be granted a period of 30 days from the date of the notice in which to do so. All relevant rebuttal material will be considered in making a final decision.

(ii) *Notice of denial.* The petitioner shall be notified of the decision, the reasons for the denial, and the right to appeal the denial under part 103 of this chapter. There is no appeal from a decision to deny an extension of stay to the alien.

(8) *Revocation of approval of petition—*(i) *General.* (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(P) of the Act and paragraph (p) of this section. An amended petition should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition.

(B) The director may revoke a petition at any time, even after the validity of the petition has expired.

(ii) *Automatic revocation.* The approval of an unexpired petition is automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or notifies the Service that the beneficiary is no longer employed by the petitioner.

(iii) *Revocation on notice—*(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

(1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;

(2) The statement of facts contained in the petition were not true and correct;

(3) The petitioner violated the terms or conditions of the approved petition;

(4) The petitioner violated requirements of section 101(a)(15)(P) of the Act or paragraph (p) of this section; or

(5) The approval of the petition violated paragraph (p) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of the date of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition.

(9) *Appeal of a denial or a revocation of a petition.* (i) *Denial.* A denied petition may be appealed under part 103 of this chapter.

(ii) *Revocation.* A petition that has been revoked on notice may be appealed under part 103 of this chapter. Automatic revocations may not be appealed.

(10) *Admission.* A beneficiary may be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition.

(11) *Extension of visa petition validity.* The petitioner shall file a request to extend the validity of the original petition under section 101(a)(15)(P) of the Act on Form I-129 in order to continue or complete the same activity or event specified in the original petition. Supporting documents are not required unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

(12) *Extension of stay—*(i) *Extension procedure.* The petitioner shall request extension of the alien's stay to continue or complete the same event or activity by filing Form I-129, accompanied by a statement explaining the reasons for the extension. The petitioner must also request a petition extension. The dates of extension shall be the same for the petition and the beneficiary's extension

of stay. The beneficiary must be physically present in the United States at the time the extension of stay is filed. Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each. If the alien leaves the United States for business or personal reasons while the extension requests are pending, the petitioner may request the director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa.

(ii) *Extension periods for P-2 aliens.*—An extension of stay may be authorized in increments of one year for aliens in reciprocal exchange programs to continue or complete the same event or activity for which they were admitted.

(13) *Effect of approval of a permanent labor certification or filing of a preference petition on P classification.*—The approval of a permanent labor certification or the filing of a preference petition for an alien shall not be a basis for denying a P petition, a request to extend such a petition, or the alien's admission, change of status, or extension of stay. The alien may legitimately come to the United States for a temporary period as a P nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States. This provision does not include essential support personnel.

(14) *Effect of a strike.* (i) If the Secretary of Labor certifies to the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress in the occupation at the place where the beneficiary is to be employed, and that the employment of the beneficiary would adversely affect the wages and working conditions of U.S. citizens and lawful resident workers:

(A) A petition to classify an alien as a nonimmigrant as defined in section 101(a)(15)(P) of the Act shall be denied; or

(B) If a petition has been approved, but the alien has not yet entered the United States, or has entered the United States but has not commenced employment, the approval of the petition is automatically suspended, and the application for admission on the basis of the petition shall be denied.

(ii) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (p)(14)(i) of this section, the Commissioner shall not deny a petition or suspend an approved petition.

(iii) If the alien has already commenced employment in the United States under an approved petition and is participating in a strike or labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Secretary of Labor, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers but is subject to the following terms and conditions:

(A) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act and regulations promulgated thereunder in the same manner as all other P nonimmigrants;

(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers; and

(C) Although participation by a P nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, an alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.

(15) *Use of approval notice, Form I-797.* The Service shall notify the petitioner on Form I-797 whenever a visa petition or an extension of a visa petition is approved under the P classification. The beneficiary of a P petition who does not require a nonimmigrant visa may present a copy of the approval notice at a port of entry to facilitate entry into the United States. A beneficiary who is required to present a visa for admission and whose visa expired before the date of his or her intended return may use Form I-797 to apply for a new or revalidated visa during the validity period of the petition. The copy of Form I-797 shall be retained by the beneficiary and presented during the validity of the petition when reentering the United States to resume the same employment with the same petitioner.

* * * * *

Dated: November 20, 1991.

Gene McNary,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 91-28552 Filed 11-29-91; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 4 and 16

[Docket RM89-7-001]

Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters; Order on Rehearing

Issued November 22, 1991.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; order on rehearing.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing an order on rehearing that in general rejects requests to modify the final rule adopted in this proceeding, governing hydropower procedural regulations. The Commission has, however, revised the definition of "fishway" to make it clear that it includes devices that provide upstream or downstream passage of fish, where passage of a population is necessary for the life cycle of a species. The Commission also has revised the regulations adopted to provide notice in the *Federal Register* of the tendering for filing of hydropower applications for license or exemption, and to set a final deadline for the completion of the consultation process under Federal Power Act section 10(j).

EFFECTIVE DATE: January 2, 1992.

FOR FURTHER LEGAL INFORMATION

CONTACT: Merrill Hathaway, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 208-0825.

FOR FURTHER TECHNICAL INFORMATION

CONTACT: Thomas E. Dewitt, Office of Hydropower Licensing, Federal Energy Regulatory Commission, 810 1st Street, NE., Washington, DC 20426, (202) 219-2821.

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I. Introduction

On May 8, 1991, the Federal Energy Regulatory Commission (Commission) issued Order No. 533, adopting a final rule amending the regulations governing submittal of proposed hydropower license conditions and other matters.¹ Requests for rehearing were filed by a number of parties.²

The requests ask the Commission to revise certain definitions adopted in the regulations, especially the definition of "fishway," which they believe should include facilities for downstream as well as upstream passage, devices for temperature control, and flow requirements. Additional opportunity for public participation in the pre-filing consultation process is sought, and requests are made for more public notice of the tendering for filing of

hydropower applications. A number of requests challenge the revisions to the regulations governing determination of when an applicant has obtained a waiver of a water quality certification and when an applicant needs to reapply to a state agency for certification because of an amendment to its proposed project facilities.

Questions are raised about the adequacy of public notice and opportunity for comment regarding the regulatory revisions adopted. Requests allege that the new regulations unfairly restrict the ability of fish and wildlife agencies to modify their fish and wildlife recommendations and that the deadlines adopted for them are beyond the Commission's authority and counterproductive.

Requests object to the procedures adopted to implement section 10(j) of the Federal Power Act (FPA)³ and ask for additional procedures. A request finds fault with the Commission's decision to end its interim policy allowing late interventions in hydropower proceedings by fish and wildlife agencies. Clarification of the new public file requirements is requested. Parties object to the delegation of authority to the Director of the Office of Hydropower Licensing (OHL) to handle FPA 10(j) matters and in appropriate cases to consider waivers of the pre-filing consultation regulations. The Commission is asked to clarify the revisions to its regulations concerning service of applications on resource agencies consulted.

After further review, the Commission has determined that it is appropriate to revise the definition of "fishway" to include facilities for downstream as well as upstream passage, based on accepted usages of the term, which applies only where a population of fish have a need for passage in order to complete the life cycle of the species. There is no basis to extend the term to include devices for temperature control or operational measures such as requirements for flows. The procedures already adopted for public participation in the pre-filing consultation process appear adequate, but the regulations are revised to provide that notice of the tendering for filing of all hydropower applications will be given in the Federal Register. The requests have not shown there is any need to make further changes in the regulations governing the Commission's determination of when an applicant has obtained a waiver of water quality certification due to inaction by a state agency and when an applicant must

reapply to a state agency for a water quality certification due to an amendment to proposed project facilities.

Adequate public notice and opportunity for comment have been afforded for the regulatory revisions adopted in this rulemaking. The regulations do not unduly restrict fish and wildlife agencies in revising their fish and wildlife recommendations, and the Commission has the authority to set reasonable deadlines for all submissions in hydropower hearings, which deadlines may be extended as appropriate in specific cases. The revised procedural regulations are necessary for the Commission's effort to instill more discipline in the conduct of hydropower proceedings, to ensure the expeditious processing of applications and the gathering of the facts required for decision.

The FPA 10(j) procedures fully comply with legal requirements and afford all interested parties the opportunity to help the Commission and resource agencies attempt to resolve any differences about the inconsistency of fish and wildlife recommendations with applicable law. There is no need to grant to fish and wildlife agencies rights to intervene in hydropower proceedings in a manner not given to other interested persons. The new public file requirements adopted for applicants for original licenses or exemptions apply only to applications filed on or after June 19, 1991. The new delegations of authority to the Director of OHL are clearly authorized and are left undisturbed. The Commission clarifies which consulted federal resource agencies need service of multiple copies of filed applications.

The following discussion supplements the discussion set forth in the preamble to the Final Rule, which deals with many of the same issues raised again on rehearing.

II. Discussion

A. Definitions.

1. Fish and Wildlife Recommendation.

The final rule added a definition of "fish and wildlife recommendation" in order to determine which recommendations are subject to the special consultation and finding requirements of FPA section 10(j). The term means any recommendation of a fish and wildlife agency designed to protect, mitigate potential damages to, or enhance any wild member of the

¹ 55 FERC ¶ 61,193 (1991); 56 F.R. 23,108 (May 20, 1991).

² These parties are listed in appendix A.

³ 16 U.S.C. 803(j) (1988).

animal kingdom.⁴ The Commission stated that the term does not include, *inter alia*, a request that the proposed project not be constructed or operated or a request for additional studies that can be completed prior to licensing.

A number of requesters ask the Commission to include in the definition a recommendation that a proposed project not be constructed or operated.⁵ They point out that a "no-build" recommendation may be critically important to protect fish and wildlife and suggest that the Commission's interpretation ignores the fish and wildlife agencies' right to base their recommendations on the Fish and Wildlife Coordination Act (FWCA).⁶ These requesters argue that the Commission's decision is based on a hypertechnical reading of FPA section 10(j) and violates the legislative intent behind enactment of that section in ECPA, citing the following language:⁷

The Committee recognizes that in certain cases the expert opinion and recommendations of these agencies may be that development of a site, even with license conditions, would not be consistent with fish and wildlife values and that a license should not issue. They are free to make such recommendations.

The Commission is also asked to include in the definition requests for additional studies prior to licensing.⁸

These arguments repeat those made in the comments on the NOPR, which the Commission considered and rejected in the Final Rule. Clearly, a fish and wildlife agency is free to recommend that a project not be licensed, and the Commission will consider such recommendation carefully in determining, under the standards of

sections 4(e)⁹ and 10(a)(1)¹⁰ of the FPA, whether or not to license a proposed hydropower project.

The language of FPA section 10(j), however, which the definition of "fish and wildlife recommendation" implements, clearly provides that only recommendations that would condition the issuance of a license trigger the special consultation and finding requirements of that section. FPA section 10(j)(1) states that "each license issued * * * shall include conditions for such protection, mitigation, and enhancement [of fish and wildlife]."¹¹

Section 10(j)(2), setting forth additional consultation and finding requirements, also is clear in referring only to recommendations for conditions that would be included in an issued license. This section applies only to recommendations "referred to in paragraph (1)," *i.e.*, recommendations for conditions in licenses to protect fish and wildlife. In listing the findings required of the Commission should it choose not to adopt a fish and wildlife recommendation for license conditions, section 10(j)(2)(B) provides that the "conditions selected by the Commission [must] comply with the requirements of paragraph (1)," *i.e.*, the conditions in the license issued by the Commission must include conditions to protect, mitigate and enhance fish and wildlife.¹²

⁹ FPA section 4(e) states:

In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

16 U.S.C. 797(e) (1988) (emphasis added). This language, like section 10(j), was added to the FPA by ECPA.

¹⁰ FPA Section 10(a)(1) requires any project that the Commission licenses to be on the condition:

That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e); and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

16 U.S.C. 803(a), as amended by ECPA.

¹¹ 16 U.S.C. 803(j)(1) (1988) (emphasis added).

¹² See also FPA section 10(j)(2) (referencing the provisions of section 10(j)(1) as to "each license issued"); compare section 4(e), discussing "whether to issue any license."

The material from the House Report on ECPA, cited by the requesters and quoted above, is in no way inconsistent with this reading of the plain language of the statute. In that material, the House Committee was merely emphasizing that the ECPA amendments were not intended to eliminate a fish and wildlife agency's discretion to recommend—under FPA section 4(e) or 10(a)—denial of a license for a proposed hydropower project.

Similar reasoning applies to the argument that the Commission should reverse its determination that a request for additional pre-licensing studies does not fit within the definition of a "fish and wildlife recommendation" subject to the requirements of FPA section 10(j). Neither in the ECPA amendments to the FPA nor in the legislative history has Congress indicated that such procedural questions, affecting the adequacy of the record before the Commission for decision, should be resolved pursuant to the special consultation and finding provisions of section 10(j). As discussed above, such provisions apply only to recommendations for conditions to protect fish and wildlife in the issuance of licenses.

2. Indian Tribe

In response to comments received on the NOPR, the Commission adopted a definition of "Indian tribe" in the final rule that refers to tribes recognized by treaty with the United States, by federal statute, or by Interior in its listing of tribal governments pursuant to 25 CFR 83.6(b).¹³ This definition is used in the regulations to determine with what Indian groups an applicant must consult in preparing a proposal for hydropower facilities, and the views of which groups the Commission must seek in deciding on such a proposal.¹⁴ For a particular project the definition includes only those tribes whose legal rights as a tribe may be affected.

Interior objects to this "nexus test" in the definition and maintains that an Indian tribe should be consulted on a

¹³ Section 4.30(b)(10). The full text of the definition reads as follows:

"Indian tribe" means, in reference to a proposal to apply for a license or exemption for a hydropower project, an Indian tribe which is recognized by treaty with the United States, by federal statute, or by the U.S. Department of the Interior in its periodic listing of tribal governments in the Federal Register in accordance with 25 CFR 83.6(b), and whose legal rights as a tribe may be affected by the development and operation of the hydropower project proposed (as where the operation of the proposed project could interfere with the management and harvest of anadromous fish or where the project works would be located within the tribe's reservation).

¹⁴ Sections 4.32, 4.34, 4.38 and 16.8.

⁴ Section 4.30(b)(9)(ii). The full text of the definition reads as follows:

"Fish and wildlife recommendation" means any recommendation designed to protect, mitigate damages to, or enhance any wild member of the animal kingdom, including any migratory or nonmigratory mammal, fish, bird, amphibian, reptile, mollusk, crustacean, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any egg or offspring thereof, related breeding or spawning grounds, and habitat. A "fish and wildlife recommendation" includes a request for a study which cannot be completed prior to licensing, but does not include a request that the proposed project not be constructed or operated, a request for additional prelicensing studies or analysis or, as the term is used in §§ 4.34(e)(2) and 4.34(f)(3), a recommendation for facilities, programs, or other measures to benefit recreation or tourism.

⁵ Interior, Commerce, Wildlife Federation, American Rivers, Washington, California Fish and Game, and West Virginia.

⁶ 16 U.S.C. 661 et seq.

⁷ H.R. Rep. No. 99-507, 99th Cong., 2d Sess. 32.

⁸ American Rivers and Washington.

hydropower project whether or not the tribe has legal rights that may be affected by the project.

The Commission considered and rejected this argument in the Final Rule, and Interior has not furnished any reason to change the result. In order to determine which of the many tribes in a state or region needs to be consulted by an applicant and the Commission regarding a specific hydropower proposal, it is necessary for there to be some connection between the tribe and the project beyond that of a concerned citizen. The Commission is confident this connection exists when the tribe's legal rights as a tribe may be affected. As the Commission explained, the requirement of a connection between the tribe and the project is not meant to exclude a tribe from making its views known on a project that affects its important interests, but to set a limit on the tribes that the applicant and the Commission would undertake to consult on a particular project. Any tribe that believes it should be consulted on a particular hydropower proposal should make known its views to the applicant and the Commission, and they will be carefully considered. If for any reason an affected tribe is not consulted by an applicant during the pre-filing consultation process, the tribe may seek intervention in the proceeding and file comments with the Commission in accordance with the procedures promulgated in the Final Rule.

3. Fishway

In the Final Rule, the Commission adopted a definition of the term "fishway," for purposes of clarifying the scope of the regulations adopted to implement the Commission's responsibilities under section 18 of the FPA.¹⁵ Under this section, the Secretaries of the Interior and Commerce may prescribe fishways for hydropower projects, conditions for which the Commission must then incorporate into licenses for approved projects. By contrast, fish and wildlife recommendations not involving federal fishway prescriptions are subject to the procedures set forth in section 10(j) of the FPA. The definition reads as follows:¹⁶

"Fishway" means any structure, facility, or device used for the upstream passage of fish through, over, or around the project works of a hydropower project, such as fish ladders, fish locks, fish lifts and elevators, and similar physical features; those screens, barriers, and similar devices that operate to guide fish to a

fishway; and flows within the fishway necessary for its operation.

In the NOPR, the Commission included in the definition devices used for the upstream or downstream passage of fish, but deleted the inclusion of downstream devices in response to comments filed, which claimed that narrowing the definition in this manner was more consistent with usages in both contemporary and historical scientific literature on the subject.

The Commission rejected claims that the definition should be expanded to include non-structural elements, such as minimum flow and temperature control regimes, on the grounds that there was no evidence to suggest that such measures had ever been commonly understood to be included within the meaning of "fishway," which was confined to physical structures, facilities, and devices, and the flows within the fishway necessary for its operation.

A number of requesters vigorously object to the definition of fishway that the Commission adopted in the Final Rule.¹⁷ They maintain that the Commission was not justified in deleting from the definition facilities for downstream passage of fish and that non-structural measures such as minimum flows and temperature-control regimes should be included.

The requesters cite precedents in recent cases, decided in the 1980s, where the Commission accepted prescriptions of fishways that included facilities for downstream passage, and claim that the Commission has not adequately explained why it is now changing its understanding of the term.¹⁸ The requesters argue that providing adequate downstream passage past hydropower facilities is critically important for the survival and prosperity of many anadromous fish species, whose adults must ascend the rivers to their spawning grounds and whose young must descend the rivers to the sea.¹⁹ Patents are listed for fishways issued by the U.S. Patent Office between 1872 and 1930 that provide for downstream passage.²⁰

The requesters believe that there is evidence of Congressional intent in adopting section 18 of the Federal Water Power Act (FWPA)²¹ (in 1920) that

supports including downstream passage facilities within the meaning of the term "fishway," and that there is no reason to assume that Congress used the term in a technical, scientific sense.²² Commerce argues that the term "fishway" should also be construed according to its contemporary meaning, *i.e.*, after 1920. According to Commerce's review of scientific literature published during this time frame, including official publications of the U.S. Government agencies entrusted with management responsibilities over the nation's fish resources, the term encompasses downstream passage facilities. Commerce points to the fish ladder at Bonneville Dam on the Columbia River, which was modified to facilitate downstream as well as upstream passage.

Wildlife Federation claims that the Commission failed to give adequate notice of the change in the definition of "fishway" from the NOPR to the Final Rule, and American Rivers takes the position that the Commission has no authority to adopt any definition of the term, based on its assertion that Congress delegated to the Secretaries of the Interior and Commerce, not the Commission, the authority prescribe fishways.

The Commission has carefully reviewed the meaning of the term "fishway" as it is used in section 18 of the FPA. The Commission continues to believe that the legislative history of section 18, discussed in the Preamble to the Final Rule, fails to provide any definitive guidance as to whether "fishway" encompasses devices for downstream passage. An attempt must therefore be made to establish what meaning or meanings that term has been commonly understood to have. In the Preamble to the Final Rule the Commission focused on the scientific usages of the term. While it is true, as stated in that preamble, that many scientists consistently use the term to include only facilities for upstream passage at hydropower facilities, both before and after 1920 other scientists have used the term to include facilities for either downstream or upstream passage. On the basis of the record the Commission finds no basis for concluding that this broader scientific use of the term is improper.

¹⁷ Interior, Commerce, Wildlife Federation, American Rivers, Washington, Oregon, West Virginia, and Congressman Dingell.

¹⁸ Interior, Attach. 3; Commerce.

¹⁹ *E.g.*, Interior, Commerce, and American Rivers.

²⁰ Interior, Attach. 2.

²¹ June 10, 1920, c.285, 18, 41 Stat. 1073.

²² *E.g.*, Wildlife Federation. The parties cite scientific literature predating passage of the Federal Dam Act of 1906 and the FWPA of 1920, federal legislation in which there first appeared the language of section 18 of the FWPA granting to certain agencies the authority to prescribe fishways, as well as the floor debate on the FPA discussed in the preamble to the Final Rule.

¹⁵ 16 U.S.C. 811.

¹⁶ Section 4.30(b)(9)(iii).

The Commission agrees with those requesters who maintain that there is no reason to assume, however, that Congress used the term "fishway" in a technical sense, as the term would be used by a scientist in a scholarly article. The Commission has undertaken additional research to determine whether the term has a meaning or meanings that have been commonly accepted outside purely scientific literature, either in respected reference works or in other laws. As a result, the Commission concludes that, while the term "fishway" and its synonyms have been commonly used to refer to upstream passage facilities, they have also been commonly used to refer to facilities for downstream passage, and that this usage has occurred both before and after 1920.

This conclusion is supported by many respected reference works. Webster's International Dictionary defines fishway as "a contrivance for enabling fish to pass around a fall or dam in a stream * * *".²³ Thus the definition is not restricted to devices to provide upstream passage. The Penguin Dictionary of Civil Engineering defines fish ladder, fish pass and fishway together as a "channel along which fish can travel up or down past a weir or dam."²⁴ The Encyclopaedia Britannica states that fish passes usually take the form of fish ladders or fish locks. The latter are commonly used in Europe, and the encyclopedia describes the function of a typical fish lock as follows:²⁵ The Borland fish lock was developed in Scotland as an alternative to fish ladders. It operates on the same intermittent principle as a ship lock but is constructed as a closed conduit. Intermittent closure of the gates at the bottom causes the continuous flow through the lock to fill the conduit at intervals, and thus allows fish waiting in the

bottom chamber to be raised through the height of the dam. The lock also serves at other seasons to flush young salmon down past the dam.

Like the example of the fish ladder referenced by Commerce, a fish lock can therefore be used both for upstream and downstream passage past a dam.²⁶ The Commission recognizes that some general reference works, past and present, define a fishway as providing upstream passage, but in light of the common usage explored herein these interpretations of the term's meaning appear at best incomplete, and cannot support the conclusion that the definition of the term excludes devices used, either partly or exclusively, for downstream fish passage.²⁷

Legal authorities, as well, commonly include downstream passage devices within the definition of fishway. Corpus Juris defines a fishway as follows:²⁸

As contemplated by some statutes, a fishway means that, where there is an obstruction in the stream which prevents the fish from going up or down the stream, an artificial means is afforded to the fish to pass the obstruction.

Ballentine's Law Dictionary defines fishway as follows:²⁹

A way, provided in the construction of a dam, whereby fish may journey from below to above the dam or vice versa.

Of the eight states whose current statutes contain definitions of the term "fishway" that discuss to which

direction of passage the term applies, five states define the term to include both upstream and downstream passage facilities.³⁰

Of the remaining states with such statutes, two states define a fishway in terms of upstream passage,³¹ and one state distinguishes between a fishway and a facility for downstream passage.³² The Commission has also found a number of state laws, in effect prior to Congressional enactment of the General Dam Act of 1906, which provide that a fishway includes devices for both upstream and downstream passage,³³ as well as state court opinions of the same vintage that emphasize the importance of maintaining the public right in maintaining the passage of fish up and down rivers and streams.³⁴

³⁰ Idaho Code § 36-906 (1990) (fishway must "accommodate seasonal movement of fish up and down the stream"); Rev. Stat. Missouri § 252.159 (1989) (fishway must "enable fish to have free passage up and down said waters at all times"); Ore. Rev. Stat. § 498.268(1) (fishway must "provide adequate upstream and downstream passage"); 30 Penn. C.S. § 3501(a) (1989) (fishway must "enable the fish to ascend and descend the waters at all seasons"); Va. Code Ann. § 29.1-532 (1991) ("purpose of such a fishway is for anadromous and other migratory fish to have free passage up and down the streams during March, April, May and June, and down the streams throughout the remaining months").

³¹ Nev. Rev. Stat. Ann. § 503.400 (1989) (fishway must be built "so that at all seasons of the year fish may ascend above such dams"); Tex. Parks & Wildl. Code § 66.109 (1991) (fishway must be "sufficient to allow fish in all seasons to ascend the dam").

³² Alaska Stat. § 16.05.840 (1990) ("every dam or other obstruction built by any person across a stream frequented by salmon or other fish shall be provided * * * with a durable and efficient fishway and a device for efficient passage for downstream migrants"). The California Water Board has stated that the purpose of a fishway is to permit upstream passage for anadromous fish. In re United Water Conservation District, 1987 Cal. ENV. LEXIS 21 (September 3, 1987); In re City of San Luis Obispo, 1982 Cal. ENV. LEXIS 24 (August 9, 1982).

³³ Pa. P.L. 302 § 13, enacted May 29, 1901, which later became P.L. 448 § 185, enacted May 2, 1925, 30 Purdon's Pa. Stat. Ann. § 185, discussed in *Commonwealth v. Pierce*, 17 Pa. Dist. 146 (1901); *Fish v. Dam*, 26 Pa. County Ct. 214 (1902) (the law required a dam to include "some artificial devices * * * to enable the fish to ascend and descend the river freely at all seasons of the year"); Ill. Sess. Laws 171, enacted May 31, 1879, discussed in *Parker v. Illinois*, 111 Ill. 581, 585 (1884) (a person who obstructs a waterway must "place therein suitable fishways, in order that the free passage of fish up or down or through such waters may not be obstructed"); and *State v. Beardsley*, 106 Iowa 396, 79 NW 138, 139 (1899) (Iowa state statute required fishways "to afford a free passage for fish up and down").

³⁴ E.g., *Commissioners on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 440, 450 (1870), *aff'd sub nom. Holyoke Co. v. Lyman*, 82 U.S. 500 (1872); *Swift v. Town of Falmouth*, 167 Mass. 115, 45 N.E. 184, 186 (1896); *State v. Roberts*, 59 N.H. 256, 257 (1879); *West Point Water Power & Land Improvement Co. v. State*, 49 Neb. 216, 68 N.W. 6 (1896); and *Sherwood v. Stephens*, 90 P. 345 (Idaho 1907).

²³ Webster's Third New International Dictionary (1981). The dictionary cites a fish ladder as an example of a fishway, and defines "fish ladder" as "a series of pools arranged like steps by which fishes can pass over a dam in going upstream." No one has claimed in this proceeding that a fish ladder is not a fishway; it is equally clear, however, that a fish ladder is but one type of fishway, and the mention of fish ladder in the definition of fishway in this dictionary cannot be construed to imply that only a fish ladder is a fishway. See McGraw-Hill Dictionary of Engineering (1984) (fish ladder is a "type of fishway that carries water around a dam through a series of stepped baffles or boxes and thus facilitates the migration of fish") (emphasis added).

²⁴ J. Scott, *The Penguin Dictionary of Civil Engineering* (3rd ed. 1984) (emphasis added). See also the definition of "fish ladder" in the McGraw-Hill Dictionary of Engineering, *supra*. A weir is a small dam.

²⁵ 5 Encyclopaedia Britannica 446-47 (1977) (emphasis added).

²⁶ The Federal Power Commission addressed this question in 1945, regarding the Bonneville project on the Columbia River:

Four fish ladders and three fish locks, referred to collectively as fishways, provide for the migrations of fish back and forth past the dam.

4 FPC 953, 957 (1945) (emphasis added); see also B. Rizzo, *Fish Passage Facilities Design Parameters for Connecticut River Basin* (Bureau of Sport Fisheries & Wildlife 1972) (fish ladders can serve the function of moving fish downstream as well as upstream past a dam).

²⁷ E.g., *The Oxford English Dictionary* (2d ed. 1989) (a fishway is "an arrangement for enabling fish to ascend a fall or dam"); Webster's Universal Dictionary (1935) (a fishway is an "arrangement by which fish may ascend a waterfall or dam"). In the preface to the latter dictionary, the first standard dictionary of the English language prepared and published in the twentieth century, the editors rejected the principle that a word should have only one meaning:

[N]o modern dictionary would be considered complete without the definitions that convey to the mind a clear view of all the senses in which a word is used, as well as its primary or most important sense. New uses of old words are as worthy of a place in the dictionary as new words themselves, and the editors of this work have been ever on the watch for them, as well as careful to include all important specific definitions sanctioned by usage in literature or speech.

²⁸ 30A Corpus Juris Secundum 499 (1961) (emphasis added, footnote omitted).

²⁹ J. Ballentine, *Ballentine's Law Dictionary* (3rd ed. 1969) (emphasis added).

Finally, the laws of England, on which many laws in this country were based, use the term "fish pass" (a synonym of fishway) to refer to devices for both upstream and downstream passage.³⁵

Based on the additional evidence regarding common usage of the term "fishway," including both technical and non-technical usage, we conclude that the term properly applies to both upstream and downstream passage.

By contrast, the requesters have provided no support, nor has the Commission discovered any during its research, for the proposition that the definition of "fishway" should be expanded to include temperature-control devices or minimum flows. The Commission is not aware of any accepted usage of the term that is this broad, and the many usages the Commission has reviewed without exception use the term "fishway" to refer to physical or structural devices that facilitate the passage of fish in the immediate vicinity of a dam (or other such obstruction in a river or stream). Indeed, these claims would have section 18 of the FPA far overreach its bounds and would, in effect, turn anything affecting fish migration in a river system into a "fishway." Congress clearly did not intend the prescriptive authority of section 18 to have such a scope, as evidenced, for example, in the many revisions made by ECPA to sections 4(e) and 10(a) of the FPA which are designed to protect fish and wildlife values, including migrating fish.³⁶ The Commission has consistently dealt with such issues pursuant to its authority under these sections of the Act, and in many cases an issue such as the appropriate level of minimum flows is at the heart of the Commission's decision under section 10(a).

In the Preamble to the Final Rule, the Commission stated that no limitation should be placed on the type of fish for which fishways may be prescribed, rejecting the recommendations of Edison Electric Institute (EEI), the National Hydropower Association, and others that fishways should be limited to passage devices for migratory fish. On further review the Commission believes that fishway prescriptions under EPA

section 18 should be limited to fish that have a *bona fide* need to migrate past the obstacles presented by hydropower facilities. Accordingly, the Commission is amending the definition of fishway in the regulations to make clear that it applies only where "passage of a population is necessary for the life cycle of a fish species." Such fish would include both anadromous fish and certain species of non-anadromous fish. The definition would not apply to fish having no manifest need to migrate during their life cycles. The Commission's decision to limit the definition in this manner is supported by a substantial body of literature on the subject of fishways, as well as by reference to state statutes and case law.

In considering whether to adopt this revision, the Commission reviewed a large number of publications concerning the need for or design of fishways. These publications invariably focus on the importance of fishways in ensuring that fish would not be prevented from their necessary migration. Particularly suggestive are publications of the Departments of Commerce and the Interior that reflect distinctions among types of fish and discuss their differing needs for fishways.

In its 1917 U.S. Bureau of Fisheries circular entitled *The Question of Fishways*, Commerce stated that the need for fishways arises from the fact that "fish have a migratory tendency that is manifested in varying degrees in different species." It continued that the migratory need is most pronounced in anadromous fish, such as shad, salmon, alewives, common sturgeon, and striped bass (rockfish). Other fish "not ordinarily called anadromous * * * still show a marked tendency to move toward the headwaters at the time of spawning." These include the trout, whitefish, and sometimes the pike perch (walleye) and the suckers. Commerce indicated that for fish in this second category, proper fishways "may be of vital importance." Finally, Commerce recognized that there is "a general migratory tendency in most fish which has no evident definite relation to the spawning instinct" but is probably governed by necessities of feeding and of protection from extreme temperature. Commerce concluded that it did not necessarily follow that dams had any ill effect on this third category of fish, for which an impassable dam "merely divides the stream into two separate parts, each complete in itself so far as concerns the propagation and abundance of those particular species."

In an analysis based on geographic drainage areas, Commerce proceeded to

specify which species of fish did and did not require fishways at dams. It concluded that fishways would be required for sturgeon, common eel, hickory and other shad, alewives, salmon (except landlocked salmon), smelt, striped bass, lampreys, steelhead trout, and eulachon (an anadromous smelt), and sometimes required for whitefish, landlocked salmon, most other trout, and several other species. It determined that, for all species not specified, it had "no evidence that under ordinary conditions a fishway is necessary or desirable." Among these species were "gars, bowfin, most of the catfishes, buffalofishes, redhorse, several species of sucker, carp, gizzard shad, chubs, pikes, crappies, sunfishes, basses, perches, and burbot (ling)." Commerce reiterated, in conclusion, that, for the majority of the fresh-water food fish, there was "no evidence, now in hand, to indicate that fishways are requisite for the maintenance of the species in normal abundance above dams under ordinary conditions."³⁷

The Department of the Interior's Fish and Wildlife Service has made a similar analysis. In a 1944 publication entitled *Fishways For Small Streams*, George A. Rounsefell stated that anadromous fishes, "such as salmon, shad, sturgeon, alewives, smelt, striped bass, and sea-run trout or steelheads, must be able to ascend streams far enough to reach spawning grounds * * *" However, for fresh-water fishes "the necessity for fishways is not always so clear cut." He concluded that certain species, especially the salmonoids, have rather strict requirements for spawning conditions but that, for many warm-water species "which can reproduce and make proper growth without extensive migration, fishways are entirely unnecessary."

In another Fish and Wildlife Service publication, entitled *Mitigation and Enhancement Techniques For the Upper Mississippi River System and Other Large Rivers* (1982), the authors (Schnick and others; cited below as Schnick) state: "There is only one reason for installing a fish passage facility: To provide fish with a means of negotiating barriers in streams that interfere with or prevent movement or migration essential to completion of the life history of a fish."

³⁷ In an even earlier Bureau of Fisheries publication (1908), entitled *Fishways*, von Bayer also addressed the need for fishways in relation to migration: " * * * the question has presented itself how to enable the fish to ascend to the headwaters of rivers in order to reach their spawning grounds for the propagation of their kind or to follow their migratory habits in search of food as heretofore."

³⁵ 18 L. Hailsham, Halsbury's Laws of England ¶ 667, 718 (4th ed. 1977) (a fish pass must be "maintained in such a condition * * * as will enable salmon and migratory trout to pass up and down it").

³⁶ ECPA added to section 4(e) the language quoted in footnote 9, *supra*, and to section 10(a) (1) the express requirement that in any license issued the project adopted must be best adapted to a comprehensive plan for, *inter alia*, "the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat * * * ." See footnote 10, *supra*.

Other publications generally relate their discussion of fishways to the needs of fish requiring migration for their lifecycle. In *Problems of Fishway Construction* (1933), Baker and Gilroy begin by stating:

If migrating fish, such as the Pacific salmon and the steelhead trout, are to be conserved, efforts must be made to maintain stream channels in a condition which will permit a safe journey both upstream for the mature fish seeking spawning beds and downstream for the young fish hatched in the headwater areas.

The authors then evaluate the success of various types of fishways in overcoming the obstacles that dams present to this necessary migration. The article is replete with references to "upstream-migrating" and "downstream-migrating" fish and discusses the behavior of salmon and steelhead.

In *An Investigation of Fishways* (1939-40), McLeod and Nemenyi define fishways as "structures installed to aid fish in overcoming obstacles in migrating." The article classifies migrating fish into three main groups: Salmonides (salmon, trout), which spawn in the fall; cyprinides (carp and allied fishes), which spawn in the summer; and young eels. The authors also discuss the apparent motivations for migration. They attribute migration in salmonides to the need to spawn and in eels to feeding and spawning needs. They postulate that migration of cyprinides is not connected directly with propagation activities or the need to reach definite feeding grounds but rather to the instinct to return upstream in the spring and summer after having been swept downstream, in a weakened state, by currents in the autumn and winter.

In 1941, Nemenyi compiled *An Annotated Bibliography of Fishways*, which summarizes approximately 150 articles about fishways. In his preface, Nemenyi states:

The effort of which the different migratory fishes are capable and the effort required to ascend the different kinds of fishways are beginning to be properly understood, thus making possible the first serious attempts to form rational rules for the design of fishways.

He also refers to an increased understanding of the "conditions under which turbines are passable without serious danger to the downstream migrants." The articles themselves, many of them translated from other languages and dealing with conditions in other countries, contain many references to "migrating fish" and discuss the behavior of, and the problems of passing, salmon, trout, and eels, in particular.

In *Fish Passage* (contained in *A Century of Fisheries in North America* (1970), Norman C. Benson, editor), G.J. Eicher begins by stating: "Passage of migratory fish past obstructions, both natural and man-made, has been the subject of effort and research on the part of fishery workers on the American scene for many years." He discusses "one of the earliest large-scale attempts to facilitate anadromous fish movement", a pool-type fish ladder in Oregon that passed large numbers of chinook salmon, as well as steelhead trout, coho salmon, and American shad. Eicher also discusses types of fishways for "upstream migrants" and "devices" designed for passing "downstream migrants."

A number of articles concern the problems of fish passage at particular dams or in particular river systems. These inevitably focus on the problems of passing fish with a need to migrate, and usually anadromous fish. Ruggles and Watt, in *Ecological Changes Due to Hydroelectric Development on the Saint John River* (1975), refer to dams impeding access to upstream spawning areas by Atlantic salmon and "other anadromous species." They furnish details of passage facilities designed to protect salmon and "migrating juveniles" and refer to the partial failure of upstream passage facilities to provide shad with satisfactory access to upstream areas. They also note that no fish passage facilities were installed in Grand Falls Dam, the uppermost dam on the river system, because anadromous fish had never been able to pass Grand Falls.

In *Fish Passage Facilities Design Parameters for Connecticut River Basin* (1972), Rizzo discusses a program entered into by the U.S. Bureau of Sport Fisheries and Wildlife (now the Fish and Wildlife Service), the National Marine Fisheries Service, and several New England states "for restoration of anadromous fish in the Connecticut River Basin." The publication focuses on American shad and Atlantic salmon. In *The Passage of Fish at Bonneville Dam* (1940) (in *Stanford Ichthyological Bulletin* 1 (6)), Holmes describes the problems of constructing fishways at Bonneville Dam and of ensuring "passage of the young fish on their way to the ocean." He indicates that a "great deal of time was devoted to the study of the design of fishways for the passage of the upstream migrants." In *Fish Problems Connected With Grand Coulee Dam* (in the same volume of the *Stanford Ichthyological Bulletin*), Chapman discusses the problems of designing fishways at Grand Coulee Dam, whose construction was creating a

barrier to the migration of spring chinook salmon, Columbia River sockeye salmon, and steelhead trout.

Respected treatises that examine fishways also reflect an emphasis on the need to ensure passage of migratory fish. *Fisheries Handbook of Engineering Requirements and Biological Criteria* (1973), by Milo C. Bell, a designer of early fishways, devotes several chapters to fishways or other fish passage problems. Although he does not appear to state affirmatively that fish passage solutions are designed or intended only for particular fish, his descriptions of these solutions invariably refer only to species requiring migration to survive. For example, in his chapter on Locks and Mechanical Handling, Bell mentions the particular experience of salmon in entering the devices he is discussing. In his chapter on Fishway Structures at Dams and Natural Obstructions, he specifies design considerations for shad and sturgeon.

An authoritative text on fishways is *Design of Fishways and Other Fish Facilities* (1961), by C. H. Clay. In his introductory chapter, Clay states at the outset: "Many different types of devices have been used to enable fish to migrate upstream past dams, waterfalls, and rapids." He emphasizes the need to construct adequate fishways in order to preserve the "many migratory species of fish left in the rivers of the world." This exclusive concern with migratory fish is reflected throughout the book. For example, in his chapter on Fishways at Dams, Clay discusses the effect of dams on migratory fish, the considerations involved in designing fishway and spillway entrances so that upstream migration can occur, and the species of migratory fish that have used particular fishways. In his chapter on Fish Locks and Fish Elevators, Clay again evaluates the success of these devices in passing particular species of migratory fish.

The literature provides little or no evidence of the use of fishways to pass all fish, without restriction. In *Fishways*, by W. H. Rogers (in *Transactions of the American Fisheries Society*, Twenty-First Annual Meeting (1892)), the author states that an impassable dam thrown across the lower portion of a river:

destroys not only anadromous fish, but almost all valuable river fish as well—for in their search for food, and to propagate their species, almost all river fish are more or less migratory at certain seasons of the year. In proof of this, all sorts of fish inhabiting the Hudson River are seen passing up the fishway recently constructed on the Mechanicville dam, and I have seen them pass up many other fishways, both in Canada and in this country.

Rogers thus seems to suggest that fishways would be useful for the passage of all species of fish past a dam. However, even he relates the use of fishways to the concept of accommodating fish that are responding to a migratory instinct.

In addition to Rogers, some of the other authorities cited above, while clearly relating the need for fishways to the passage of migrating fish, consider a broad range of species to be capable of migrating. McLeod and Nemenyi, whose work was directed at problems in Iowa, refer to "trout, bass, wall-eye pike, and northern pike * * * crappies, bluegill, perch, and sunfish" as all being "prevented from migrating by a number of dams * * *". The construction of suitable fishways at these dams would greatly increase the migrating range of the fish, improving feeding and spawning conditions." Schnick cites a 1954 reference to the Keokuk Dam as "an effective barrier to the upstream migration of paddlefish, American eel, skipjack herring, Alabama shad, buffalo, shortnose gar, freshwater drum, common carp, shovelnose sturgeon, and three species of catfish." Among the species mentioned by these authorities, crappies, sunfish, pike, perch, carp, buffalo, and gar, as well as most catfish, were believed by Commerce, in 1917, not to require fishways. Nevertheless, the statements of these authorities cannot reasonably be interpreted as urging the construction of fishways for the benefit of all fish, or even of fish that may migrate but do not need to. The statement of McLeod and Nemenyi is tempered by their elaboration that the construction of fishways would improve "feeding and spawning conditions." Schnick's statement must be read in the context of her earlier-cited statement that the only reason for installing a fish passage facility is to overcome barriers to "migration essential to completion of the life history of a fish." ³⁸

The overwhelming body of the literature thus refers to, or considers the need for, fishways in the context not only of migrating fish but of fish species whose migration is essential for the survival of their population. The literature contains no support for the proposition that fishways should be

constructed for non-migrating fish and scant support for the proposition that they should be constructed for fish that do not require migration, although they may in fact migrate.

The relation of fishways to the need to pass fish whose survival depends on migration is also reflected in state fishway statutes. Of the eight state statutes on fishways that we cited above, five directly state or imply that fishways are to be constructed only for such fish.³⁹ The remaining states qualify the fishway requirement with some kind of a "need" or practicality test.⁴⁰ This qualification suggests that, even in these states, the duty to install a fishway to provide fish passage is not absolute and that a right of free passage for any fish at any time, as may occur in a naturally free-flowing river or stream, is not guaranteed.⁴¹

State court cases enforcing the requirement for fishways also tend to reflect the view that fishway construction is intended to benefit only fish that need to migrate. In *Commonwealth v. Pierce*, 17 Pa. Dist. 146 (1901), the defendant was charged with erecting an obstruction that prevented the "migration of fish." A purpose of the law he was alleged to have violated was to "preserve the general movement of fish as they ascend streams for the purpose of propagating their kind * * *". *Id.* at 147. In *Parker v. Illinois*, 111 Ill. 581 (1884), the court stated that fishways are used to provide passage for fish that have "periodically to pass up and down streams for breeding purposes," such as salmon, and to prevent the destruction of such fish. *Id.* at 588, 591, 598. In *Commissioners on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446 (1870), *aff'd*

sub nom. Holyoke Co. v. Lyman, 82 U.S. 500 (1872), fishways were required to prevent the obstruction to migration of shad upriver to spawning grounds and back downstream to the sea. The court in *Swift v. Town of Falmouth*, 167 Mass. 115, 45 N.E. 184 (1896), stated that fishways are for "migratory fish" such as alewives and herring that run "up natural streams during spawning time and * * * return to the sea * * *". 45 N.E. at 186. In *Sherwood v. Stephens*, 90 P. 345 (Idaho 1907), the court ruled that there is a "common right to have fish inhabit and spawn in the stream. For this purpose, they must have a common passageway to and from their spawning and feeding grounds." 90 P. at 347, quoting from *State v. Theriault*, 41 Atl. 1030, 70 Vt. 617.⁴²

The Commission's own treatment of fishway prescriptions is consistent with our revised definition. For example, we cited two recent Commission cases in the preamble to the Final Rule regarding fishway protection under FPA section 18. In *Lynchburg Hydro Associates*, 39 FERC ¶ 1,079 (1987), the Commission decided to reserve authority to prescribe fishways for striped bass, shad, alewife, and herring, all anadromous fish. In *Eugene Water and Electric Board*, 49 FERC ¶ 61,211 (1989), the Commission required the provision of fishways for salmon. In its request for rehearing, Interior cited five cases in support of its contention that fishways must include downstream passage devices. One of these cases is *Lynchburg*. The other cases all concern anadromous fish, such as salmon, striped bass, shad, alewife and herring.⁴³

In considering the adoption of this restricted definition, we also reviewed other Commission orders in which fishways were prescribed or recommended. In all of these cases the primary reason given by Commerce or Interior for requiring installation of fishways, or for reserving the authority to prescribe them during the term of the

³⁹ Alaska Stat. § 16.05.040 (1990) (fishways required for "salmon or other fish"); Idaho Code § 36-906(a) (1990) (fishways must accommodate "seasonal movements of fish up and down the stream"); Nevada Rev. Stat. Ann. § 503.400.1 (purpose of fishways is "so that at all seasons of the year fish may ascend above such dams * * * to deposit their spawn"); Tex. Parks & Wild. Code § 66.109(a) (1991) (fishways required "to allow fish in all seasons to ascend the dam or other obstruction for the purpose of depositing spawn"); and Va. Code Ann. § 29.1-532 (1991) (fishways required to ensure "the free passage of anadromous and other migratory fish").

⁴⁰ Rev. Stat. Missouri § 252.150 (1989) (fishways required if they are "necessary," but if they are "impractical or unnecessary" programs to stock hatchery-bred fish may be substituted); Ore. Rev. Stat. § 498.268 (1) (1988) (fishway must provide "adequate" passage for fish); and 30 Penn. C. S. § 3501(a) (1989) (fishways required except where they are not "practical or advisable").

⁴¹ As a comparison, in England, fishways (called "fish passes") are required to provide passage for "salmon or migratory trout." 18 L. Halsbury's Laws of England, ¶ 666.718 (4th ed. 1977).

⁴² Other state court cases, while not clearly stating that the fishway construction requirement applies to fish requiring migration for survival, nevertheless relate the requirement to migration. For example, in *State v. Beardsley*, 108 Iowa 396, 79 N.W. 138 (1899), the court indicated that fishways are designed to prevent obstruction to the migration of fish. In *State v. Roberts*, 59 N.H. 256 (1879), the court stated that right "to have migratory fish pass in their accustomed course up and down rivers and streams is a public right." *Id.* at 257. And in *West Point Water Power & Land Improvement Co. v. State*, 49 Neb. 218, 66 N.W. 6 (1896), the court stated that fishways are for "migratory fish."

⁴³ *Greenwood Ironworks*, 41 FERC ¶ 62,023 (1987); *Appomattox River Water Authority*, 45 FERC ¶ 62,243 (1988); *Commonwealth Hydroelectric*, 41 FERC ¶ 62,309 (1987); and *Bangor Hydro-Electric Co.*, 41 FERC ¶ 62,304 (1987).

³⁸ In the only apparent Congressional comment on this issue, in a debate in 1918 on the proposed FPA Section 18, Representative Graham of Illinois complained that, because of the Keokuk Dam, edible fish: Are rapidly disappearing from the upper Mississippi River. The larger fish, such as carp and buffalo and the larger catfish, migrate up and down the river. In the spring of the year people come to the Keokuk dam, and below it they take out tons of fish, where they have come up to the foot of the dam trying to go up the great river.

license, pursuant to section 18 of the FPA, was to benefit salmonids. In the occasional cases that mentioned fishways benefiting resident fish, these benefits were only incidental to the main purpose of the fishway, helping the salmonids in their migrations.

The Commission also notes that the definition of fishways states that flows within the fishway will be considered part of it only where they are "necessary for its operation." This statement is as true for downstream fishways as it is for upstream fishways. The Commission will review the basis for any specific flows under this standard.

The Commission finds no basis to conclude that there was inadequate public notice of the fishway issue, since a complete, detailed definition of the term was included in the NOPR, and all modifications to that definition made during this proceeding have been in response to comments filed. The Commission has carefully and fully considered all arguments and evidence on this issue that were submitted in the comments, reply comments, and requests for rehearing that have been filed.

4. Ready for Environmental Analysis

In the Final Rule, the Commission adopted a definition of "ready for environmental analysis."⁴⁴ The Commission will deem an application ready for environmental analysis when there is no need for the applicant to file additional information or when any additional information requested by the Commission has for the most part been filed and found adequate. At this point, and not before, under the revised regulations the Commission will ask for public comments and agency recommendations on the merits of the application. This procedure was adopted to avoid placing the public and the agencies in the predicament of either making timely submissions with an incomplete factual basis or submitting their comments and recommendations after the deadline set by the Commission.

Washington objects to the definition, alleging that under it agencies may still be required to make recommendations when the scientific studies conducted by the applicant are inadequate. Commerce wants the Commission to obtain the concurrence of the fish and wildlife

agencies in the determination of when an application is ready for environmental analysis.

The Commission sees no reason to change the definition of this term, nor is it necessary to require the concurrence of fish and wildlife agencies before the determination is made that an application is ready for environmental analysis. The Commission will make this determination only if and when the applicant has furnished the information necessary to serve as a basis for the evaluation of the proposed project's impact on the environment. The revised regulations establish procedures prior to filing and immediately after filing an application with the Commission, pursuant to which agencies can request studies and raise questions about their adequacy. The Commission will carefully consider all views of the agencies concerned prior to making a determination that an application is, or is not, ready for environmental analysis.

5. Resource Agency

Resource agency is a term used in the regulations. For example, § 4.38 requires applicants to consult with "the relevant Federal, state, and interstate resource agencies * * *." Accordingly, the regulations set forth the following definition of this term:⁴⁵

"Resource agency" means a Federal, state, or interstate agency exercising administration over the areas of flood control, navigation, irrigation, recreation, fish and wildlife, water resource management, or cultural or other relevant resources of the state or states in which a project is or will be located.

Interior and American Rivers ask that the National Park Service be included in the definition, citing various laws recognizing Park Service expertise and authority relevant to the hydropower program, including the River Watch Program. For this reason these requesters argue that the Park Service should be consulted by applicants for proposed hydropower facilities. Interior also asks that Indian tribes be included in the definition.

The Commission has already addressed the appropriate role of Indian tribes in the pre-filing consultation process and in hydropower proceedings, as reflected in the revised regulations in parts 4 and 16 and as explained at length in the Preamble to the Final Rule. It is unnecessary to alter the definition of resource agencies for this purpose or to make any other changes in the regulations regarding Indian tribes.

We agree with the requesters, however, that in light of its administrative responsibilities under

federal law the National Park Service should be consulted by hydropower applicants. We think the appropriate place to emphasize this fact is in §§ 4.38(a) (1) and 16.8(a) (1), where we will add the Park Service to the illustrative list of resource agencies with whom applicants must consult prior to filing their applications with the Commission. Finally, we are revising the definition to clarify and emphasize that reference to agencies exercising administration over "water resource management" includes agencies administering disposition of water rights.

B. Pre-hearing Procedures and Related Issues

1. Pre-filing Consultation

In the Final Rule, the Commission revised its regulations governing pre-filing consultation by applicants for original licenses and exemptions.⁴⁶ This revision was based on the similar provision for pre-filing consultation by applicants for new licenses.⁴⁷ As under previous regulations, applicants for original licenses and exemptions are required to go through a three-stage process prior to filing their applications with the Commission. In the first stage, the applicants must notify resource agencies of their plans; in the second stage the applicants must conduct studies of the impact of their proposal on resources and submit a draft application to the agencies for comment; and in the third stage the applicants file their applications with the Commission and serve copies on consulted agencies. The revision added a requirement that the applicant conduct a public meeting in the first stage, meet with resource agencies to resolve any disagreements regarding necessary studies and the draft application, and study reasonable hydropower alternatives to the proposed facilities. A mechanism for submitting disputes over necessary studies to the Commission was added in response to comments received.

American Rivers objects to what it characterizes as the virtual exclusion of the public from the pre-filing consultation process. It claims that allowing the public to participate fully in the process would not delay the preparation of applications, would improve the quality of applications filed with the Commission, and would increase the public's confidence in the fairness of the process. American Rivers cites as an example of procedures that

⁴⁴ Section 4.30(b) (26): "Ready for environmental analysis" means the point in the processing of an application for an original or new license or exemption from licensing which has been accepted for filing, where substantially all additional information requested by the Commission has been filed and found adequate.

⁴⁵ Section 4.30(b) (28).

⁴⁶ Section 4.38.

⁴⁷ Section 16.8.

should be required by the Commission for all applicants the practices of the State of Maine regarding hydropower applications. Maine allegedly gives notice of and solicits public input on draft applications submitted to state resource agencies during the second stage of pre-filing consultation and allows members of the public to attend any stage two meetings between state agencies and the applicant. American Rivers claims that the National Environmental Policy Act (NEPA)⁴⁸ applies to the pre-filing consultation process and supports its request for an expanded role for private citizens to participate.

American Rivers also objects to restricting the required analysis by the applicant of alternatives to hydropower facilities only, claiming that this limit violates NEPA, FPA section 4(e), and the Commission's own goals of promoting efficiency in the preparation and processing of applications.

The Commission has expanded the role of the public in the pre-filing consultation process and has initiated in this rulemaking other reforms, such as requirements for additional local notice and public files, that were previously not provided in the hydropower program.⁴⁹ The Commission welcomes initiatives on the state level, such as those in Maine, to supplement the Commission's efforts in this regard. We do not think it is appropriate at this time, however, to require additional procedures for public participation in the pre-filing consultation process. The goals of this process are to improve the quality of applications filed with the Commission and to expedite the processing of those applications, and we believe that the more detailed pre-filing consultation regulations already adopted will achieve these goals.

This rulemaking has also made numerous revisions to the Commission's hearing procedures on hydropower applications and has explained the procedures in great detail, so that members of the public may know when and how they may participate in the hearings, on the basis of which the Commission makes its final decisions. Should members of the public wish to participate more actively in the pre-filing consultation process concerning a particular hydropower application, they may take advantage of programs such as Maine's or they may take the initiative to contact the applicant directly and make more detailed presentations of

their views. Going beyond these steps to require in all cases additional pre-filing procedures for consultation with the public would in our view unnecessarily complicate and encumber this process, risking delays that could undercut the Commission's goals for the pre-filing consultation process. Nor has American Rivers shown how this process is in any way inconsistent with NEPA.⁵⁰

American Rivers has not given any new reasons for requiring an applicant to study non-hydropower alternatives to its proposal. The Commission fully considered this argument and stated why it was rejected in the Final Rule.⁵¹

2. Scientific Studies

In this rulemaking, the Commission addressed questions concerning which types of scientific study of the impact of hydropower proposals an applicant should be required to conduct. The Commission proposed and adopted, in response to the comments filed, procedures for determining when and how resource agencies may request studies of potential applicants in the pre-filing consultation process, what support for such study requests should be furnished, the obligations of applicants to conduct such studies, how disputes regarding such study requests may be resolved, and when and how the issue of the adequacy of studies will be addressed after a hydropower application is filed.

The Commission stated both its dedication to a full exploration of the resource impacts of a hydropower proposal, based on reasonable and necessary scientific studies conducted by the applicant, and its concern that certain study requests may cause undue delay in the preparation and processing of hydropower applications. Under the revised regulations, in the first stage of the pre-filing consultation process, resource agencies must furnish the applicant with a clear description of the basis for each study request, an explanation of why the study methodology specified is more appropriate than alternatives, and documentation that the use of the study methodology is a generally accepted practice that will be useful to the agency in furthering the resource goals affected by the proposed project.⁵² During the

second stage of pre-filing consultation, an applicant must conduct any reasonable study that is necessary for the Commission to make an informed decision on the merits of its application.⁵³ Disputes about study requests may be referred to the Commission for decision.⁵⁴ Within 45 days after an application is tendered for filing with the Commission, anyone can request that additional studies be conducted by an applicant, so long as the request is accompanied by a detailed showing of why the study is reasonable and necessary for the Commission to make an informed decision on the merits of the application.⁵⁵ Notice of the filing of the application would be given by the applicant inserting a notice in a local newspaper published in the county where the project is located and, in the case of resource agencies, by the applicant serving a copy of the application on each agency consulted.⁵⁶

A number of agencies and environmental groups object to any requirement in the regulations that agencies justify their study requests.⁵⁷ They allege that such a requirement would place a severe burden of proof on the agencies, and that requested studies should be presumed valid and should be required unless the applicant or the Commission can show that a requested study is not necessary or that the information is already available.⁵⁸

American Rivers objects to the notice provisions for the tendering for filing of applications and asks that public notice of this filing date be given by the Commission through the Federal Register. American Rivers complains that, under the former regulations, it could raise questions about the adequacy of studies in its comments on an application after it was accepted for filing, but that under the new regulations such questions may not be raised after the 45-day deadline following the tendering of the application to the Commission. American Rivers argues that citizens groups are denied a meaningful role in the pre-filing consultation process, and that therefore this rule change is particularly unfair. American Rivers contends that notice published in local newspapers where a proposed hydropower project is located is inadequate, because there are

⁴⁸ Section 4.38(c)(1).

⁴⁹ Section 4.38 (b) and (c).

⁵⁰ Section 4.32 (b)(7).

⁵¹ Section 4.32(b) (6), 4.38(d) (2), 16.8(d) (2).

⁵² Interior, Commerce, California Fish and Game, West Virginia, and Wildlife Federation.

⁵³ Commerce.

⁵⁴ See the discussion of the NEPA process in the Commission's hydropower program, including its relationship to pre-filing consultation, in section IV.C.6. of the Preamble to the Final Rule.

⁵⁵ Preamble, section IV.B.1.

⁵⁶ Section 4.38(b)(4).

⁴⁸ 42 U.S.C. 4321 *et seq.* (1988).

⁴⁹ See the more detailed explanation of these recent changes in the Preamble to the Final Rule, section IV.D.2.

hundreds of such newspapers in large states and about 10,000 newspapers in the country. American Rivers states that, while members of citizens groups concerned about hydropower development do regularly review the *Federal Register*, they do not and cannot reasonably be expected to read newspapers in all the counties where hydropower proposals of interest to them may be located. As a result, it argues that the revised regulations may deprive citizens groups of the opportunity to present their views to the Commission on the adequacy of scientific studies conducted by an applicant. In addition, American Rivers submits that 60 rather than 45 days is a reasonable time to expect comments on the study question following reasonable notice of the filing of a hydropower application, and that the Commission should adopt procedures to ensure use of staggered study comment deadlines for any state where a large number of hydropower applications is filed at the same time.⁵⁹

On the other hand, EEI objects to any provision allowing requests to be made for scientific studies after an application is filed. EEI maintains that such issues should be addressed solely in the pre-filing consultation process and that § 4.32(b)(7) should be deleted.

The Commission has already addressed many of these arguments in the preamble to the Final Rule.⁶⁰ The Commission continues to believe that the procedures it has adopted, to address the issue of what scientific studies an applicant must conduct, do not impose an excessive burden on resource agencies. To require them to describe in appropriate detail the study sought and explain why it is reasonable and necessary is the least that can be done to ensure that expensive and time-consuming studies are not imposed on applicants when there are less burdensome methods available to provide the record the Commission requires in order to make a decision on the merits of an application, including its resource impacts.

The showing required of an agency requesting scientific studies will vary with the facts of a case. For simple study requests, especially those that have been regularly used by hydropower applicants, there is no need for the description and justification for the request to be lengthy. On the other hand, where an agency wants an applicant to conduct an elaborate or expensive study, the agency must be

careful to explain fully what study is being requested and why, so that the applicant and, where appropriate, the Commission can intelligently evaluate the request. Disputes over requested studies can be referred to the Commission by either an agency or an applicant. The revised regulations in part 4, based on those in part 16 applicable to applicants for new licenses, apply these procedures to all applicants for hydropower facilities and codify the practices that the Commission has evolved for weighing study requests. However, we remind applicants that they are ultimately responsible for ensuring the adequacy of their applications. Therefore, while resource agencies may request studies of particular interest to those agencies, the applicant is required to conduct such additional studies and collect such additional data as is needed to file an acceptable license application.

The Commission agrees, however, that the public notice provisions, relating to the filing of applications, need improvement in order to provide more opportunity for concerned citizens to make their views known to the Commission on the study issue. The *Federal Register* has been accepted as the appropriate vehicle for giving notice to the public of important matters affecting their rights.⁶¹ Accordingly, the Commission is revising § 4.32(b)(7) of the regulations to require that notices be published in the *Federal Register* of the tendering for filing of all hydropower applications; all applicants for license or exemption will be required to furnish the Commission with a draft of this notice. The Commission is also requiring that local publication of the notice for the tendering for filing of an application be made at least twice and is extending to 60 days after filing, or such longer periods as the Commission believes is appropriate in particular cases, the deadline for filing with the Commission comments on or requests for additional studies.⁶²

The Commission does not agree with EEI that it is inappropriate to allow any party to raise issues concerning the adequacy of studies after an application is filed, since the Commission's regulations do not grant to the public the

right to participate in all facets of the pre-filing consultation process. The Commission is however optimistic that the procedures it has adopted for public participation in the pre-filing consultation process, as discussed above and in the Preamble to the Final Rule,⁶³ together with the procedures for participation by resource agencies, should be adequate to ensure that in most cases the necessary scientific studies have been conducted to furnish the Commission with the record it needs to process and reach decisions on the merits of hydropower applications. In some cases, however, disputes over necessary studies may not be resolved prior to filing, and all concerned parties, including resource agencies and private citizens, have the right under the FPA and the Administrative Procedure Act (APA)⁶⁴ to present their views to the Commission and to have a decision made on this issue. The rights of applicants are fully protected by the new procedures, which afford applicants notice of and the opportunity to respond to any requests for additional studies. The interests of an efficient administrative process for hydropower applications are far better served by raising and addressing such issues as soon as an application is filed, when the Commission is evaluating the need for additional information, rather than postponing this important procedural issue and attempting to address it at a later stage, along with substantive issues.

3. Non-capacity Amendments

In the Final Rule the Commission revised its regulations to clarify what kinds of applications are subject to the pre-filing consultation requirements of § 4.38. Applicants for "non-capacity amendments," *i.e.*, amendments that would not increase the maximum hydraulic capacity of a project by 15 percent or more and result in an increase in installed name-plate capacity of 2 megawatts (MW) or more, would not be subject to the complete three-stage, pre-filing consultation process, in order to encourage the kind of efficiency improvements such amendments would create.⁶⁵ Such an applicant would be required to consult with resource agencies and Indian tribes only to the extent that the amendment would affect their interests.⁶⁶

⁵⁹ Preamble, Section IV.D.2.

⁶⁰ 5 U.S.C. 551 *et seq.*

⁶¹ Sections 4.38(a)(4); 4.201 (b) and (c).

⁶² Section 4.38(a)(5).

⁶³ *E.g., Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947).

⁶⁴ The Commission is making a related change to § 4.32(e)(2) (i) and (ii) of the regulations, to allow the Director of OHL 90 days, instead of the 60 days provided by the current regulations, in which he may reject an application as patently deficient. This revision will allow the Director, in his decision as to whether to accept an application, to take into account objections raised by persons challenging the adequacy of scientific studies conducted by the applicant.

⁵⁹ See also the requests filed by Interior, Oregon, and West Virginia.

⁶⁰ Section IV.B.3.

EEL asks that the Commission directly define "non-capacity amendment," as the regulations now contain only a definition of "capacity related amendment," and to confirm that a non-capacity amendment involves either less than 15 percent increase in hydraulic capacity or less than 2 megawatt increase in installed name-plate capacity. We confirm EEL's reading of the regulation. We believe that the regulation is clear as written, and perceive no need to revise it.

C. Bearing Process

1. Water Quality Certification

In the Final Rule, the Commission modified the showing previously required of an applicant regarding its compliance with section 401(a) (1) of the Federal Water Pollution Control Act (the Clean Water Act),⁶⁷ where the certifying agency has received a request for water quality certification but has not acted on it for one year. Formerly, the Commission's regulations required that the applicant provide the Commission a copy of its request for certification, including proof of the date that the certifying agency received the request "in accordance with applicable law governing filings with that agency."⁶⁸ If the certifying agency had not denied or granted a request for certification within one year from this date, under the Commission's regulations the certifying agency was deemed to have waived the certification requirements of the Clean Water Act. Under the revised regulations, an applicant must provide the Commission proof of the date on which the certifying agency received the request for water quality certification, without having to demonstrate that it was filed "in accordance with applicable law;"⁶⁹ a certifying agency is deemed to have waived the certification requirements of the Clean Water Act if it has not denied or granted a request for certification within one year from receipt of the request.⁷⁰

The Commission also revised its regulations to clarify when amendments to pending applications for license or applications to amend an existing license would require an applicant to submit a new request for water quality certification to a certifying agency. The revised regulations provide that going back to the certifying agency with the proposed amendment is necessary only if "the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project."⁷¹ If, for example, an amendment would add recreational facilities or replace outmoded electrical facilities with more efficient facilities, without having a material effect on discharges of water from the project, a new water quality certification would not be required.

A number of requesters object to the new regulation providing that the one-year waiver period commences on the date the certification application is received by the agency, not the date the application is received in accordance with applicable law governing filings with that agency.⁷² They suggest that this change would require the Commission to overlook violations of state law (regarding filing requirements), and that the old rule is superior since the Commission only needs to ask the state agency in question for guidance to determine if and when the agency had received a certification application satisfying state filing requirements. The requesters claim that the revised rule would diminish the authority Congress granted to the states in this area and that the Commission therefore lacks the authority to promulgate the rule. The requesters also submit that the revised rule is contrary to section 401 of the Clean Water Act, as interpreted in *City of Fredericksburg v. FERC*,⁷³ and that the Commission is encouraging delay and confusion in proceedings before state agencies, through repeated filings of incomplete certification applications.

The requesters also oppose the rule change to determine when an applicant seeking an amendment to its license or pending application must obtain a second water quality certification from a state agency.⁷⁴ They claim that any amendment to a license or pending application that would affect project facilities or operating requirements requires either a new section 401 certification from the state or a

determination by the certifying agency that a new certification is unnecessary. It is asserted that the new regulation will encourage applicants to design applications to please the state agencies and then to amend the application or license in hopes of evading the requirements of section 401. The requesters argue as well that this rule change is beyond the Commission's authority by invading the states' powers to make water quality determinations and by attempting to restrict the states' powers to include in a section 401 certification requirements that the applicant satisfy other appropriate state laws, and that the revised rule conflicts with state court legal precedents.⁷⁵ It is claimed that any Commission rule governing when a second water quality certification is needed must parallel those regulations governing when a hydropower application is materially or significantly amended.

Oregon claims that this rule was changed without opportunity for notice and comment. Oregon states that the Commission has failed to address whether a new water quality certification or waiver is required if the applicant does not seek to amend its application but the Commission analyzes an alternative plan of development in the environmental review process and the state agency determines that a new certification is required for the alternative.⁷⁶

EEL wants the Commission to retract its statement in the Preamble to the Final Rule allowing what it terms a "reopener" of the one-year waiver of water quality certification.⁷⁷ Specifically, EEL objects to the one-year waiver period commencing on the effective date of the Final Rule, in cases where a certifying agency had received but had not accepted for filing a request for water quality certification prior to the effective date of the Final Rule. If a state agency had not accepted or otherwise acted upon a request for certification filed more than one year ago, EEL would require the agency to come forward within 60 days of the effective date of the Final Rule to demonstrate that the request was incomplete or otherwise deficient within the meaning of the Commission's former regulations. Otherwise the water quality

⁶⁷ 33 U.S.C. § 1341(a)(1).

⁶⁸ Former 18 CFR 4.38(c)(2)(ii) and 16.8(f)(7)(i)(B).

⁶⁹ Sections 4.38(f)(7)(i)(B) and 16.8(f)(7)(i)(B).

⁷⁰ In section IV.C.2 of the Preamble to the Final Rule, the Commission stated in footnote 116: If a request for water quality certification was filed with a certifying agency prior to the effective date of this final rule, and if that certifying agency had not accepted the request for filing as of that date, then the one year in which the certifying agency must act on the request in order to avoid the waiver commences on the date of the effectiveness of this final rule. If the certifying agency had accepted the request for filing, then the one-year period commences running on the date of that acceptance for filing.

⁷¹ Sections 4.38(f)(7)(iii), 16.8(f)(7)(iii).

⁷² Wildlife Federation, American Rivers, Oregon, and California Water Board.

⁷³ 878 F.2d 1109 (4th Cir. 1989).

⁷⁴ Wildlife Federation, American Rivers, Oregon, and California Water Board.

⁷⁵ American Rivers.

⁷⁶ Oregon cites as an example the proposed Salt Caves Hydroelectric Project in Klamath County, Oregon (P-10199), for which a license application was filed by the City of Klamath Falls on November 21, 1986. See Final Environmental Impact Statement, FERC/EIS-0052F, June 1990.

⁷⁷ Preamble, section IV.C.2., footnote 116, quoted above.

certification would be deemed waived under the revised regulations.

EEL asks the Commission to expand its regulations on water quality certifications in order to adopt certain procedural and substantive limitations within which state agencies must operate in denying or conditioning certifications. EEL wants the Commission to require a state agency to issue notices of intent to deny or condition a certification, to explain the basis for a proposed denial or conditioning, to afford applicants an opportunity to respond to the agency's intended action and to appeal it, and to limit the bases for an agency to deny or condition certifications.

The Commission declines to make any of the requested changes in its regulations determining when the one-year waiver for a water quality certification has been granted. The requesters are asking the Commission to reinstate the regulations that existed prior to the Final Rule, as construed in *City of Fredericksburg*. The court's opinion in *City of Fredericksburg* was construing the Commission's own former regulation on when the one-year waiver period for certifications under the Clean Water Act commenced to run. The court was not asked to decide, and expressed no opinion on, whether that regulation was compelled by the terms of the Clean Water Act;⁷⁸ we think it is clearly not. The Commission explained at length in the Preamble to the Final Rule, in response to comments that were submitted, why it decided to change the rule construed in *City of Fredericksburg*. The former regulation forced the Commission to make judgments as to when and if an applicant had complied with state filing requirements for applications for water quality certifications. The Commission's experience has been that it is sometimes far from clear what the applicable law governing filings is.⁷⁹ It is much easier and more predictable for the Commission and all parties concerned to determine when an application for water quality certification is actually filed with a state agency and commence the running of the one-year waiver period from that date, instead of the date when an application is accepted for filing in accordance with state law.

Changing the Commission's regulations involves no invasion of state law prerogatives under the Clean Water

Act. As noted in the Preamble to the Final Rule, the state certifying agencies remain totally free, as they were before, to fashion whatever procedural regulations they deem appropriate to implement their responsibilities under the Act. Nor does the new rule provide any incentive for an applicant to delay or evade compliance with state agency proceedings on requests for water quality certifications. As the Commission has pointed out,⁸⁰ under the new rule if an applicant requesting certification fails to comply fully with state law requirements for filing such requests, or fails to provide the certifying agency with timely and adequate information to allow a ruling on the merits of the request, then the certifying agency can, within one year from receiving the request, prevent waiver of the certification requirement by dismissing or denying the request.

The Commission rejects the requesters' claims that any amendment to a license or pending application requires a second water quality certification or waiver, or a determination by the state agency that a second certification is unnecessary. Nor have the requesters shown why the Commission's regulations in this area must parallel those regulations governing, for unrelated procedural purposes, when a hydropower application is materially or significantly amended.

It is true that prior to the rule revision the Commission's regulations provided that any material amendment to development plans in a license application required the applicant to file with the applicable state agency a new request for water quality certification (even if the applicant had already received a certification or waiver for its original proposal).⁸¹ A material amendment to a license application is defined as any fundamental and significant change in a project, including, *inter alia*, a material change in the location or size of a dam.⁸² However, while there may be a high correlation between a material amendment to a license application and a material adverse impact to the discharge that is the subject of the water quality certification, the real focus of a recertification requirement must necessarily be on the nature of the change, if any, to the water quality in the discharge from the proposed project. Therefore, even before the rule change, and irrespective of how extensively,

why, or with what benefits, a project proposal is amended, section 401(a)(1) of the Clean Water Act requires recertification if a project proposal is revised in a way that would have a material adverse impact on the water quality in the discharge from the proposed project. Conversely, even if an amendment is material for other purposes under the Commission's regulations, if that amendment has no material adverse impact on the project discharge, there is no reason to require an applicant to request recertification.

The rule change recognizes this distinction and describes directly, rather than indirectly, what amendments require a second water quality review by certifying agencies. The Commission continues to believe that this clarification serves the interests of all parties in an efficient hydropower licensing program, recognizes the legitimate interests of state certifying agencies, and fully complies with the Clean Water Act.

The Commission does not agree with Oregon that insufficient notice and comment on this issue was afforded to the public. The NOPR addressed water quality issues presented by hydropower applications and proposed a comprehensive revision of the pre-filing consultation regulations which contain the standards for determining when a new water quality certification is required. EEL and Oklahoma filed comments seeking changes in the proposal, and the Commission responded to these comments in issuing the Final Rule.⁸³ The rehearing process afforded all interested parties yet another opportunity to make their views known on this issue, which the Commission has carefully and fully considered.

The Commission does not believe it is appropriate at this time to attempt to insert into the regulations standards for determining when a new water quality certification or waiver is required in all cases, including those where no amendment application is filed but an alternative is explored by the Commission in the environmental review process. Such questions have arisen only rarely and are best handled on a case-by-case basis, at least until the Commission has gained more experience in this area.

The Commission declines to make the changes requested by EEL with respect to the transition rule for waivers and its request for rules to govern state procedures for processing requests for water quality certifications. Regarding

⁷⁸ The court stated (876 F.2d at 1111 n. 1): We rest our holding solely on our reading of FERC regulations and do not purport to decide the meaning of "request" under Section 401(a)(1) of the Clean Water Act. * * *

⁷⁹ See Preamble, section IV.C.2., footnote 115.

⁸⁰ See, e.g., *Central Maine Power Company*, 52 FERC ¶ 61,033 (1990) at p. 61,170.

⁸¹ Former § 4.38(e)(3), and § 4.35.

⁸² Section 4.35(f)(1).

⁸³ Preamble to the Final Rule, section IV.C.1.

waivers, the Commission made clear that it would not retroactively apply the revised rule II describing when the one-year period for determining eligibility for the waiver commences. If a state agency had accepted for filing a request for water quality certification prior to the effective date of the revised rule, the one-year period will run from the date of that acceptance for filing, as under the old rule. If a request had been filed but not accepted prior to this effective date, the one-year period will run from the effective date. The Commission has no authority to adopt procedural or substantive regulations to govern the processing by state agencies of requests for water quality certifications, as EEI requests. In the Clean Water Act, Congress delegated this authority to the states; EEI should therefore address its concerns on this issue to the state agencies that have responsibility for acting on requests for water quality certification.

2. Notice-and-Comment Hearing

In the Final Rule, the Commission adopted comprehensive regulations to codify and clarify the notice-and-comment procedures by which most hydropower hearings are conducted.⁸⁴ Comments on an application, including all mandatory and recommended terms and conditions for exemption or license, must be filed with the Commission within 60 days after the Commission issues a public notice declaring that the application is ready for environmental analysis.⁸⁵ Reply comments are due within 105 days of this date. The Commission could extend these comment periods if appropriate in particular cases, and parties could ask for extensions of time.⁸⁶ Agencies with responsibility for mandatory terms and conditions or prescriptions could file preliminary terms and conditions or prescriptions with the Commission by the due date, if ongoing agency proceedings prevented the filing of final terms and conditions or prescriptions with the Commission by that date.

All commenters must identify the relief sought and present their evidentiary basis; agencies submitting mandatory terms and conditions or prescriptions must explain their legal basis; and each fish and wildlife agency or Indian tribe must discuss its understanding of the resource issues presented by the proposed facilities.⁸⁷

Agencies, Indian tribes, and members of the public may modify the recommendations, terms, and conditions or prescriptions previously submitted in response to a draft environmental impact statement (DEIS) or a material amendment to the project's proposed plans of development.⁸⁸

The Commission will analyze all timely submissions concerning fish and wildlife and other resource impacts of the proposed project, in connection with the Commission's environmental review of a hydropower application, leading, as appropriate, to an environmental assessment (EA) or an environmental impact statement (EIS). The Commission adopted procedures to comply with FPA section 10(j).⁸⁹ Finally, the hearing regulations referred to the legal standards pursuant to which the Commission decides whether and on what basis to issue licenses and exemptions for hydropower facilities.⁹⁰

Wildlife Federation argues that the Commission lacks the authority to limit when a fish and wildlife agency may file additional or modified fish and wildlife recommendations in response to changes in a proposed project, and Interior wants to revise the regulations to allow fish and wildlife agencies to file preliminary fish and wildlife recommendations where the scientific studies conducted by the applicant are deficient or there are concerns about the impact of the project on an endangered species. Washington wants fish and wildlife agencies to have the right to change their fish and wildlife recommendations at any time prior to issuance of a final decision by the Commission on a license application. American Rivers and California Fish and Game believe that a fish and wildlife agency should be able to change its fish and wildlife recommendation in response to an EA, as well as a DEIS, and ask that the regulations be revised accordingly. American Rivers argues that NEPA requires granting liberal leave to fish and wildlife agencies to revise their fish and wildlife recommendations.

The Wildlife Federation contends that the Commission has not given adequate notice and opportunity to comment on the hearing regulations, in violation of the APA.

Washington maintains that the revised regulations permit license decisions based on incomplete information, in violation of NEPA. Washington opposes the requirement

that a fish and wildlife agency discuss its understanding of resource issues presented by an application when it submits its fish and wildlife recommendations. In Washington's view, this requirement is meaningless, unsupported, and unclear. Washington believes that fish and wildlife agencies cannot be required to submit fish and wildlife recommendations prior to completion of the Commission's environmental analysis. Washington further argues that requiring the agencies to do so or lose their rights under FPA section 10(j) places the agencies in an untenable position.

North Carolina Electric asks the Commission to amend its reference to the conditions it will adopt in licenses, to refer to FPA section 10 instead of referring only to section 10(a)(1).

On further review the Commission believes that the revised regulations in general give adequate opportunity to fish and wildlife agencies to revise their fish and wildlife recommendations. In particular cases it may be appropriate to afford additional opportunity, not specifically described in the regulations, for these agencies to submit revised fish and wildlife recommendations. In such cases, of course, other agencies and parties in a proceeding should have similar rights to modify their earlier submissions. The requesters disagree amongst themselves as to when such opportunity should be granted and argue their points abstractly, without pointing to specific sets of facts that would demonstrate how a rule could be crafted to expand the opportunity to submit revised comments and recommendations without causing unnecessary delay in cases where such an opportunity is inappropriate. The Commission will therefore leave the regulations in this area as they are and rely on a case-by-case determination of when additional opportunity to revise comments and recommendations should be afforded, either in response to requests for such procedures by agencies or parties or on the Commission's own initiative. We do not see the relevance of NEPA to the Commission's choice of procedures in this regard, especially since the Commission has by rule granted to agencies the right to modify their recommendations in light of a DEIS.

We find no lack of adequate notice and comment on the hearing procedures contained in the Final Rule. They were described at length in the NOPR and set forth for comment in proposed regulatory text. The Commission adopted these hearing procedures in order to ensure fairness to all parties

⁸⁴ Section 4.34.

⁸⁵ The notice will be published in the *Federal Register* and in one local newspaper, and will be sent to all parties on the service list.

⁸⁶ Section 385.2008.

⁸⁷ Section 4.34(b) (1), (2), and (3).

⁸⁸ Section 4.34 (b)(4).

⁸⁹ Section 4.34(e). See section II.C.5., *infra*.

⁹⁰ Section 4.34(f).

and agencies involved in hydropower proceedings and to gather the record necessary for decision according to the applicable legal standards. These procedures therefore do not in any way encourage decisions based on incomplete information. In order to understand agency recommendations, to permit a response by affected parties, and to allow analysis of the recommendations in reference to all the facts in a hydropower case, the Commission set forth a number of requirements for submissions in the hearing process, including the requirement that fish and wildlife agencies discuss their understanding of resource issues presented by an application when filing fish and wildlife recommendations. Contrary to Washington's claim, this requirement is simple, straightforward, and consistent with standards commonly set for submissions in administrative hearings. Should an agency insist on submitting a fish and wildlife recommendation without such a discussion, the agency is certainly free to do so. The regulations put agencies on notice, however, that making fish and wildlife recommendations without discussing the major issues in the case or the evidence bearing on those issues is unlikely to be helpful or persuasive. It is not up to an applicant or the Commission to divine the meaning of a fish and wildlife recommendation or to guess its possible evidentiary basis.

The Commission discussed at length in the NOPR and the preamble to the Final Rule the relationship between the whole hydropower hearing and environmental review processes.⁹¹ The Commission explained how resource agencies are given abundant opportunities, long before a hydropower application is filed, to meet with an applicant, discuss the proposed plans of development, request scientific studies, and respond to and discuss the applicant's draft application. Disputes about necessary studies can be referred to the Commission for resolution in the pre-filing process. Most applications that are filed concern either existing facilities, or new facilities for which a preliminary permit application had previously been tendered to and granted by the Commission. Hydropower applications must contain an Exhibit E, addressing environmental issues raised by the proposed hydropower facilities. The Commission's revised regulations also deferred when fish and wildlife recommendations are due until the time

when the application is ready for environmental analysis. Contrary to Washington's suggestion, there is no reason to believe that pursuant to the Commission's regulations resource agencies have not had repeated opportunities over a period of years, both before and after the filing of an application, to become familiar with the resource issues presented. It is therefore reasonable and entirely consistent with NEPA to require the agencies, at the point when an application is ready for environmental analysis, to submit fish and wildlife recommendations, which may serve as a basis for the completion of the environmental review process.

The Commission appreciates the concerns of North Carolina Electric about the accuracy of the language in the regulations referring to the legal conditions on which the Commission will grant licenses. Accordingly, the Commission will modify § 4.34(f)(1)(i) of the regulations to conform to section 10 of the FPA, as requested.

3. Deadlines

The Commission found that the timely submission of all resource agency recommendations, mandatory terms and conditions, and prescriptions is extremely important to avoid unnecessary delays in processing hydropower applications and to prevent the waste of the Commission's limited resources on proposals that may have to be significantly changed to address the concerns of resource agencies. The Commission stated that it may be difficult to conduct a proper NEPA analysis of the issues presented by a hydropower application if these submissions are not made on a timely basis. The Commission therefore set in the revised regulations uniform deadlines for the submission of all public comments, resource recommendations (including fish and wildlife conditions), mandatory terms and conditions, and prescriptions. Extensions of time within which to make these submissions may be requested in particular cases. Late fish and wildlife recommendations would be considered under FPA section 10(a), not under section 10(j), and late mandatory terms and conditions or prescriptions would also be considered under section 10(a), not sections 4(e) or 18, so long as such consideration would not delay or disrupt the proceeding.⁹²

Wildlife Federation states that the restrictions in the revised regulations on fish and wildlife agencies are unacceptable and inappropriate. In its

view, without evidence of dilatory conduct by fish and wildlife agencies, the Commission must defer to the agencies' need for more time to submit their recommendations. It asserts that by setting deadlines for agency recommendations the Commission is attempting to regulate other agencies and to go beyond its statutory authority.⁹³ Wildlife Federation does not view FPA section 309 as providing the Commission with the authority to set deadlines in hydropower hearings and points to the problem complying with these deadlines would cause where there are concerns about the impact of proposed hydropower facilities on endangered species. Wildlife Federation also claims that the Commission's procedural regulations interfere with the sovereignty of the states and violate the Tenth Amendment to the U.S. Constitution, by invading powers reserved to the states.

American Rivers objects to what it characterizes as the strict time deadlines set by the Commission for the submission of fish and wildlife recommendations.

The Commission explained the basis for the adoption of the deadlines in the preamble to the Final Rule.⁹⁴ Wildlife Federation repeats arguments on this issue that the Commission has already considered and rejected. In revising the hydropower procedural regulations the Commission did not attempt to regulate other agencies but only to discharge its own responsibilities for managing the hydropower licensing program entrusted to the Commission by Congress. The revised regulations recognize the important roles played by state and federal agencies regarding hydropower proposals, and there is absolutely no basis for the claim that the regulations in any way infringe on the sovereignty of the states.

The time deadlines promulgated in the revised hearing regulations are by no means inflexible. The Commission sought comments on how they could be varied according to the type of application presented, but neither any commenter nor the Commission was able to devise a system to set in the regulations different and reasonable time deadlines for different types of applications. Therefore the Commission retains the authority to allow longer time periods for particular submissions in specific cases or to grant additional procedures, either on its own initiative or in response to requests by agencies or parties, in order to ensure fairness to all

⁹¹ E.g., Preamble to Final Rule, sections IV.B.1. and 2., IV.C.3. and 6.

⁹² Section 4.34(b).

⁹³ Wildlife Federation and American Rivers.

⁹⁴ Preamble, section IV.C.4.

concerned with a hydropower proposal and the gathering of a complete record for analysis and decision.

4. Endangered Species Act

In response to comments filed in this rulemaking the Commission adopted a regulation recognizing its consultation responsibilities under the Endangered Species Act (ESA).⁹⁵ The regulation codifies the Commission's existing practice of consulting with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, as appropriate, concerning the impact of a hydropower proposal on federally listed endangered or threatened species and their critical habitat.⁹⁶

Wildlife Federation argues that the Commission's "public information notices" should not contain information regarding the locations where endangered species may be found. As the Commission's public notices have not contained such information, it does not appear necessary to adopt a specific prohibition in the regulations along the lines Wildlife Federation recommends.

If a question should arise in a specific case as to whether protective measures should be taken by the Commission to prevent the disclosure of information about the precise location of an endangered species, the Commission will of course consider taking such measures, if they are within its authority and after consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, as appropriate.

5. Section 10(j) Process

The Commission adopted regulations specifying the procedures it will use to fulfill its responsibilities under section 10(j) of the FPA, concerning how the Commission will respond to fish and wildlife recommendations filed by fish and wildlife agencies.⁹⁷ The Commission adopted a six-step consultation procedure, beginning with the submittal of fish and wildlife recommendations; continuing as appropriate through clarification of those recommendations, preliminary determination of their inconsistencies (if any) with applicable law, response by the agencies and others to such determinations, and meetings with the agencies and affected parties; and ending with the issuance of the order on the license application.

Wildlife Federation contends that the Commission adopted these regulations without notice and comment. Interior and Wildlife Federation object to the requirement that fish and wildlife recommendations be supported by "substantial evidence," and Wildlife Federation asks that the section 10(j) consultation process end with the preparation by the Commission of a written set of recommended license conditions.

Interior and West Virginia want the section 10(j) process extended to include recommendations for post-licensing studies and recommendations.

Washington and Oregon are generally critical of the regulations, and Oregon wants the Commission to afford additional opportunity for negotiation and comment on section 10(j) issues and demands that the Commission do an EIS if there is any inconsistency found between a fish and wildlife recommendation and applicable law.

In the NOPR, the Commission discussed at length the section 10(j) process, putting all interested parties on notice of the procedures it had followed and intended to follow in this area.⁹⁸ The Commission received and reviewed extensive comments on this issue from a wide range of parties, who asked the Commission not merely to explain its procedures in this important area, but to codify them in the regulations.⁹⁹ There is no basis for the accusation, therefore, that the Commission has in any way failed to give to the public the notice and opportunity for comment required by law.

The Commission has not required that fish and wildlife recommendations be supported by "substantial evidence." As discussed above, the procedural regulations adopted do call for those recommendations to discuss the agency's "understanding of the resource issues presented by the proposed facilities and the evidentiary basis for the recommended terms and conditions."¹⁰⁰ If the Commission concludes that a fish and wildlife recommendation is not in fact supported by substantial evidence, the Commission may on that basis make the preliminary determination that the recommendation is inconsistent with applicable law and offer the agency an opportunity to show why this is not true. ECPA does not require the Commission to prepare an EIS whenever it believes

that a fish and wildlife recommendation is inconsistent with applicable law, and the Commission does not believe that it would improve the hydropower licensing program to require preparation of an EIS in each such instance even though the environmental review process on an application already fully complies with NEPA.

The Commission is confident that the section 10(j) consultation process it has adopted fully complies with legal requirements and affords sufficient opportunities for the Commission and fish and wildlife agencies to attempt to work out their differences in particular cases. The Commission is not convinced that it is appropriate as a general rule to require the process to end in the preparation of recommended license terms and conditions, automatically triggering another round of comments. In their fish and wildlife recommendations, fish and wildlife agencies may recommend specific language for license terms and conditions, which the Commission will carefully consider, and the agencies, if they have intervened as parties in a case, may request rehearing and seek judicial review of any license term or condition, adopted by the Commission, to which they object.

The Commission has already considered and discussed why the section 10(j) consultation process does not apply to recommendations for post-licensing studies, and the requesters have not shown why this decision should be reversed.¹⁰¹

The Commission has had several months' experience with the new FPA section 10(j) procedures. On the whole, the process appears to be working well, but two problems have arisen. First, agencies have taken the opportunity to submit arguments and evidence unrelated to the Commission's preliminary determination of inconsistency between an agency's fish and wildlife recommendation and applicable law, as part of the agency's comments responding to the preliminary determination of inconsistency. Second, agencies have requested that conferences to settle differences between the Commission and agencies over section 10(j) matters be postponed until a significant period of time after the deadline for filing agency comments in response to the preliminary determination of inconsistency.

The 10(j) process is not designed to afford agencies, parties, or other interested persons another opportunity to submit new issues and related

⁹⁵ 16 U.S.C. 1521 *et seq.*

⁹⁶ Section 4.34(d). See generally Alabama Power Co., 53 FERC ¶ 61,217 (1990), modified on rehearing, 54 FERC ¶ 61,331 (1991) and 56 FERC ¶ 61,173 (1991).

⁹⁷ Section 4.34(e), discussed in the Preamble to the Final Rule at section IV.C.8.

⁹⁸ NOPR, 50 FERC ¶ 61,270 (1990), Section III.B.1. and 2.

⁹⁹ See the Preamble to the Final Rule, section IV.C.8.

¹⁰⁰ Section 4.34 (b) (2). See the discussion in section II.B.2. *supra*.

¹⁰¹ Section II.A.1., *supra*, and Preamble to Final Rule, section IV.A.2.

arguments and evidence to the Commission on a hydropower application. The process and the procedures codified in § 4.34(e) of the regulations to implement that process were designed solely to address how the Commission, affected resource agencies, Indian tribes, and parties could work together to identify instances where fish and wildlife recommendations and applicable law appeared inconsistent and to attempt to resolve differences over these issues. Resource agencies should limit their comments in response to any preliminary determination of inconsistency by the Commission to the identified issues and not attempt to inject new issues in the 10(j) process.¹⁰²

Since the 10(j) process occurs at the end of the Commission's hearing on hydropower applications, it must be concluded promptly whenever possible. The 10(j) process is not designed to serve as a basis for prolonged delay of decisions on hydropower applications. Accordingly, the Commission is revising § 4.34 (e) (5) by adding a sentence to make clear that, except in extraordinary circumstances,¹⁰³ the Commission expects any meeting, conference, or further procedure used in an attempt to resolve any inconsistency, between a fish and wildlife recommendation and applicable law, to take place within 75 days of the date the Commission issues a preliminary determination of inconsistency, *i.e.*, within 30 days after comments by a resource agency and others in response to this determination are due. The regulations as revised should afford sufficient time to complete 10(j) consultations while moving the Commission expeditiously toward decisions on the merits of hydropower proposals.

6. Intervention.

The Commission's regulations permit intervention in a hydropower proceeding when the Commission issues public notice of the acceptance for filing of an application and, if applicable, in response to a DEIS. In Order No. 511, the Commission issued a policy statement on an interim basis allowing a fish and wildlife agency the opportunity to intervene after issuance by the

Commission's staff of an order rejecting or materially modifying a fish and wildlife recommendation of the agency. In response to comments filed on the NOPR, seeking similar late intervention rights for other parties, the Commission decided to discontinue the policy of allowing late interventions by fish and wildlife agencies as a matter of right, concluding that it would be most fair to put all parties in hydropower proceedings on the same footing regarding intervention, and noting that the regulations do not impose any significant burden on persons, including agencies, that decide to file for intervention in a proceeding.¹⁰⁴

Wildlife Federation wants an express rule allowing interventions in a proceeding on a hydropower application before it is accepted for filing, in order to avoid what it contends is confusion about the rights of persons to file such early interventions. Wildlife Federation also objects to our determination not to extend Order No. 511 and claims that this will result in the narrowing of participation by fish and wildlife agencies in the Commission's hydropower proceedings.

The Commission does not invite interventions in hydropower proceedings prior to the time when the Commission accepts an application for filing and issues a public notice inviting interventions. However, the Commission will entertain motions to intervene in a hydropower proceeding that are filed after the application has been filed but before public notice has issued.¹⁰⁵

Fish and wildlife agencies have not taken issue with the Commission's decision to discontinue the interim policy on late intervention rights for fish and wildlife agencies announced in Order No. 511. Those agencies have many opportunities not only to intervene as parties in hydropower proceedings, but also to participate in them pursuant to the special statutory status of these agencies under federal law and under Commission regulations, as considered at length and revised in this rulemaking. There is no question that these regulations fully comply with the Commission's responsibilities, ensure the consideration of a wide variety of views on hydropower proposals, and treat on a fair and equitable basis all persons interested in those proposals, including resource agencies, Indian tribes, public interest groups, and applicants. The Commission is not persuaded, therefore, that there is any

reason to reinstate the interim policy announced in Order No. 511.

D. Miscellaneous

1. Transition Provisions

In the revised regulations, the Commission required each applicant filing an application for original license or exemption on or after June 19, 1991, to keep a public file of the application and any supplementary filings or amendments relating to the application that the applicant submitted to the Commission.¹⁰⁶ In the Preamble to the Final Rule, however, the Commission stated that the Commission was requiring an applicant to retain such material and "to make available in its public file whatever such material it has in its possession."¹⁰⁷ Tarlock requests that the Commission clarify that an applicant that filed for an original license or exemption before June 19, 1991, need not maintain a public file of its application.

The Commission intended only to require that an applicant for an original license or exemption that filed its application on or after June 19, 1991, maintain a public file of the application. Therefore, an applicant that filed such an application prior to that date need not maintain a public file.¹⁰⁸

2. Clarification of Delegated Authority

In the revised regulations, the Commission clarified that the Director of the Office of Hydropower Licensing has the authority to make preliminary determinations of inconsistency between a fish and wildlife agency's fish and wildlife recommendation and applicable law, and to conduct through staff whatever consultation is appropriate to attempt to resolve such inconsistencies. The Commission also delegated to the Director the authority to waive the pre-filing consultation requirements in §§ 4.38 and 16.8 whenever the Director, in his discretion, determines that an emergency so requires or where the potential benefit of expeditiously considering a proposed improvement in hydropower facilities outweighs the potential benefit of requiring completion of the entire pre-filing consultation process.¹⁰⁹

Commerce and Washington object to the delegation to the Director of the authority to waive the pre-filing consultation requirements in

¹⁰² The hydropower hearing process, ordinarily held by means of notice and comment, is the appropriate place to raise whatever arguments and to introduce whatever evidence an agency or person wishes to bring to the Commission's attention regarding a hydropower proposal.

¹⁰³ Such circumstances may exist in complicated cases where, despite good-faith efforts by all concerned to resolve difference over a section 10(j) issue, the consultation on the issue cannot be completed prior to 75 days after the preliminary determination of inconsistency is issued by the Commission.

¹⁰⁴ Preamble to Final Rule, section IV.C.9.

¹⁰⁵ See, e.g., *Halecrest Company*, 38 FERC ¶ 61,312 (1987).

¹⁰⁶ Section 4.32(b) (3), (4), and (9).

¹⁰⁷ Preamble to Final Rule, section IV.D.3.

¹⁰⁸ Applicants for new licenses must comply with the public file requirements of part 16, adopted to implement ECPA, §§ 4.32(b) (9) and 16.7.

¹⁰⁹ Sections 375.314(s) and (t).

appropriate cases. Commerce charges that this delegation is unconstitutional because it gives the Director total discretion to waive statutory consultation requirements. Washington argues that the delegation is beyond the Commission's authority; that the pre-filing consultation is critical to the gathering of adequate information in the licensing process; and that the waiver would enable the Director to avoid this process.

The Commission delegated to the Director the authority to waive pre-filing consultation requirements in order to ensure that the more elaborate regulations adopted in this area in the Final Rule would not have the effect of discouraging improvements in hydropower facilities or proposals that are in the public interest. The Director is only authorized to consider such waivers where he determines that "an emergency so requires, or that the potential benefit of expeditiously considering a proposed improvement in safety, environmental protection, efficiency, or capacity outweighs the potential benefit of requiring completion of the consultation process prior to the filing of an application."¹¹⁰

Contrary to the suggestion of Commerce and Washington, the Final Rule does not authorize the Director to waive any consultation requirements that are mandated by statute, such as the consultation mandated by section 10(j) of the FPA. The pre-filing consultation requirements that the Final Rule authorizes the Director to waive are not mandated by statute, but were adopted by the Commission in its discretion to assist in the preparation and processing of complete applications ready for environmental review and to expedite the hydropower administrative process. The Commission certainly has the authority to waive these regulatory requirements in appropriate circumstances, and it is quite proper to delegate this authority to the Director of OHL, who has the principal responsibility for managing the hydropower regulatory program, under the Commission's direction.

3. Filing Requirements for Certain Applicants.

The Commission adopted special filing requirements for applications for new licenses due to be filed with the Commission on or after June 19, 1991, and prior to January 1, 1992, in order to expedite the processing of the large number of such applications

expected.¹¹¹ These applicants are permitted to file fewer than the otherwise required 14 copies of their application with the Commission, but they are required to serve copies of the application on the U.S. Department of the Interior in Washington, DC, and on the U.S. Bureau of Land Management District Office, the U.S. Corps of Engineers District Office, and the Commission's Regional Office for the area in which the project is located.

Interior asks that applicants serve on it six copies of applications for projects in the Eastern United States (including Minnesota, Iowa, Missouri, Arkansas, and Louisiana) and nine copies of applications for projects in the Western United States (west of the boundaries of Minnesota, Iowa, Missouri, Arkansas, and Louisiana).

Interior's request is reasonable, given the wide range of its responsibilities and the number of offices, national and field, that may be involved in the review of a hydropower application, and the requirements in the revised procedural regulations adopted by the Commission. The Commission is revising the regulations accordingly. In order to be consistent with this change and the Commission's current practices, the Commission is also revising parts 4 and 16 of the regulations to refer to those offices of federal resource agencies consulted by hydropower applicants that need multiple copies of applications served on them.¹¹² Attached as appendix B is a revised list of current addresses for certain federal resource agencies.¹¹³

4. Requests to Intervene and Late Requests

A number of requesters seek leave to intervene in this proceeding. Intervention in a rulemaking proceeding is not necessary in order to participate, and the motions to intervene are dismissed without prejudice.

Certain of the requests for rehearing and other filings in response to the Final Rule were made after the due date for rehearing requests.¹¹⁴ Because of the importance of the issues raised, in this order the Commission has responded to all of the filings received. However, inasmuch as section 313(a) of the FPA¹¹⁵ prescribes a 30-day deadline for

the filing of requests for rehearing, all untimely requests for rehearing are dismissed.

List of Subjects

18 CFR Part 4

Electric power, Report and recordkeeping requirements.

18 CFR Part 16

Electric power.

The Commission Orders

(A) Parts 4 and 16 of chapter I, title 18, Code of Federal Regulations, are amended as set forth below.

(B) In all other respects the requests for rehearing of Order No. 533 are denied.

(C) The requests for leave to intervene are dismissed without prejudice.

(D) The untimely requests for rehearing filed by California Department of Fish and Game, Oregon Strategic Water Management Group, and West Virginia Division of Natural Resources are dismissed.

By the Commission. Commissioner Trabandt dissented in part with a separate statement to be issued later. Commissioner Moler dissented in part with a separate statement attached. Commissioner Terzic concurred.

Lois D. Cashell,
Secretary.

PART 4—LICENSES, PERMITS, EXEMPTIONS, AND DETERMINATION OF PROJECT COSTS

1. The authority citation for part 4 is revised to read as follows:

Authority: 16 U.S.C. 791a-825r; 16 U.S.C. 2601-2645; 42 U.S.C. 7101-7352; E.O. 12009, 3 CFR, 1978 Comp., p. 142.

2. In § 4.30, paragraphs (b)(9)(iii) and (b)(28) are revised to read as follows:

§ 4.30 Applicability and definitions.

- (b) * * *
- (9) * * *
- (iii) *Fishway* means any structure, facility, or device used for the passage of fish through, over, or around the project works of a hydropower project, such as fish ladders, fish locks, fish lifts and elevators, and similar physical contrivances, where passage of a population is necessary for the life cycle of a fish species; and those screens, barriers, and similar devices that operate to guide fish to a fishway; and flows within the fishway necessary for its operation.

(28) *Resource agency* means a Federal, state, or interstate agency

¹¹⁰ Section 375.314(f) (emphasis added).

¹¹¹ Section 16.10(f).

¹¹² Sections 4.38 (d)(2) and 16.8 (d)(2).

¹¹³ The list attached to the Final Rule as Appendix B inadvertently listed Corps of Engineers' Divisional instead of District offices. Pursuant to § 16.10(f), service of a copy of a hydropower application is required on the latter, not the former.

¹¹⁴ See appendix A.

¹¹⁵ 16 U.S.C. § 8251(a) (1988).

exercising administration over the areas of flood control, navigation, irrigation, recreation, fish and wildlife, water resource management (including water rights), or cultural or other relevant resources of the state or states in which a project is or will be located.

3. In § 4.32, paragraphs (b)(6), (b)(7), and (e)(2) (i) and (ii) are revised to read as follows:

§ 4.32 Acceptance for filing or rejection; information to be made available to the public; requests for additional studies.

(b) * * *

(6) An applicant must publish notice twice of the filing of its application, no later than 14 days after the filing date, in a daily or weekly newspaper of general circulation in each county in which the project is located. The notice must disclose the filing date of the application and briefly summarize it, including the applicant's name and address, the type of facility applied for, its proposed location, the places where the information specified in paragraph (b)(3) of this section is available for inspection and reproduction, and the date by which any requests for additional scientific studies are due under paragraph (b)(7) of this section, and must state that the Commission will publish subsequent notices soliciting public participation if the application is found acceptable for filing. The applicant must promptly provide the Commission with proof of the publications of this notice.

(7) If any resource agency, Indian tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merits, the resource agency, Indian tribe, or person must file a request for the study with the Commission not later than 60 days after the application is filed and serve a copy of the request on the applicant. The Commission will issue public notice of the tendering for filing of each application for hydropower license or exemption; each such applicant must submit a draft of this notice to the Commission with its application. For any such additional study request, the requester must describe the recommended study and the basis for the request in detail, including who should conduct and participate in the study, its methodology and objectives, whether the recommended study methods are generally accepted in the Scientific community, how the study and information sought will be useful in furthering the resource goals that are affected by the proposed facilities, and

approximately how long the study will take to complete, and must explain why the study objectives cannot be achieved using the data already available. In addition, in the case of a study request by a resource agency or Indian tribe that had failed to request the study during the pre-filing consultation process under § 4.38 of this part or § 16.8 of this chapter, the agency or Indian tribe must explain why this request was not made during the pre-filing consultation process and show good cause why its request for the study should be considered by the Commission.

(e) * * *

(2) *Patently deficient applications.* (i) If, within 90 days of its filing date, the Director of the Office of Hydropower Licensing determines that an application patently fails to substantially comply with the requirements of paragraph (a), (b), and (c) of this section and of § 4.38 of this part or § 16.8 of this chapter, or is for a project that is precluded by law, the application will be rejected as patently deficient with the specification of the deficiencies that render the application patently deficient.

(ii) If, after 90 days of its filing date, the Director of the Office of Hydropower Licensing determines that an application patently fails to substantially comply with the requirements of paragraphs (a), (b), and (c) of this section and of § 4.38 of this part or § 16.8 of this chapter, or is for a project that is precluded by law:

(A) The application will be rejected by order of the Commission, if the Commission determines it is patently deficient; or

(B) The application will be considered deficient under paragraph (e)(1) of this section, if the Commission determines it is not patently deficient.

4. In § 4.34, the first sentence in paragraph (b) introductory text, paragraph (e)(5), and paragraph (f)(1)(i) are revised to read as follows:

§ 4.34 Hearings on applications; consultation on terms and conditions; motions to intervene.

(a) * * *

(b) *Notice and comment hearings.*

All comments (including mandatory and recommended terms and conditions or prescriptions) on an application for exemption or license must be filed with the Commission no later than 60 days after issuance by the Commission of public notice declaring that the application is ready for environmental analysis. * * *

(e) *Consultation on recommended fish and wildlife conditions; Section 10(j) process.*

(5) If the Commission decides to conduct any meeting, telephone or video conference, or other procedure to address issues raised by its preliminary determination of inconsistency and comments thereon, the Commission will give at least 15 days' advance notice to each party, affected resource agency, or Indian tribe, which may participate in the meeting or conference. Any meeting, conference, or additional procedure to address these issues will be scheduled to take place within 75 days of the date the Commission issues a preliminary determination of inconsistency. The Commission will prepare a written summary of any meeting held under this subsection to discuss 10(j) issues, and a copy of the summary will be sent to all parties, affected resource agencies, and Indian tribes. If the Commission believes that any fish and wildlife recommendation submitted by a fish and wildlife agency may be inconsistent with the purposes and requirements of the Federal Power Act or other applicable law, the Commission will attempt to resolve any such inconsistency by appropriate means, giving due weight to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agency.

(f) *Licenses and exemption conditions and required findings—(1) License conditions.* (i) All licenses shall be issued on the conditions specified in section 10 of the Federal Power Act and such other conditions as the Commission determines are lawful and in the public interest.

5. In § 4.38, paragraphs (a)(1) and (d) are revised to read as follows:

§ 4.38 Consultation requirements.

(a) *Requirement to consult.* (1) Before it files any application for an original license or an exemption from licensing that is described in paragraph (a)(4) of this section, a potential applicant must consult with the relevant Federal, State, and interstate resource agencies, including the National Marine Fisheries Service, the United States Fish and Wildlife Service, the National Park Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands or facilities utilized or occupied by the project, the appropriate State fish and wildlife

agencies, the appropriate State water resource management agencies, the certifying agency under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1341(c)(1), and any Indian tribe that may be affected by the proposed project.

(d) *Third stage of consultation.* (1) The third stage of consultation is initiated by the filing of an application for a license or exemption, accompanied by a transmittal letter certifying that at the same time copies of the application are being mailed to the resource agencies, Indian tribes, and other government offices specified in paragraph (d)(2) of this section.

(2) As soon as an applicant files such application documents with the Commission, or promptly after receipt in the case of documents described in paragraph (d)(2)(iii) of this section, as the Commission may direct the applicant must serve on every resource agency and Indian tribe consulted and on other government offices copies of:

(i) Its application for a license or an exemption from licensing;

(ii) Any deficiency correction, revision, supplement, response to additional information request, or amendment to the application; and

(iii) Any written correspondence from the Commission requesting the correction of deficiencies or the submittal of additional information.

PART 16—PROCEDURES RELATING TO TAKEOVER AND RELICENSING OF LICENSED PROJECTS

6. The authority citation for part 16 is revised to read as follows:

Authority: 16 U.S.C. 791a-825e; 42 U.S.C. 7101-7352; E.O. 12009, 3 CFR, 1978 Comp., p. 142.

7. In § 16.8, paragraphs (a)(1) and (d) are revised to read as follows:

§ 16.8 Consultation requirements.

(a) *Requirement to consult.* (1) Before it files any application for a new license, a nonpower license, an exemption from licensing, or pursuant to § 16.25 or § 16.26 of this part, a surrender of a project, a potential applicant must consult with the relevant Federal, State, and interstate resource agencies, including the National Marine Fisheries Service, the United States Fish and Wildlife Service, the National Park Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands or facilities utilized or occupied by the project, the appropriate state fish and wildlife

agencies, the appropriate State water resource management agencies, the certifying agency under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1341(c)(1), and any Indian tribe that may be affected by the project.

(d) *Third stage of consultation.* (1) The third stage of consultation is initiated by the filing of an application for a new license, nonpower license, exemption from licensing, or surrender of license, accompanied by a transmittal letter certifying that at the same time copies of the application are being mailed to the resource agencies, Indian tribes, and other government offices specified in paragraph (d)(2) of this section and § 16.10(f) of this part, if applicable.

(2) As soon as an applicant files such application documents with the Commission, or promptly after receipt in the case of documents described in paragraph (d)(2)(iii) of this section, as the Commission may direct, the applicant must serve on every resource agency and Indian tribe consulted, on other government offices, and, in the case of applications for surrender or nonpower license, any state, municipal, interstate, or Federal agency which is authorized to assume regulatory supervision over the land, waterways, and facilities covered by the application for surrender or nonpower license, copies of:

(i) Its application for a new license, a nonpower license, an exemption from licensing, or a surrender of the project;

(ii) Any deficiency correction, revision, supplement, response to additional information request, or amendment to the application; and

(iii) Any written correspondence from the Commission requesting the correction of deficiencies or the submittal of additional information.

8. In § 16.10, paragraph (f) is revised to read as follows:

§ 16.10 Information to be provided by an applicant for new license: filing requirements.

(f) *Filing requirements.* For all applications for new licenses due to be filed with the Commission on or after June 19, 1991, and prior to January 1, 1992, the following number of copies must be submitted to the Commission and served on resource agencies

(1) If the application is hand-delivered to the Commission, as by messenger or courier service, only an original and five copies of the application need be delivered to the Secretary, but the filing must be accompanied by a transmittal

letter certifying that at the same time five copies of the application are being hand delivered to the Director, Division of Project Review, Office of Hydropower Licensing, and copies are being mailed to the resource agencies consulted and the government offices specified in § 16.8(d)(2) of this part, including each of the following:

(i) The Regional Office of the Commission for the area in which the project is located;

(ii) The U.S. Department of the Interior, Washington, DC (6 copies for projects located in the Eastern United States, including Minnesota, Iowa, Missouri, Arkansas, and Louisiana, and 9 copies for projects located in the Western United States westward of the western boundaries of Minnesota, Iowa, Missouri, Arkansas, and Louisiana);

(iii) The U.S. Bureau of Land Management District Office for the area in which the project is located; and

(iv) The U.S. Corps of Engineers District Office for the area in which the project is located.

(2) If the application is mailed to the Commission, only an original and ten copies of the application need be sent to the Secretary, but the application must be accompanied by a transmittal letter certifying that at the same time copies of the application are being mailed to each of the offices listed in paragraphs (f)(1) (i) through (iv) of this section.

Note: This appendix will not be published in the Code of Federal Regulations.

Appendix A—List of Requests for Rehearing and Reconsideration Federal Agencies

1. U.S. Department of the Interior (Interior)
2. U.S. Department of Commerce (Commerce)

State Agencies

3. California Department of Fish and Game (California Fish and Game)*
4. California State Water Resources Control Board (California Water Board)
5. Oregon Strategic Water Management Group (Oregon)*
6. Washington Department of Fisheries and Department of Wildlife (Washington)
7. West Virginia Division of Natural Resources (West Virginia)*

Associations, Companies, and Individuals

8. American Rivers, Inc., American Whitewater Affiliation, Friends of the River, Natural Heritage Institute, and Trout Unlimited (American Rivers)
9. Congressman John Dingell**
11. Edison Electric Institute (EEI)
12. National Wildlife Federation (Wildlife Federation)

* Filed requests for rehearing after the 30-day statutory deadline of June 7, 1991.

** Filed informal comments or petitions for clarification of the Final Rule.

13. North Carolina Electric Membership Corporation (North Carolina Electric)

14. Turlock Irrigation District and Tuolumne County, California (Turlock) **

Note: This appendix will not be published in the Code of Federal Regulations.

Appendix B—List of Addresses

Area of jurisdiction	Addressee
U.S. Department of the Interior	
Nationwide.....	Director, Office of Environmental Affairs, Department of the Interior, Main Interior Building, MS 2340, 1849 C Street, NW., Washington, DC 20240.
Bureau of Land Management	
Eastern States (includes all states not listed below).....	Director, Bureau of Land Management, Branch of Lands (ES-962), 350 South Pickett Street, Alexandria, VA 22304.
Alaska.....	State Director, Bureau of Land Management, Division of Lands and Renewable Resources (AK-930), 222 W. 7th Avenue, No. 13, Anchorage, AK 99513-7599.
Arizona.....	State Director, Bureau of Land Management, Division of Lands and Renewable Resources (AZ-930), 3707 North 7th Street, P.O. Box 16563, Phoenix, AZ 85011.
California.....	State Director, Bureau of Land Management, Branch of Adjudication and Records (CA-943.5), Federal Building, Room E-2841, 2800 Cottage Way, Sacramento, CA 95825.
Colorado.....	State Director, Bureau of Land Management, Branch of Realty Programs (CO-932), 2850 Youngfield Street, Lakewood, CO 80215.
Idaho.....	State Director, Bureau of Land Management, Land Services Section (ID-943A), 3380 Americana Terrace, Boise, ID 83706.
Montana (includes North Dakota and South Dakota).....	State Director, Bureau of Land Management, Branch of Land Resources (MT-932), Granite Tower, 222 N. 32nd Street, P.O. Box 36800, Billings, MT 59107.
Nevada.....	State Director, Bureau of Land Management, Branch of Lands and Minerals Operations (NV-943.2), 850 Harvard Way, P.O. Box 12000, Reno, NV 89520.
New Mexico (includes Kansas, Oklahoma, and Texas).....	State Director, Bureau of Land Management, Branch of Lands and Minerals Operations (NM-943C-2), Federal Building, South Federal Place, P.O. Box 1449, Santa Fe, NM 87501.
Oregon (includes Washington).....	State Director, Bureau of Land Management, Lands and Minerals Adjudication Section (OR-943.3), 1300 N.E. 44th Avenue, P.O. Box 2965, Portland, OR 97208.
Utah.....	State Director, Bureau of Land Management, Branch of Lands and Minerals Operations (UT-942), P.O. Box 45155, Salt Lake City, UT 84145-0155.
Wyoming (includes Nebraska).....	State Director, Bureau of Land Management, Branch of Land Resources (WY-931), 2915 Warren Avenue, P.O. Box 1828, Cheyenne, WY 82001.

U.S. Corps of Engineers

Lower Mississippi Valley District Offices:

- U.S. Corps of Engineers, 167 N. Main Street, Memphis, TN 38103-1894.
- U.S. Corps of Engineers, P.O. Box 60267, New Orleans, LA 70160-0267.
- U.S. Corps of Engineers, 1222 Spruce Street, St. Louis, MO 63103-2833.
- U.S. Corps of Engineers, 3550 1-20 Frontage Rd., Vicksburg, MS 39180-5191.

New England Division Office:

- U.S. Corps of Engineers, 424 Trapelo Road, Waltham, MA 02254-9149.

Missouri River District Offices:

- U.S. Corps of Engineers, 700 Federal Bldg., Kansas City, MO 64106-2896.
- U.S. Corps of Engineers, 215 North 17th Street, Omaha, NE 68102-4978.

North Atlantic District Offices:

- U.S. Corps of Engineers, P.O. Box 1715, Baltimore, MD 21203-1715.
- U.S. Corps of Engineers, 26 Federal Plaza, New York, NY 10278-0090.
- U.S. Corps of Engineers, 803 Front St., Norfolk, VA 23510-1096.
- U.S. Corps of Engineers, 2nd & Chestnut Streets, Philadelphia, PA 19106-2991.

North Central District Offices:

- U.S. Corps of Engineers, 1776 Niagara St., Buffalo, NY 14207-3199.
- U.S. Corps of Engineers, 111 N. Canal Street, Chicago, IL 60606-7206.
- U.S. Corps of Engineers, P.O. Box 1027, Detroit, MI 48231-1027.
- U.S. Corps of Engineers, P.O. Box 2004, Rock Island, IL 61204-2004.
- U.S. Corps of Engineers, 180 East Kellogg Blvd., St. Paul, MN 55101-1479.

North Pacific District Offices:

- U.S. Corps of Engineers, P.O. Box 898, Anchorage, AK 99506-0898.
- U.S. Corps of Engineers, P.O. Box 2946, Portland, OR 97208-2946.
- U.S. Corps of Engineers, P.O. Box 3755, Seattle, WA 98124-2255.
- U.S. Corps of Engineers, 602 City-County Airport, Walla Walla, WA 99362-9265.

Ohio River District Offices:

- U.S. Corps of Engineers, 502 8th St., Huntington, WV 25701-2070.
- U.S. Corps of Engineers, P.O. Box 59, Louisville, KY 40201-0059.
- U.S. Corps of Engineers, P.O. Box 1070, Nashville, TN 37202-1070.
- U.S. Corps of Engineers, William S. Moorhead, Federal Bldg., Rm-1828, 1000 Liberty Ave., Pittsburgh, PA 15222-4186.

South Atlantic District Offices:

- U.S. Corps of Engineers, P.O. Box 919, Charleston, SC 29402-0919.
- U.S. Corps of Engineers, P.O. Box 4970, Jacksonville, FL 32232-0019.
- U.S. Corps of Engineers, P.O. Box 2288, Mobile, AL 36628-0001.

South Atlantic District Offices:

- U.S. Corps of Engineers, P.O. Box 889, Savannah, GA 31402-0889.
- U.S. Corps of Engineers, P.O. Box 1890, Wilmington, NC 28402-1890.

South Pacific District Offices:

- U.S. Corps of Engineers, P.O. Box 2711, Los Angeles, CA 90053-2325.
- U.S. Corps of Engineers, 1325 J Street, Sacramento, CA 95814-2922.
- U.S. Corps of Engineers, 211 Main St., San Francisco, CA 94105-1905.

Area of jurisdiction	Addressee
Southwestern District Offices: U.S. Corps of Engineers, P.O. Box 1580, Albuquerque, NM 87103-1580. U.S. Corps of Engineers, P.O. Box 17300, Fort Worth, TX 76102-0300. U.S. Corps of Engineers, P.O. Box 1229, Galveston, TX 77553-1229. U.S. Corps of Engineers, P.O. Box 867, Little Rock, AR 72203-0867. U.S. Corps of Engineers, P.O. Box 61, Tulsa, OK 74121-0061.	

¹¹⁶ In New England, the U.S. Army Corps of Engineers only has a Division office.

Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters Issued November 22, 1991.

Moler, Commissioner, *dissenting in part*:

As I stated when we adopted this rule last May, it is an important rule that should improve our licensing process by bringing to it much needed definition and discipline. I continue to be an enthusiastic supporter of the rule. I am particularly gratified that a good rule is made better by the majority now adopting a proper definition of the term "fishway". I write separately to dissent from only two aspects of the rule: The majority's limiting the types of fish for which a fishway may be required, and the majority's failure to fix a serious shortcoming in the rule respecting the implementation of Section 401 of the Clean Water Act.¹

Limiting Federal Action Under the Federal Power Act.

The Commission properly reverses its earlier conclusion and now finds that a fishway includes both upstream and downstream fish passage facilities.² But, when before, a fishway could be prescribed for any type of fish, now it may be prescribed under section 18 of the Federal Power Act only "where passage of a population is necessary for the life cycle of a fish species."³ As with its short-lived attempt to limit the term fishway to a one-way facility, there is no basis in law or policy for this call. In its original order, the Commission found that limiting the application of fishways under section 18 to anadromous or marine migratory fish was not supportable.⁴ Now, *sua sponte*, the majority revisits the issue and finds differently.⁵ The only purpose for this about face, like the original effort to limit fishways to upstream facilities, is to limit the scope of action for the Secretaries of the Interior and Commerce who, by law, are to make the call under section 18.

The first two sources cited for the Commission's new limitation are reports authored by, respectively, the Departments of Commerce and the Interior.⁶ It is ironic that,

in recognizing this as expert opinion, the Commission does not provide the means for the Departments to implement their expertise. But, by law, the question of determining when to require a fishway falls to the Departments of Commerce and the Interior (and their respective agencies, National Marine Fisheries Service and the Fish and Wildlife Service) not the Commission.⁷ Of necessity, this decision must encompass the question of which types of fish are to be protected with fishways. The Commission here trespasses on this statutory charge no less than when it originally and wrongly decided to limit fishways to only upstream applications.⁸

The Commission's decision to limit the statutory exercise of the authority of the two Cabinet officers was accompanied by much rhetoric about our action being essential to preserve the viability of hydropower development as called for in the President's National Energy Strategy (NES). First, the proposed statutory changes in the Federal Power Act included in the NES are not yet law. Thus, the NES cannot be used as an excuse to limit the legitimate exercise of the Departments' statutory authority. Second, to the extent the NES can and should be implemented under existing law, we must assume that the Secretaries, as Cabinet officers, will carry out the Administration's policies. It is not for us, as an independent regulatory commission, to police the Secretaries on behalf of the Administration. To do so would be as improper as having the Administration police this agency.

Limiting State Action under Section 401 of the Clean Water Act

As a matter of law, before the Commission may license a hydropower project under Part

⁷ Section 18 of the Federal Power Act reads, in pertinent part:

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of " . . . such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

16 U.S.C. 811 (1988). This is a statutory prescription. The relative expertise of our staff, Interior's and Commerce's is not at issue, nor should it be.

⁸ Apologists might argue that what the Commission does here is but a short extension of its position in *Lynchburg Hydro Associates*, 39 FERC ¶ 61,079 (1987) and in this rule to determine where the scope of Section 18 is appropriately drawn. Such a simplistic view fundamentally misapprehends the issue involved. The question is not what type of structure we deal with, rather, it is when any structure is to be required. But, as the Commission held in *Lynchburg*, *supra* at 61,217-61,218, "[w]e have no discretionary authority in this regard; fishways must be required when properly prescribed by the Secretaries."

I of the Federal Power Act, the license applicant must have a certification covering water quality standards for the project as required under Section 401 of the Clean Water Act.⁹ A problem develops when a project, having once received such a certificate, is amended at the licensing stage or after licensing. If the change is minor, having no effect on water quality, there should be no need to require that the applicant reapply for a water quality certificate. The problems I am concerned with stem from two possible cases. First would be the case when the change to the proposed or existing project (however minor) may indeed affect water quality adversely. Second would be the case when the change is of such magnitude that we have what amounts to a materially different project.

The rule issued purportedly distinguishes between these two cases. It would recognize that situations may arise involving a fundamental alteration of the project, or proposed project, such as adding or deleting a dam or comparably significant facility, or relocating the entire project to an area that had not previously been evaluated. In those situations, we expect the applicant to request new water quality certification, and will require it to obtain one, or a waiver thereof.¹⁰ The regulation, however, is more circumscribed, requiring that the applicant obtain a new water quality certificate only "if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project."¹¹

There is thus a fundamental inconsistency between the preamble and the regulatory text. Nowhere does the Commission deal with this inconsistency. This is important for, as the Commission recognized, it must allow certifying agencies a second look when, in essence, we are presented with a new

⁹ Section 401 states in relevant part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of [law] . . .

33 U.S.C. 1341(a)(1)(1988).

¹⁰ Order No. 533, Preamble, note 4 *supra* at 30,137.

¹¹ 18 CFR 4.38(f)(7)(iii) (for license applications) (emphasis added); see also 18 CFR 16.8(f)(7)(iii) requiring substantially the same for new licenses.

¹ 33 U.S.C. § 1341(a)(1)(1988).

² Slip op. at 13-22 and 87.

³ Slip op. at 24 and 87.

⁴ Order No. 533, Preamble, reproduced at FERC Stats. & Regs. ¶ 30,921 at 30,117-30,118.

⁵ While comments at the initial stage had requested that fishways be limited to meeting the needs of only migratory fish, *id.* at 30,112-30,113, no one requested that the Commission revisit this issue at rehearing.

⁶ Order No. 533-A, slip op. at 24-27.

project. The problem is that the rule does not recognize the inconsistency. As promised in the Preamble, any "fundamental alteration" should, at a minimum, trigger a second look under Section 401 if that change will have any effect on water quality. The regulation itself falls short of that promise. The Commission is, of course, bound by its regulations and the regulations control over the preamble. What we have then is a regulation that runs counter to the plan of State certification laid out under the Clean Water Act.

Water quality certification is a matter left solely to the state or other certifying authority, not to FERC. As the Congress recognized, "[t]he purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements."¹² That purpose cannot be met under the Commission's regulations.

Conclusion

The two aspects of the rule from which I dissent share a common thread. In each the majority acts to limit statutorily prescribed responsibilities of other agencies, state and federal. This is a disturbing trend.¹³ The error lies in the majority's seeming inability to recognize the limits of its own jurisdiction. Because I perceive that jurisdiction to be more limited than my colleagues, I must dissent.

Elizabeth Anne Moler,

Commissioner.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 14a

[T.D. 8374]

RIN 1545-AN26

Stockholder Approval of Incentive Stock Option Plans

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains a final regulation on the stockholder approval requirement for incentive stock

option plans. The regulation affects corporations establishing incentive stock option plans and provides guidance on the method and degree of stockholder approval necessary for those plans. The guidance is the same as that set forth in a temporary regulation published in 1988. This document also removes obsolete regulations under a repealed Internal Revenue Code section pertaining to qualified stock options.

EFFECTIVE DATES: The removal of §§ 1.422-1 and 1.422-2 is effective November 5, 1990. Section 1.422-4 is effective November 5, 1990. The amendments to § 1.422-5 are effective August 13, 1981, and apply to options granted on or after that date and to certain options granted after December 31, 1975.

FOR FURTHER INFORMATION CONTACT: Charles Deliee at 202-566-4741 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Overview

Proposed regulations on incentive stock options were published in 1984. A temporary regulation on the stockholder approval requirement for incentive stock option plans was published in 1988. This document contains a final regulation on the stockholder approval requirement. In substance, the final regulation is the same as the temporary regulation. This document also removes obsolete regulations about qualified stock options.

Explanation of Provisions

Incentive stock options are now described in section 422 of the Internal Revenue Code of 1986. Section 422 was section 422A before being renumbered by section 11801 of OBRA '90 (the Omnibus Budget Reconciliation Act of 1990, Public Law 101-508).

Proposed regulations under section 422A were published in the *Federal Register* on February 7, 1984 (49 FR 4504). One subject addressed in those proposed regulations was the stockholder approval requirement for incentive stock option plans, which appeared in section 422A(b)(1) of the Code (now section 422(b)(1)). Written comments were received from the public on the proposed regulations.

To address concerns raised in those comments, a temporary regulation on the stockholder approval requirement, § 14a.422A-2, was published in T.D. 8235, 53 FR 48639, December 2, 1988.

Under section 7805(e) of the Code, any temporary regulation issued after November 20, 1988, shall expire within 3 years after the date of its issuance. The Service expects to publish final

regulations at a later date on the full range of issues addressed in the 1984 proposed regulations. Meanwhile, this Treasury decision adopts the temporary regulation in final form by redesignating it as § 1.422-5. The text of the regulation is also revised without substantive change, to eliminate the question-and-answer format and to reflect the renumbering of the underlying Internal Revenue Code section.

OBRA '90 also repealed the generally obsolete prior section 422 of the Code, pertaining to qualified stock options. This Treasury decision removes prior §§ 1.422-1 and 1.422-2, the regulations under the repealed section 422. Those removed regulations could have continuing relevance in view of the savings provision in section 11821 of OBRA '90. A new § 1.422-4 is therefore added, referring interested readers to the 1991 edition of the Code of Federal Regulations, where the removed regulations last appeared.

Special Analyses

It has been determined that this rule is not a major rule as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to the regulations and, therefore, a final Regulatory Flexibility Analysis is not required.

Drafting Information

The principal author of these regulations is Mark Schwimmer of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the Service and Treasury participated in their development.

List of Subjects

26 CFR 1.421-1 through 1.425-1

Income taxes, Securities.

26 CFR Part 14a

Income taxes, Reporting and recordkeeping requirements, Securities.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 14a are amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority for part 1 continues to read in part:

¹² S. Rep. No. 92-414 (1971), reprinted in 1972 U.S. Code Cong. & Adm. News 3735. As one treatise puts it, "[i]n a peculiar sense, the certification requirement imposes a kind of reverse preemption on certain federally licensed or permitted activities." I Grad, *Treatise on Environmental Law* 3-219 (1990). The Commission's hydrolicensing program is explicitly recognized as being one of these activities. S. Rep. No. 92-144 *supra*, 1972 U.S. Code Cong. & Adm. News at 3735.

¹³ See Order No. 555, Revisions to Regulations Governing Authorizations for Construction of Natural Gas Pipeline Facilities, reprinted in FERC Stats. and Regs. ¶ 30,928 at 30,813 (1991) (Moler, dissenting in part.)