(iii) Provide a means from the flight deck to shut off ventilation system inflow to the Class B cargo compartment.

(iv) Provide a barrier between the Class B cargo compartment and the passenger compartment to prevent the penetration of smoke or flames from the cargo compartment into the passenger compartment. The barrier must extend from the cargo compartment floor to the upper crown area of the fuselage, and from the right sidewall to the left sidewall of the cargo compartment, completely isolating the cargo compartment from the passenger compartment. The barrier and associated seals/interfaces must meet the requirements of FAR 25, Appendix F, Part III (Amdt. 25–60).

(v) Provide appropriate protection of the cockpit voice and flight data recorders, and all systems or components required for safe flight and landing of the airplane, unless it can be demonstrated that these systems are not susceptible to damage in the event of a fire in the Class B cargo compartment.

(vi) Provide illumination of the Class B cargo compartment as specified in paragraphs (b)(4)(vi)(A) and (b)(4)(vi)(B) of this AD:

(A) General area illumination of the cargo with an average illumination of 0.1 foot-candle measured at 40-inch intervals both at one-half the pallet or container height, and at the full pallet or container height, or as approved by the FAA.

(B) Illumination of the longitudinal access pathways, required by paragraph (a)(2)(iv) of this AD, with an average illumination of .05 foot-candle when measured at 40-inch intervals along a line that is within 2 inches of and parallel to the floor centered on the pathway, or illumination under visibility conditions likely to occur in the cargo compartment in the event of a fire, as approved by the FAA.

(vii) Establish FAA-approved procedures and training for responding to alarms, and monitoring and controlling cargo compartment fires.

(viii) Provide a viewport into the Class B cargo compartment from the passenger compartment. The viewport must be located such that a crewmember can readily identify the overall smoke conditions in the compartment prior to entering it.

(ix) Demonstrate the following features and functions:

(A) Fire extinguishant concentration, required by paragraph (b)(4)(i) of this AD, by flight test.

(B) Smoke or fire detection system, required by paragraph (b)(4)(ii) of this AD, by flight test.

(C) Prevention of smoke penetration into occupied compartments [refer to FAR 25.857(b)2 and 25.855(e)2], demonstrated by flight test.

(D) Cargo accessibility, as specified in paragraph (a)(2)(iv) of this AD.

(x) Provide the following systems and equipment:

(A) Provide appropriate protective garments for two persons stored in the passenger compartment, adjacent to the Class B cargo compartment entrance.

(B) Provide a minimum of 120 minutes of protective breathing for one person, and an additional 30 minutes of protective breathing for an additional person. This equipment must meet the requirements of Technical Standard Order (TSO) C–116, Action Notice 8150.2A, or equivalent, and at least 30 minutes of the total protective breathing must be stored adjacent to the Class B cargo compartment entrance. All protective breathing equipment must be located outside the cargo compartment.

(xi) Revise the Limitations Section of the FAA-approved Airplane Flight Manual (AFM) to include the following statement:

FOR EACH FLIGHT IN WHICH CARGO IS TRANSPORTED IN THE CLASS B CARGO COMPARTMENT:

Prior to flight, a crewmember who is assigned firefighting responsibility for the flight must make a visual inspection throughout the Class B cargo compartment for familiarization, after the cargo door is closed and secured.

Note 3: This visual inspection is in no manner intended to relieve the pilot of his/her responsibility to ensure safe operation of the airplane, as required by FAR 91.3.

(c) Compliance with paragraph (b)(1) or (b)(2) of this AD constitutes terminating action for the requirements of paragraph (a) of this AD. Compliance with paragraph (b)(3) or (b)(4) of this AD constitutes terminating action for the requirements of paragraphs (a)(1) and (a)(3) of this AD.

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate (for affected Boeing series airplanes); or the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate (for affected McDonnell Douglas series airplanes). Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, of the Seattle ACO, or the Manager of the Los Angeles ACO, as appropriate.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO or the Los Angeles ACO.

Note 5: Alternative methods of compliance previously granted for Amendment 39–6557, AD 89–18–12 R1; or Amendment 39–6986, AD 91–10–02; continue to be considered as acceptable alternative methods of compliance with this amendment.

(e) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(f) This amendment becomes effective on May 2, 1993.

Issued in Renton, Washington, on April 14, 1993.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93–9183 Filed 4–19–93; 8:45 am]

BILLING CODE 4910–13–P

14 CFR Part 73

[Airspace Docket No. 92–AWP–10]

Consolidation of Restricted Areas R–3107A and R–3107B; Kaula Rock, HI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action consolidates Restricted Areas R–3107A and R–3107B Kaula Rock, HI, into Restricted Area R–3107. Since the two existing restricted areas are used simultaneously, it is more appropriate to consolidate them into one area. Additionally, this action reduces the time of designation for Restricted Area R–3107. This action does not affect the outer limits or altitudes of the restricted airspace complex as a whole, or change the operating requirements of the airspace.

EFFECTIVE DATE: 0901 UTC, July 22, 1993.

FOR FURTHER INFORMATION CONTACT: Diane Bodenhamer, Military Operations Program Office (ATM–420), Office of Air Traffic System Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–3178.

SUPPLEMENTARY INFORMATION:

The Rule

This amendment to part 73 of the Federal Aviation Regulations consolidates Restricted Areas R–3107A and R–3107B Kaula Rock, HI, into Restricted Area R–3107 Kaula Rock, HI. R–3107A is currently designated for continuous use and R–3107B is designated for use 0700–2200 local time daily, other times by NOTAM issued at least 24 hours in advance. R–3107 will be designated for use 0700–2200 local time weekdays, 0700–1800 local time weekends and holidays, other times by NOTAM issued at least 24 hours in advance. This action more accurately reflects usage of the restricted airspace. This action does not affect the outer limits or altitudes of the restricted airspace complex as a whole, or change the operating requirements of the airspace. I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary because this action is a minor technical amendment in which the public would not be particularly interested. The coordinates for this airspace docket are based on North American Datum 83. Section 73.31 of part 73 of the Federal Aviation Regulations was republished in FAA Order 7400.8A dated March 3, 1993.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This action does not alter the dimensions of restricted airspace, nor is the mission conducted within the airspace changed. It consolidates two existing areas into one and reduces the time of designation. Accordingly, this action will have no effect on current air traffic procedures or on routing or altitude of civil aircraft operations in the area. The FAA, therefore, finds that there will be no significant impact on the environment as a result of this action.

List of Subjects in 14 CFR Part 73

Aviation safety, Restricted areas.

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510, 1522; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 73.31 [Amended]

2. Section 73.31 is amended as follows:

R–3107A Kaula Rock, HI [Removed]

R–3107B Kaula Rock, HI [Removed]

R–3107 Kaula Rock, HI [New]

Boundaries. The airspace within 3 nautical miles of the Island of Kaula (lat. 21°39'16"N., long. 160°32'20"W.).

Designated altitudes. Surface to FL 180.

Time of designation. 0700–2200 local time weekdays; 0700–1800 local time weekends and holidays; other times by NOTAM issued at least 24 hours in advance.

Controlling agency. FAA, Honolulu CERAP.

Using agency. U.S. Navy, Commander, Fleet Area Control and Surveillance Facility, Pearl Harbor, HI.

Issued in Washington, DC, on April 12, 1993.

Willis C. Nelson,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 93–9174 Filed 4–19–93; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 365

[Docket No. RM93–1–000; Order No. 550–A]

Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status; Order Addressing Motions for Rehearing, Reconsideration and Clarification; Amending Regulations; and Interpreting PUHCA Section 32(a)(1)

Issued April 14, 1993.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order on rehearing and motions for reconsideration and clarification, amending regulations, and interpreting PUHCA section 32(a)(1).

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing this order to address motions for rehearing, reconsideration and clarification of Order No. 550, the Commission's final rule establishing filing requirements and ministerial procedures for persons seeking exempt wholesale generator (EWG) status. The order also amends the regulations to more accurately track the criteria of section 32(a)(1) of the Public Utility Holding Company Act of 1935, and to interpret that section regarding EWG determinations for certain owners and operators of eligible facilities.

EFFECTIVE DATE: This order is effective on April 14, 1993.

FOR FURTHER INFORMATION CONTACT: James H. Douglass, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, Telephone: (202) 208–2143.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the Federal Register, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in room 3104, at 941 North Capitol Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208–1397. To access CIPS, set your communications software to use 300, 1200, or 2400 bps, full duplex, no parity, 8 data bits and 1 stop bit. CIPS can also be accessed at 9600 bps by dialing (202) 208–1781. The full text of this order will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

On February 10, 1993, the Federal Energy Regulatory Commission (hereafter, Commission) adopted a final rule establishing filing requirements and ministerial procedures for persons seeking exempt wholesale generator (EWG) status pursuant to section 32 of the Public Utility Holding Company Act of 1935 (PUHCA), as amended by section 711 of the Energy Policy Act of 1992 (Energy Policy Act).[1] Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status, Order No. 550, 58 FR 8897 (February 18, 1993) (as corrected at 58 FR 11886 (March 1, 1993)), III FERC Stats. & Regs. ¶30,964 (1993).

On March 12, 1993, Mission Energy Company and U.S. Generating Company[2] (jointly, Mission) and Nevada Sun-Peak Limited Partnership (Sun-Peak) filed motions for reconsideration and clarification of Order No. 550. On March 19, 1993, the National Independent Energy Producers (NIEP) filed a request for rehearing of Order No. 550. The Commission addresses the issues raised by these parties below. In addition, the Commission amends § 365.3(a)(1)(i) of the regulations to more accurately track the requirements of PUHCA section 32(a)(1), interprets section 32(a)(1) with respect to two issues that have arisen in individual EWG applications, and amends § 365.3(a) of the regulations to

[1] Public Law 102–486, 106 Stat. 2776 (1992).

[2] U.S. Generating Company has not previously participated in this proceeding. U.S. Generating Company requests leave to join in Mission's request for clarification. The Commission grants U.S. Generating Company's request.

reflect the interpretations reached herein.

I. Public Reporting Burden

This order contains minor, technical amendments to § 365.3(a) of the regulations. The amendments are intended to ensure that the regulations more precisely track the language of section 32(a)(1) of PUHCA. The amendments will not have a significant impact on the public reporting burden.

The Commission is submitting notification of the amendments to the regulations to OMB. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, 941 North Capitol Street, NE., Washington, DC 20426 [Attention: Michael Miller, Information Policy and Standards Branch, (202) 208–1415]. Comments on the requirements of this order can also be sent to the Office of Information and Regulatory Affairs of OMB [Attention: Desk Officer for Federal Energy Regulatory Commission].

II. Judicial Review

In Order No. 550, the Commission responded to the comments of Enron Power Corp. (Enron) concerning the availability of judicial review of determinations of EWG status. Enron stated that it presumed that EWG determinations are not subject to judicial review under the Federal Power Act (FPA) since section 32 of PUHCA does not implicate the FPA.[3] Enron also stated that it presumed that the Commission's EWG determinations are not subject to judicial review under PUHCA because section 24 of PUHCA refers only to judicial review of orders issued by the Securities and Exchange Commission (SEC).[4]

In response to Enron's comments, the Commission stated in Order No. 550 that it did not interpret section 24 of PUHCA, which refers to orders issued by the SEC, as providing for judicial review of EWG determinations issued by this Commission. However, the Commission also noted that judicial review is provided under section 25 of PUHCA. See 15 U.S.C. 79y.

Sun-Peak requests that the Commission reconsider its view that EWG determinations are not subject to review under section 24 of PUHCA, but may be reviewable under section 25 of PUHCA.

Sun-Peak and Mission point out that there is a 60-day time limit for obtaining judicial review under both section 313(b) of the FPA and section 24 of PUHCA. In contrast, there is no time limit for obtaining judicial review under section 25 of PUHCA. The parties argue that a time limit is necessary to provide finality to EWG determinations. The parties contend that a lack of finality of EWG determinations could cause financing problems for project developers.

Mission acknowledges that the Commission cannot create a statutory deadline for obtaining judicial review, where a deadline does not exist. However, Mission urges the Commission to provide some degree of finality to EWG determinations by pledging to oppose judicial review of issues that are not first raised during the initial EWG application procedure. In this regard, Mission notes that the "exhaustion doctrine" generally provides that claims not raised before an agency may not be raised for the first time on review.[5] Therefore, Mission argues that the Commission should contest efforts to raise issues on judicial review that were not raised during the comment period during the EWG application process.

Sun-Peak also states that section 25 provides for judicial review in the Federal district courts, rather than the Federal Circuit Courts of Appeals. Sun-Peak argues that review by the Federal district courts could cause inconsistency in the interpretation of section 32 of PUHCA.

Sun-Peak contends that Congress inadvertently omitted to amend section 24 of PUHCA to specifically provide for review of EWG determinations. Sun-Peak argues that the Commission should interpret section 24 to apply to all orders issued pursuant to PUHCA, including EWG determinations. Sun-Peak adds that the persons seeking judicial review of decisions involving section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA)[6] were permitted to use the judicial review provisions provided by section 313 of the FPA.[7] In support of this contention, Sun-Peak cites *American Electric Power Company* v. *FERC*, 675 F.2d 1226, 1232 & n.26 (D.C. Cir. 1982) (*American Electric*), *rev'd on other grounds sub nom. American Paper Institute, Inc.* v. *American Electric Power Co.*, 461 U.S. 402 (1983) and *Puerto Rico Electric Power Authority* v. *FERC*, 848 F.2d 243 (D.C. Cir. 1988) (*PREPA*). Sun-Peak argues that, because *American Electric* and *PREPA* permitted persons seeking review of one statute to use the judicial review procedures provided by another statute, the Commission may interpret one section of a statute (PUHCA section 24) to permit judicial review of Commission EWG determinations under another section of the same statute (PUHCA section 32).

Commission Ruling

At the outset, the Commission agrees with Mission and Sun-Peak that achieving finality for EWG determinations is a critical objective. Both project developers and the financial community need regulatory certainty if EWGs are to play a significant role in meeting the Nation's electric power needs. Therefore, the Commission strongly agrees with Mission that persons will be required to raise concerns or objections about EWG applications during the comment period provided for by Order No. 550. In addition, the Commission believes that a person's failure to present concerns or objections to an EWG application during the specified comment period should disqualify that person from raising a new issue on appeal. Accordingly, the Commission may challenge the standing of persons who seek judicial review of EWG determinations without first raising their concerns during the application process.[8]

As to the proper section governing judicial review, we find Sun-Peak's citations to American Electric and PREPA are not on point.

In American Electric, the D.C. Circuit never expressly discussed the applicability of section 313 of the FPA to persons seeking review of the challenged Commission decisions. The D.C. Circuit simply assumed, *sub silentio*, that section 313 was the applicable vehicle for the parties seeking review in that case.[9]

---

[3] Under section 313(b) of the FPA, parties to proceedings under the FPA who are aggrieved by orders issued by the Commission may appeal to the Circuit Courts of Appeal within 60 days of the order on rehearing. See 16 U.S.C. 825*l*(b).

[4] Section 24 of PUHCA provides that persons aggrieved by an order issued by the SEC under PUHCA may obtain review of such order in the Circuit Courts of Appeals within 60 days after the entry of such order. See 15 U.S.C. 79x.

[5] Mission cites *Foundation on Economic Trends* v. *Heckler*, 756 F.2d 143, 156 (D.C. Cir. 1985); *Washington Ass'n for Television and Children* v. *FCC*, 712 F.2d 677, 680 (D.C. Cir. 1983); *U.S.* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952); and *Cheney RR Co., Inc.* v. *ICC*, 902 F.24 66, 70 n.2 (D.C. Cir.), *cert. denied*, 111 S. Ct. 519 (1990).

[6] 16 U.S.C. 824a–3.

[7] 16 U.S.C. 825*l*.

[8] As a general matter, the Commission does not participate in District Court proceedings. Therefore, the Commission is unwilling to agree at this point in time to oppose on such grounds in the future *all* such appeals in all circumstances. The Commission does not believe that such an open-ended, all-encompassing commitment at this time would be wise.

[9] See 675 F.2d at 1232 n.26. In this regard, see Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record,

Continued

Moreover, in American Electric, four provisions of the Commission's regulations adopted under PURPA were challenged: (1) The "full avoided cost" rule; (2) the "simultaneous transaction" rule; (3) the grant of blanket authority to qualifying facilities (QFs) to interconnect with electric utilities without meeting the requirements of sections 210 and 212 of the FPA; and (4) the failure to adopt "fuel use" criteria in determining what cogeneration facilities are QFs.[10]

The first three of the challenged regulations were promulgated to implement section 210 of PURPA,[11] which remained a stand-alone PURPA provision. However, the fourth regulation challenged was promulgated to implement sections 3 (17)–(22) of the FPA, as amended by section 201 of PURPA.[12] Since one of the four challenged regulations was promulgated pursuant to the Commission's authority under the FPA, as amended by PURPA, the *American Electric* case was properly before the D.C. Circuit. See 16 U.S.C. 825*l*(b) (party to proceeding under the FPA may obtain review in the Circuit Courts of Appeal).[13]

While the D.C. Circuit in *PREPA* considered the "application of section 210 [of PURPA] to a cogeneration arrangement that involves separate ownership of" the producing and consuming functions,[14] the issue in the case was whether the facility, as determined by the Commission, fell within the statutory definition of "qualifying cogeneration facility," as defined in section 3(18) of the FPA. In other words, *PREPA* concerned whether the facility was a QF, as defined in the FPA. *PREPA* did not address whether a QF was entitled to backup power under the Commission's regulations promulgated pursuant to section 210 of PURPA. Thus, as in *American Electric*, the D.C. Circuit had jurisdiction in *PREPA* pursuant to section 313 of the FPA.[15]

The Commission continues to believe that section 24 of PUHCA does not provide a basis for judicial review of this Commission's decisions since the text of section 24 expressly refers to orders issued by "the Commission" (*i.e.*, the SEC).[16] Additionally, when Congress drafted section 32 of PUHCA it clearly distinguished between powers granted to "the Commission" (*i.e.*, SEC) and powers granted to the "Federal Energy Regulatory Commission."[17] Each time section 32 references this Commission, it refers to the "Federal Energy Regulatory Commission." Congress left unchanged the section 24 reference to "the Commission." Accordingly, the Commission does not find support for changing the interpretation of section 24 that it adopted in Order No. 550.

III. Section 365.7 of the Regulations

In Order No. 550, the Commission stated that an EWG determination is based on the facts that are presented to the Commission. The Commission noted that any material variation from those facts may render an EWG determination invalid. Therefore, the Commission added a section to the regulations that requires that if there is any material change in facts that may affect an EWG's eligibility for EWG status under section 32, the EWG must, within 60 days: Apply for a new determination of EWG status; file a written explanation of why the material change in facts does not affect the EWG's status; or notify the Commission that it no longer seeks to maintain EWG status. This requirement is incorporated in § 365.7 of the regulations.

Sun-Peak states that § 365.7 may cause an EWG unknowingly to lose its EWG status if it fails to recognize that a "material fact" has changed. Sun-Peak states that by comparison the SEC provides prior notice if, for example, it believes that a question exists concerning a holding company's continuing qualification for an exemption. Sun-Peak states that prior notice is provided by the SEC that such a question exists because the penalties for losing an exemption under PUHCA are "potentially draconian."

Sun-Peak argues that prior notice that an EWG determination may be invalid is similarly essential, so that an EWG owner may ascertain whether a subsidiary has ceased to be exempt from PUHCA, thereby subjecting its parent to the potential consequences of being a holding company. Sun-Peak also states that the penalty for failure to comply with § 365.7 is unclear, and Sun-Peak expresses concern that a failure to comply with § 365.7 may render an existing EWG determination invalid. Sun-Peak further argues that the term "material change" is too vague to provide adequate notice of what factual changes warrant a new filing.

Sun-Peak requests that the Commission provide prior notice before any EWG determination is terminated. Sun-Peak also requests that the Commission clarify that an EWG will not lose its status if it fails to make a filing required by § 365.7.

Commission Ruling

The Commission will deny reconsideration. Section 365.7 is intended to provide a process whereby persons may confirm EWG status when a material change in facts occurs after the Commission's initial determination. When a material change in facts occurs, a person that was an EWG might no longer qualify to be an EWG. However, the Commission does not intend to actively seek to terminate a person's EWG status; indeed, the Commission typically will not be aware that any change in facts, material or otherwise, has even occurred. The Commission instead will rely in the first instance on the EWG itself to be vigilant to ensure that it continues to qualify to be an EWG. Moreover, if there is any question concerning whether a change is material, *i.e.*, whether the change will adversely affect EWG status, the EWG can, prior to such change, file another request for EWG status based on the facts that will exist if the change occurs.[18]

---

neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") Accord, *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 183 (1979); U.S. v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

[10] 675 F.2d at 1229.

[11] Order No. 69, Small Power Production and Cogeneration Facilities; Regulations Implementing section 210 of the Public Utility Regulatory Policies Act of 1978, FERC Stats. and Regs., Reg. Preambles 1977–81, ¶ 30,128 (1980).

[12] Order No. 70, Small Power Production and Cogeneration Facilities—Qualifying Status, FERC Stats. and Regs., Reg. Preambles 1977–81, ¶ 34,134 (1980). Unlike section 210 of PURPA, which did not amend the FPA, section 201 of PURPA amended the FPA by adding new paragraphs (17)–(22) to section 3 thereof. Amended sections 3 (17) and (18) of the FPA provide the statutory authority for the Commission to determine which entities qualify as QFs.

[13] The rule is that "[w]hen an agency decision has two distinct bases, one of which provides for exclusive jurisdiction in the courts of appeals, the entire decision is reviewable exclusively in the appellate court." *Suburban O'Hare Commission* v. *Dole*, 787 F.2d 186, 192 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986).

However, this rule is inapplicable to judicial review of agency decisions that do not have two distinct bases, *i.e.*, EWG determinations.

[14] 848 F.2d at 245.

[15] See Media Access Project v. FCC, 883 F.2d 1063, 1066–67 (D.C. Cir. 1989) (where two statutes provide parallel agency authority, statute providing for review in appeals courts overrides statute providing for general review). Again, this rule is inapplicable to judicial review of agency decisions that do not have two distinct statutory bases, such as EWG determinations.

[16] Compare 15 U.S.C. 79x (providing for judicial review of "Commission" orders under PUHCA in the Circuit Courts of Appeal within 60 days of the entry of such orders) with 15 U.S.C. 79b(a)(6) (defining "Commission" as the SEC).

[17] Compare sections 32(g), (h), and (i) (discussing jurisdiction of "the Commission," *i.e.*, the SEC) with section 32(a) (discussing determinations to be made by the "Federal Energy Regulatory Commission").

[18] Additionally, as noted in Order No. 550, violations can be reported to the SEC for

IV. Deficiency Process

In Order No. 550, the Commission stated that it would not issue deficiency letters for applications that appear to be incomplete. The Commission stated that the absolute 60-day deadline for action does not leave adequate time for review of deficiency responses or for amendments to filings. Therefore, the Commission stated that it will either grant or deny an application within the 60-day time period.[19] However, if the Commission denies an application, the Commission noted that an applicant may refile an application with additional information or explanation.

NIEP states that the requirement that applicants file new applications to correct deficiencies is extremely burdensome. As an alternative, NIEP argues that the Commission should implement a limited deficiency procedure that would permit the Commission to notify applicants of deficiencies within 10 days after an application is filed and to permit amendments within 10 days after notification of a deficiency.

Commission Ruling

Now that § 365.3 of the regulations is in place to guide EWG applicants, the Commission believes there will be little excuse for filing deficient applications. The EWG filing requirements, which follow the requirements of section 32(a)(1) of PUHCA, are simple and straightforward. Applicants need only provide, in a straightforward manner, the sworn statement, representations, and information set forth in § 365.3 of the regulations.

The Commission notes that some applicants, instead of providing the required information and statements, have filed complex applications often including extraneous and irrelevant information, from which the Commission is supposed to deduce that the applicant is an EWG. The Commission attributes this to the fact that the regulations have only recently been promulgated, and anticipates that applicants will file sufficient (as opposed to deficient) applications in the future. The Commission urges applicants to file concise and straightforward applications in conformance with § 365.3 of the regulations.[20] The information and statements needed to demonstrate EWG status are neither complex nor burdensome. Accordingly, the Commission rejects NIEP's suggestion that the Commission inform the applicant within 10 days of receipt of an application of any additional information required, and, if so, give the applicant 10 days to respond with the necessary information.[21]

NIEP's proposed deficiency procedure would be extremely burdensome to the Commission. Under the procedures specified in Order No. 550, the Commission will publish notice of an EWG application in the **Federal Register** and give interested persons an opportunity to comment. The Commission's substantive review of an EWG application normally cannot be completed until after the comment period has expired. Adopting NIEP's suggestion would, therefore, require the Commission's staff to immediately review an EWG application and, before having the benefit of any comments, effectively determine whether an application is complete, *i.e.* whether the application satisfies the applicable criteria for EWG status. Such a procedure would put Commission staff in an untenable position.[22]

NIEP suggests that its proposal is similar to procedures employed with respect to QF applications under PURPA. While there are some similarities, there are also important differences. While the 90-day deadline for Commission action on QF applications is regulatory,[23] and thus can be extended by the Commission in appropriate circumstances, the 60-day deadline for Commission action on EWG applications is statutory, and thus cannot be extended by the Commission. Moreover, the filing of a QF application under 18 CFR 292.207(b) does not deem an applicant a QF until the Commission acts.

Finally, the Commission rejects NIEP's suggestion that deficiencies, such as the deficiency presented in NW Energy (Williams Lake) Limited Partnership, 62 FERC ¶61,235 (1993), are somehow minor. As noted above, Congress clearly specified the statutory criteria for EWG status. Failure to include a statement that an applicant satisfies one of the statutory criteria for EWG status cannot be characterized as a "minor deficiency."

V. Interpretations of PUHCA Section 32(a)(1)

In Order No. 550, the Commission declined to act on a number of requests for interpretations of section 32(a)(1) of PUHCA. The Commission stated that this proceeding is not intended to answer each and every question that may be presented concerning EWGs and section 32, and that questions would be addressed in individual applications. As a general matter, the Commission continues to believe that interpretation issues should be addressed on a case-by-case basis. However, now that the Commission has had some limited experience in interpreting section 32 in the context of addressing concrete factual situations,[24] the Commission believes it important to address two interpretation issues which could have

---

appropriate action or the SEC, *sua sponte*, may take appropriate action.

[19] The 60-day time period for Commission action was found to begin on the date that an application, including any required filing fee, is received by the Secretary.

[20] Unless the sworn statement, representations, and information contained in an application are challenged during the comment period, or are obviously factually or legally inaccurate, the Commission intends to rely on such information and statements. This is entirely consistent with the ministerial role Congress intended the Commission to play with respect to EWG applications. However, if an application fails to make the sworn representations that it meets the specific requirements of section 32(a)(1), the Commission must assume there is a potential problem meeting the EWG requirements and will have to further analyze the information provided.

[21] The Commission also rejects NIEP's suggestion that if the applicant fails to respond within the 10-day period, the 60-day period permitted for Commission review begin again when the Commission receives the complete application. Congress clearly provided the Commission shall make its decision within 60 days of receipt of an application. Congress also provided that a person applying in good faith for an EWG determination shall be deemed an EWG, with all exemptions provided, see PUHCA section 32(e), until the Commission makes such determination. Accepting NIEP's suggestion could permit an EWG applicant to be deemed an EWG well beyond the 60-day period intended by Congress.

[22] While the Commission staff cannot issue deficiency letters under part 365 of the regulations, the Commission does not mean to suggest that staff cannot communicate in uncontested cases to discuss possible problems with applicants. To the contrary, the Commission encourages such activity. If based on discussions with staff an applicant determines that a deficiency exists, it can voluntarily move to withdraw its pending application and file another application correcting the perceived deficiency. However, this is quite different from a procedure that would require staff to review applications shortly after receipt by the Commission.

[23] See 18 CFR 292.207(b)(5).

[24] *See* Costanera Power Corporation, 61 FERC ¶61,335 (1992) (only one person may request EWG status per application); Richmond Power Enterprise, L.P. *et al.*, 62 FERC ¶ 61,157 (1993) (person otherwise meeting EWG requirement may engage in sale of by-products of electric generation such as steam and fly-ash; EWG may own a qualifying facility (QF); facility may simultaneously be an eligible facility and a QF); KFM Pepperell, Inc., *et al.*, 62 FERC ¶ 61,182 (1993) (an owner or operator, or an entity that both owns and operates an eligible facility, must also sell electric energy at wholesale in order to be an EWG); Louis Dreyfus Electric Power, Inc., 62 FERC ¶ 61,234 (1993) (EWG must generate at least a portion of the electric energy it sells; eligible facilities must be physical facilities); Southern Electric Wholesale Generators, Inc., *et al.*, 63 FERC ¶ 61,050 (1993) (indirect ownership/operation must be through a PUHCA section 2(a)(11)(B) affiliate); InterAmerican Energy Leasing Co., 62 FERC ¶ 61,283 (1933) (an owner lessor of an eligible facility must also sell electric energy at wholesale in order to be an EWG).

a significant and recurring impact on the development of EWGs as contemplated by Congress.

The two issues the Commission addresses herein arose in recent cases in which the Commission denied EWG status. They involve the PUHCA section 32(a)(1) requirement that an EWG be engaged directly, or indirectly through one or more PUHCA section 2(a)(11)(B) affiliates, and exclusively in the business of owning and/or operating eligible facilities *and* selling electric energy at wholesale. In *KFM Pepperell, Inc. et al.* (*KFM*), *supra*, the Commission granted EWG status to the owner of an eligible facility who would also be selling electric energy at wholesale from the eligible facility, but denied EWG status to the operator of the eligible facility because the operator would not be selling energy at wholesale, *i.e.*, the operator would not meet the criterion of PUHCA section 32(a)(1) that it be engaged in selling electric energy at wholesale. Likewise, in *InterAmerican Energy Leasing Co.* (*InterAmerican*), *supra*, the Commission denied EWG status to an entity who would own and lease an eligible facility, but who would not also be engaged in selling electric energy at wholesale from the facility or any other eligible facility.

The Commission's decisions in *KFM* and *InterAmerican* were based on a plain reading of PUHCA section 32(a)(1), which states that an EWG is:

> Any person determined by the [FERC] to be engaged directly, or indirectly through one or more affiliates as defined in section 2(a)(11)(B), and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities *and* selling electric energy at wholesale. [Emphasis added.]

However, the Commission believes that the result reached in those cases, without further interpretation of the "and selling" requirement, may have the unintended consequence of discouraging the development of EWGs as contemplated by Congress.[25] Accordingly, the Commission takes this opportunity to refine and clarify its interpretation of the "and selling" criterion of section 32(a)(1) as its applies to certain types of owners and operators of eligible facilities.

In the case of a person engaged directly, or indirectly through one or more section 2(a)(11)(B) affiliates, and exclusively in the business of owning all or part of one or more eligible facilities and leasing those eligible facilities, the Commission believes it's appropriate and consistent with the intent of the statute to treat the lease of the facility as a sale of electric energy at wholesale for purposes of section 32(a)(1), absent a case-specific determination that to do otherwise could harm the public interest. A typical financing arrangement for eligible facilities may be one in which a passive owner invests in eligible facilities, but leases the facilities to public utility companies or EWGs who will operate and sell electric energy from the facilities and who will have management discretion and control over the operation of the facilities. In this situation, the Commission does not believe Congress intended that the entity having control over the facility and the sales therefrom could obtain EWG status, but that the passive owner could not. In addition, even in situations in which the owner lessor is not totally passive, but does retain some amount of control over the eligible facility, the Commission believes the intent of the PUHCA amendments is met if the lease is construed to be a wholesale sale of energy from the eligible facility.[26]

In the case of a person engaged directly, or indirectly through one or more section 2(a)(11)(B) affiliates, and exclusively in the business of operating all or part of one or more eligible facilities, the Commission believes it appropriate and consistent with the intent of the statute to deem the operator as being engaged in sales of electric energy at wholesale if it has an agency relationship with the person selling electric energy at wholesale from the eligible facility.[27] A typical arrangement for eligible facilities may be one in which an operator of an eligible facility will perform operation and maintenance (O&M) for the facility pursuant to an O&M agreement with the person who owns and sells electric energy from the facility. While the operator will be responsible for day-to-day operations, these agreements typically provide that the owner/seller will direct or control the services provided by the operator. In other words, the operator in effect is an agent of the owner/seller because the owner/seller, at a minimum, directs the activities of the operator. Accordingly, where the operator of an eligible facility or facilities carries out its responsibilities subject to the direction of the person who sells power at wholesale from the eligible facility, the Commission will impute the seller's sales of electric energy at wholesale to the operator,[28] absent a case-specific determination that to do otherwise could harm the public interest.

The Commission's interpretation of section 32(a)(1), as discussed above, is influenced by the practical and commercial effect that would obtain from a contrary interpretation of that section in conjunction with section 32(i) of PUHCA. Section 32(i) provides:

> In the case of any person engaged directly and exclusively in the business of owning or operating (or both owning and operating) all or part of one or more eligible facilities, an advisory letter issued by the [SEC] staff under this Act after the date of enactment of this section, or an order issued by the [SEC] after the date of enactment of this section, shall not be required for the purpose, or have the effect, of exempting such person from treatment as an electric utility company under section 2(a)(3) or exempting such person from any provision of this Act.

While the agency primarily responsible for interpreting section 32(i) is the SEC, and not this Commission, the Commission believes the section could be construed to prohibit certain owners and/or operators of eligible facilities from obtaining a PUHCA exemption other than through a section 32(a)(1) EWG determination.[29] Thus, if this Commission were to construe section 32(a)(1) narrowly so as to preclude owner/lessors and operators from obtaining EWG status under that section of PUHCA, they could be prohibited from seeking exemptions via SEC Staff

[25] In introducing S. 341, which contained the original EWG provisions, Senator Bennett Johnston stated, "The bill changes PUHCA only to the extent necessary to allow independent power production to go forward. * * * There is an emerging consensus that IPP's and competitive acquisition of wholesale power should at least be an option and thus that the separate statutory obstacles to independent power production contained in the Holding Company Act should be removed. The purpose of title XV is the removal of these obstacles for utilities and nonutilities alike." 137 Cong. Rec. S1512–13 (daily ed. Feb. 5, 1991).

[26] The Commission notes that the PUHCA section 32(a)(2) definition of eligible facility contains a proviso that leases of certain eligible facilities (those used for the generation of electric energy and leased to one or more public utility companies as defined in PUHCA) shall be treated as a sale of electric energy at wholesale for purposes of sections 205 and 206 of the FPA. See also 18 CFR 35.2(a), which defines FPA jurisdictional electric service to include such service "whether by leasing or other arrangements."

[27] Whether the operator is a public utility subject, *inter alia*, to section 205 of the FPA is a separate issue. See Bechtel Power Corp., 60 FERC ¶ 61,156 (1992).

[28] The Commission notes that this information was not presented in *KFM Pepperell, supra*.

[29] Section 32(i) originated in the House of Representatives. The only legislative history of which the Commission is aware is contained in the section-by-section analysis contained in H. Rep. No. 102–474 (p. 192) (Mar. 30, 1992). It states: "Fourth, section 711 forecloses an independent power producer from obtaining a PUHCA exemption to operate as such through action by the Securities and Exchange Commission (SEC) or its staff. Henceforth, IPPs must pass scrutiny at FERC under the provisions of this Act."

advisory letters or SEC orders under any other sections of PUHCA. The Commission does not believe Congress intended this incongruous result, particularly in view of the facts that such entities were able to seek exemptions via SEC Staff advisory letters and SEC orders prior to the new statute, and the new statute was intended to eliminate (not add to) prior PUHCA restrictions.

The interpretations announced herein do not attempt to address all the various permutations and issues that may arise in the future regarding owners and operators of eligible facilities. However, the Commission believes these general interpretations do address some fundamental problems that have arisen regarding the emerging development of EWGs, and will provide useful generic guidance to the industry. Other interpretation issues will be addressed on a case-by-case basis.

VI. Amendment to Section 365.3(a)

The Commission is amending § 365.3(a)(1)(i) of the regulations. In Order No. 550, § 365.3(a)(1)(i) of the regulations read as follows:

A representation that the applicant is engaged directly, or indirectly through one or more affiliates, and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale; and

The Commission is revising this section of the regulations so that it will more accurately track the requirements of PUHCA section 32(a)(1) with respect to the definition of "affiliates." The revised version of § 365.3(a)(1)(i) will read as follows:

A representation that the applicant is engaged directly, or indirectly through one or more affiliates as defined in section 2(a)(11)(B) of the Public Utility Holding Company Act of 1935, and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale;

In light of the interpretation of PUHCA section 32(a)(1) in the preceding section, regarding operators of eligible facilities, the Commission is adding a new paragraph to § 365.3(a)(1), as follows:

(iii) If the applicant intends to satisfy the "and selling electric energy at wholesale" requirement of paragraph (a)(1)(i) as a person engaged exclusively in operating all or part of one or more eligible facilities, a representation that the operator has an agency relationship with the person (or persons) who sells electric energy at wholesale from the eligible facility (or facilities).

In light of the interpretation of lease arrangements in the preceding section, the Commission is also revising § 365.3(a)(2)(ii) to read as follows:

(ii) Any lease arrangements involving the facilities, including leases to one or more public utility companies; and

VII. Regulatory Flexibility Certification Statement

The Regulatory Flexibility Act[30] requires rulemakings to either contain a description and analysis of the impact the rule will have on small entities or to certify that the rule will not have a significant economic impact on a substantial number of small entities. This order makes minor, technical amendments to the regulations adopted in Order No. 550. These minor, technical amendments have no impact on the Commission's certification in Order No. 550 that this rulemaking will not have a significant economic impact on a substantial number of small entities.

VIII. Environmental Statement

Commission regulations require that an environmental assessment or an environmental impact statement be prepared for any Commission action that may have a significant adverse effect on the human environment.[31] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.[32] No environmental consideration is necessary for the promulgation of a rule that is clarifying, corrective, or procedural or that does not substantially change the effect of legislation or regulations being amended.[33] This order makes minor, technical revisions to the regulations adopted in Order No. 550. Accordingly, no environmental consideration is necessary.

IX. Information Collection Statement

The Office of Management and Budget's (OMB) regulations[34] require that OMB approve certain information collection and recordkeeping requirements imposed by an agency. The information collection requirement affected by this order is FERC–598 (Determinations for Entities Seeking Exempt Wholesale Generator Status).

This order makes minor, technical revisions to part 365 of the regulations. The Commission will notify OMB of these revisions.

X. Administrative Findings and Effective Date

This order is in response to issues raised in motions for clarification, reconsideration and rehearing filed by intervenors in this proceeding. Therefore, the Commission finds that no further notice and comment period is required. The Commission finds that good cause exists to make this order effective immediately.[35] The revisions to part 365 of the regulations contained in this order are technical in nature and are necessary to facilitate the Commission's consideration of ongoing EWG proceedings.

Accordingly, this order is effective April 14, 1993.

List of Subjects in 18 CFR Part 365

Electric power, Exempt wholesale generators, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission is amending part 365, title 18, chapter I of the Code of Federal Regulations, as set forth below.

By the Commission.

Lois D. Cashell,

Secretary.

PART 365—FILING REQUIREMENTS AND MINISTERIAL PROCEDURES FOR PERSONS SEEKING EXEMPT WHOLESALE GENERATOR STATUS

1. The authority citation for part 365 is revised to read as follows:

Authority: 15 U.S.C. 79.

2. In § 365.3, paragraph (a)(1) (i) and (ii) are revised, paragraph (a)(1)(iii) is added, and paragraph (a)(2)(ii) is revised, to read as follows:

§ 365.3 Contents of application and procedure for filing.

(a) * * *

(1) * * *

(i) A representation that the applicant is engaged directly, or indirectly through one or more affiliates as defined in section 2(a)(11)(B) of the Public Utility Holding Company Act of 1935, and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale;

(ii) Any exceptions for foreign sales of power at retail; and

(iii) If the applicant intends to satisfy the "and selling electric energy at

[30] 5 U.S.C. 601–612.

[31] Regulations Implementing National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. and Regs. ¶30,783 (1987).

[32] 18 CFR 380.4.

[33] 18 CFR 380.4(a)(2)(ii).

[34] 5 CFR 1320.12, as authorized by Public Law 96–511, 44 U.S.C. chapter 35, the Paperwork Reduction Act of 1980.

[35] *See* 5 U.S.C. 553(b).

wholesale" requirement of paragraph (a)(1)(i) as a person engaged exclusively in operating all or part of one or more eligible facilities, a representation that the operator has an agency relationship with the person (or persons) who sells electric energy at wholesale from the eligible facility (or facilities).

(2) * * *

(ii) Any lease arrangements involving the facilities, including leases to one or more public utility companies; and

* * * * *

[FR Doc. 93-9178 Filed 4-19-93; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 175

[Docket No. 91F-0139]

Indirect Food Additives: Adhesives and Components of Coatings

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of 5-sulfo-1,3-benzenedicarboxylic acid, monosodium salt in polyester resins (including alkyd type) intended for use as components of adhesives in contact with food. This action is in response to a petition filed by Eastman Kodak Co.

DATES: Effective April 20, 1993; written objections and requests for a hearing by May 20, 1993.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Richard H. White, Center for Food Safety and Applied Nutrition (HFS-216), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-254-9511.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of May 1, 1991 (56 FR 20005), FDA announced that a food additive petition (FAP 1B4251) had been filed by Eastman Kodak Co., P.O. Box 511, Kingsport, TN 37662, proposing that § 175.105 *Adhesives* (21 CFR 175.105) be amended to provide for the safe use of 1,3-benzenedicarboxylic acid, 5-sulfo-, monosodium salt in polyester resins (including alkyd type) intended as components of adhesives in contact with food.

FDA has evaluated data in the petition and other relevant material. The agency concludes that the proposed use of the additive is safe, and that 21 CFR 175.105 should be amended as set forth below. The agency further concludes that the additive should be identified as 5-sulfo-1,3-benzenedicarboxylic acid, monosodium salt because it is the preferred scientific name rather than 1,3-benzenedicarboxylic acid, 5-sulfo-, monosodium salt as described in the filing notice.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in 21 CFR 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

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

Any person who will be adversely affected by this regulation may at any time on or before May 20, 1993, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 175

Adhesives, Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 175 is amended as follows:

PART 175—INDIRECT FOOD ADDITIVES: ADHESIVES AND COMPONENTS OF COATINGS

1. The authority citation for 21 CFR part 175 continues to read as follows:

Authority: Secs. 201, 402, 409, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 376).

2. Section 175.105 is amended in paragraph (c)(5) by alphabetically adding a new entry to the table under the heading "Substances" and the subheading "Acids," appearing after the entry for "Polyester resins * * *." For the convenience of the reader, the introductory text for "Polyester resins * * *" is republished to read as follows:

§ 175.105 Adhesives.

* * * * *

(c) * * *

(5) * * *

Substances	Limitations
* * * * * * *	
Polyester resins (including alkyd type), as the basic polymer, formed as esters when one or more of the following acids are made to react with one or more of the following alcohols:	
Acids:	
* * * * * * *	
5-sulfo-1,3-benzenedicarboxylic acid, monosodium salt (CAS Reg. No. 6362-79-4).	
* * * * * * *	

Dated: April 2, 1993.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 93-9112 Filed 4-19-93; 8:45 am]

BILLING CODE 4160-01-F

21 CFR Part 175

[Docket No. 89F-0176]

Indirect Food Additives: Adhesives and Components of Coatings

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of disodium 4-isodecyl sulfosuccinate as a component of adhesives for articles intended to contact food. This action responds to a petition filed by the American Cyanamid Co.

DATES: Effective April 20, 1993; written objections and requests for a hearing by May 20, 1993.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Richard H. White, Center for Food Safety and Applied Nutrition (HFS-216), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-254-9511.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of June 13, 1989 (54 FR 25174), FDA announced that a food additive petition (FAP 9B4122) had been filed by the American Cyanamid Co., One Cyanamid Plaza, Wayne, NJ 07470, proposing that § 175.105 *Adhesives* (21 CFR 175.105) and § 178.3400 *Emulsifiers and/or surface-active agents* (21 CFR 178.3400) of the food additive regulations be amended to provide for the safe use of disodium 4-isodecyl sulfosuccinate for use as a component of adhesives and as an emulsifier in the production of food-contact polymers. The petitioner has requested that, at this time, the agency proceed only with the regulation of the additive for use as a component of adhesives in food-contact materials. The agency's decision regarding the petitioned use of the additive as an emulsifier in the production of food-contact polymers will be addressed in a future **Federal Register** document.

FDA has evaluated data in the petition and other relevant material. The agency concludes that these data establish the safe use of disodium 4-isodecyl sulfosuccinate as a component of adhesives for articles intended to contact food, and that § 175.105 should be amended as set forth below.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in 21 CFR 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

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

Any person who will be adversely affected by this regulation may at any time on or before May 20, 1993, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 175

Adhesives, Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director of the Center for Food Safety and Applied Nutrition, 21 CFR part 175 is amended as follows:

PART 175—INDIRECT FOOD ADDITIVES: ADHESIVES AND COMPONENTS OF COATINGS

1. The authority citation for 21 CFR part 175 continues to read as follows:

Authority: Secs. 201, 402, 409, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 376).

2. Section 175.105 is amended in paragraph (c)(5) by alphabetically adding a new entry to the table to read as follows:

§ 175.105 Adhesives.

* * * * *

(c) * * *

(5) * * *