

# Proposed Rules

Federal Register

Vol. 69, No. 35

Monday, February 23, 2004

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

## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Part 205

[Docket No. RM 2004-2]

### Legal Processes

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Proposed rule.

**SUMMARY:** The Copyright Office is proposing adoption of rules governing service of process on the Copyright Office, the Register of Copyrights or an employee of the Copyright Office acting in his or her official capacity and adoption of rules governing production of Office documents and testimony of Office employees in legal proceedings. These regulations will serve as a statement of Office policy and provide comprehensive guidelines for the Office and its employees, outside agencies, and other persons regarding the appropriate procedures in these areas.

**DATES:** Comments must be received no later than March 24, 2004.

**ADDRESSES:** An original and ten copies of any comment shall be sent to the Copyright Office. If comments are mailed, the address is: Copyright Office GC/I&R, PO Box 70400, Southwest Station, Washington, DC 20024-0400. If comments are hand delivered by a private party, they must be addressed to: "Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC 20559-6000" and delivered to the Public Information Office of the Copyright Office, located in Room 401 of the James Madison Memorial Building of the Library of Congress, 101 Independence Avenue, SE., Washington, DC between 8:30 a.m. and 5 p.m. If comments are hand delivered by a commercial, non-government courier or messenger, they must be delivered to: the Congressional Courier Acceptance Site, located at

Second and D Streets, NE., between 8:30 a.m. and 4 p.m., and addressed to "Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC 20559-6000."

#### FOR FURTHER INFORMATION CONTACT:

Marilyn J. Kretsinger, Assistant General Counsel or Robert Kasunic, Senior Attorney, Copyright GC/I&R, PO Box 70400, Southwest Station, Washington, DC 20024-0400. Telephone (202) 707-8380. Telefax: (202) 707-8366.

**SUPPLEMENTARY INFORMATION:** The Copyright Office is proposing revision of part 205 of subchapter A of Chapter II, 37 CFR. Generally, part 205 establishes rules governing service of complaints, summonses, subpoenas and other legal process on the Copyright Office and its employees in their official capacities. Under the proposed revision, subpart A sets forth the definitions for the part, the addresses for legal service, and waiver of the rules. Subpart B establishes the requirements for service of legal process on an employee of the Copyright Office concerning information acquired in the course of performing official duties or because of the employee's official relationship with the Office and clarifies the requirements for service on the Register of Copyrights pursuant to section 17 U.S.C. 411(a). Subpart C prescribes policies and procedures of the Copyright Office governing testimony by an Office employee in his or her official capacity and the production of Office documents pursuant to a demand, request, subpoena, or order for use in legal proceedings in which the Office is not a party.

### Background

#### 1. Service of Process

Since its inception, the Copyright Office has operated without any published rules or regulations governing service of process.<sup>1</sup> Unlike many government agencies, the Copyright Office is not charged with enforcing the provisions of the statute that it administers. Under both the Copyright

<sup>1</sup> In 1994, the Office published a policy statement containing an address where litigation material should be directed. In 2001, it published in regulatory text the address where the Register should be served when copyright registration is refused and the applicant wants to bring a copyright infringement suit. 66 FR 19094 (April 13, 2001).

Act of 1909 and the Copyright Act of 1976, the rights bestowed by copyright protection are primarily enforced privately by copyright owners. The Copyright Office is an office of public record which, through the registration process, enables copyright owners both to make a record of their works and to facilitate protection of those works. The Office has, in the past, referred to the applicable law governing service of complaints and summonses on the United States and has handled service of subpoenas and other process on a case-by-case basis. See Fed. R. Civ. p. 4(i). The proposed rules ensure that service intended for the Office and its employees will be properly handled. These rules also ensure centralized procedures that are necessary for the Office's timely response to service of legal process.

#### 2. Production of Documents and Testimony by Employees in Legal Proceedings in Which the Office Is Not a Party

The Copyright Office occasionally receives subpoenas and other informal requests for documents and testimony in cases in which the Office is not a party. Although the Office has rules governing requests for information from the general public and charges fees for providing such information, the Office currently has no regulations governing subpoenas requesting document production and testimony of Office employees in legal proceedings. An increase in such requests in recent years warrants adoption of regulations governing their submission, evaluation, and processing. Proper handling of subpoenas for documents and testimony requires uniform rules and centralized procedures. In some situations, litigants have served subpoenas directly on Office employees, while others have mailed copies of subpoenas to the Copyright Office. In some cases, the responsible officials within the Office have not become aware of the existence of subpoenas for days or even weeks. Such delays cause the Office to lose valuable time assessing and responding to subpoenas for testimony and documents. Establishing uniform procedures for legal processes will ensure timely notice and promote centralized decision-making.

As a general rule, all documents and material submitted to the Copyright

Office as part of a completed registration of a claim to copyright are available for public inspection and copying. 37 CFR 201.2(b)(1). Anyone seeking such documents, including documents to be used in litigation, must contact the Certifications and Documents Section of the Office. *Id.* Correspondence between a copyright claimant or his or her agent and the Copyright Office regarding matters such as recordation, registration, or refusal to register is also available for public inspection. The Certifications and Documents Section certifies the authenticity of copies of Office documents and records which expedites legal proceedings since such certified copies of public documents and public records are self-authenticating. Fed. R. Evid. 902, 1005. *See also*, Fed. R. Civ. p. 44(a)(1). Office policy denies direct public access to in-process files and to work areas where they are handled. 37 CFR 201.2(b)(2). Information contained in the in-process files may, under certain circumstances, be obtained by complying with the procedures of 37 CFR 201.2(b)(3). Records that are not open to the public include correspondence, memoranda, reports, opinions, and similar material relating to internal matters of personnel and procedures, Office administration, security matters, and internal consideration of policy and decisional matters, including the work product of an attorney. 37 CFR 201.2(c).

Section 201.2(d) of 37 CFR prescribes the method for requesting copies of copyright registration records. Copying of the deposit copies of works submitted for registration is limited to circumstances where there is written permission from the copyright holder(s), a court order, or a written request submitted via a Litigation Statement from an attorney engaged in either actual or prospective litigation involving the requested work.

Copyright Office regulations also specify how documents, other than registration material, that are available to the public may be obtained. For example, administrative staff manuals may be obtained in accordance with 37 CFR 201.2(b)(7).

Given the existing regulations and the availability of most Office documents and records, further regulations for production of documents in legal proceedings may seem unnecessary. When the Office has received production requests in the past, it has attempted to apply current regulations to respond to the request. Attorneys familiar with Office practices generally forego seeking document production via request or subpoena and simply follow the established procedures. When

attorneys do not follow established procedures for obtaining information, it is usually because they are unfamiliar with Office practices or established procedures. Typically, such demands take the form of a subpoena on an Office employee directing him or her to appear at a certain time and place and to produce certain documents. In addition, subpoenas are sometimes served on an Office employee who is not responsible for the requested documents. Responding to these requests and subpoenas is not only burdensome for the Office, but is less efficient for the requestor who could obtain the requested documents more expeditiously by other means. There is, therefore, a need to regulate requests by centralizing their receipt and thereby allowing the Office to assess the request in an efficient manner. The proposed rules will also assist those seeking documents or testimony from the Office, by clarifying the alternative procedures available to obtain the information sought.

The rules governing testimony of Office employees in legal proceedings will also centralize the service of deposition subpoenas. Subpoenas for depositions are typically directed to copyright examiners and supervisors, but the Office has received deposition notices for other employees. Generally, the information sought by deposition is available through alternative written resources published or available for public inspection by the Office. As a consequence, it is important for the Copyright Office General Counsel to determine whether Office involvement in private litigation would unduly burden Office resources. This determination requires obtaining information on the precise nature of the testimony sought and whether alternative sources of the requested information are available. A single procedure directing all requests for testimony to an authorized official for review and evaluation will expedite and centralize the decision-making process. The Copyright Office is, therefore, proposing the following regulations.

#### *Proposed Regulations*

The Copyright Office is proposing revision of part 205 of subchapter A of chapter II of 37 CFR as adopted on April 13, 2001, 37 CFR 205.1. Generally, part 205 would set forth the Office rules on legal processes. Subpart A contains the general provisions governing legal process on the Office. Subpart B sets forth the requirements for service of process on the Office or its employees in their official capacities. Subpart C prescribes the requirements for requests

and subpoenas to produce Office documents or the testimony of Office employees in legal proceedings in which the Office is not a party to the action.

#### 1. General Provisions

The general provisions supply definitions and Office addresses. There is also a provision that permits waiver of the rule by the General Counsel. Only the General Counsel of the Copyright Office or his or her designee is authorized to receive service of process for the Office or an employee of the Office acting in his or her official capacity. The requirements prescribed by part 205 are in addition to any requirements prescribed by law or statute; and parties must, of course, comply with the service requirements of the Federal Rules of Civil or Criminal Procedure and any other applicable statute or court rule.

#### 2. Service of Process

The purpose of subpart B is to identify the proper parties within the Copyright Office upon whom process must be served, and to describe the conditions and requirements of such service.

Section 205.11 provides the scope and purpose of subpart B.

Section 205.12 clarifies that the subpart applies only to process served on the Copyright Office and its employees in their official capacities. Subpart B does not apply to any Office employee who is served with process in his or her individual capacity for matters related solely to his or her personal dealings.

Section 205.13 clarifies the procedures for complaints served on the Register of Copyrights pursuant to 17 U.S.C. 411(a).

#### 3. Testimony by Employees and/or the Production of Documents in Legal Proceedings in which the Office is not a Party

Subpart C governs the terms and procedures for demands for Office documents or the testimony of a Copyright Office employee in his or her official capacity in legal proceedings. The requirements of subpart C are modeled on those imposed by other federal agencies following *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

The Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) affirmed the reversal of a contempt charge against an FBI agent who, pursuant to a Department of Justice ("DOJ") regulation, refused to produce certain

documents subpoenaed by a state prisoner in a federal habeas corpus proceeding. The DOJ regulation forbade employees from disclosing Department documents, except as authorized by the Attorney General or his assistant. The Court held that the FBI agent's refusal to produce documents was lawful given the DOJ regulation. The Court stated that "[w]hen one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious." *Touhy* at 468. Thus, under *Touhy*, government entities may centralize, by regulation, determinations concerning subpoena responses and forbid the unauthorized response by employees. Further, government employees cannot be held in contempt of court for complying with such regulations.

*Touhy* regulations typically provide internal guidance and direction to agency employees, as well as establish procedures that must be followed by those external to an agency who are seeking information from the agency or its employees. *Touhy* regulations usually contain provisions concerning matters such as who an agency employee should contact for direction when he or she receives a subpoena or demand; the agency's office or official that a party or attorney seeking testimony or documents should contact; and who at the agency may authorize the production of testimony or documents by agency employees. Almost universal are provisions prohibiting an employee's disclosure of documents or giving of testimony without authorization of an appropriate agency official. Additionally, some regulations set out factors that the agency decision-maker should consider in deciding whether to authorize the giving of testimony or the release of documents. *Touhy* regulations, thus, serve the purpose of centralizing determinations within an agency concerning whether and to what extent demands for testimony and documents will be honored.

Section 205.21 outlines the scope of subpart C and notes that it applies to testimony and production of documents in legal proceedings pursuant to a demand, subpoena or order. Section 205.21 makes it clear that an employee acting in his or her official capacity may not appear voluntarily as a witness or provide voluntary testimony in a legal proceeding without authorization by the General Counsel of the Copyright Office.

The section explains the reasons for this policy, including conservation of Office resources and the centralization of the administrative process.

Sections 205.22 and 205.23 state under what conditions the Office will authorize the production of documents and testimony in a legal proceeding in which the Office is not a party. Section 205.22 provides the required procedure for demands for documents or testimony in legal proceedings. In most cases, testimony of an Office employee must be sought through either a subpoena or a court order, both of which require proper service on the Copyright Office. The service requirements of Rule 45 of the Federal Rules of Civil Procedure must be complied with. However, there are occasions when one or more parties to a proceeding contact the Office and request a deposition of an Office employee or seek testimony at trial. The proposed rule clarifies that any such demand, request or subpoena for testimony must be in writing, must be accompanied by an affidavit or declaration under penalty of perjury pursuant to 28 U.S.C. 1746, and must be delivered to the General Counsel of the Copyright Office.

Likewise, all demands, requests, subpoenas or orders for production of documents must be directed to the General Counsel of the Copyright Office. As discussed above, under current Copyright Office regulations, most documents in the possession of the Office are available to the general public, and the Office encourages litigants to avail themselves of these records by following existing agency practices. When the Office has in the past received a subpoena or order for production of documents, it has generally responded to the demand through use of current procedures. However, because a court may require an official of the Office to appear in person to produce the requested records, it is necessary to adopt procedures governing these types of demands.

In addition to requiring that all demands, requests or subpoenas for testimony and production of documents in legal proceedings in which the Office is not a party be in written form, § 205.22(a)(3) requires that all demands, requests and subpoenas be accompanied by an affidavit or declaration under penalty of perjury pursuant to 28 U.S.C. 1746 that identifies the title of the legal proceeding, the forum, the requesting party's interest in the legal proceeding, the reasons for the demand, request or subpoena, a showing that the desired testimony or document is not reasonably available from any other

source, and, if testimony is requested, the intended use of the testimony, a detailed summary of the testimony desired, and a showing that no document could be provided and used in lieu of the requested testimony. The purpose of this requirement is to permit the Office to evaluate whether the information sought in the demand is available through other less burdensome means before deciding whether the testimony or production should be authorized.

Subsections (b) through (f) of § 205.22 propose several Office practices governing testimony by employees and production of documents in legal proceedings. Subsection (b) makes it clear that no Office employee may provide testimony or produce a document in a legal proceeding concerning Office business without the authorization of the General Counsel of the Copyright Office. In addition, no Office employee shall answer inquiries from members of the public regarding testimony or documents subject to a demand, subpoena or order. All requests for such testimony must be directed to the General Counsel of the Copyright Office. There are two exceptions to this rule: there is no limitation on testimony of facts or events that are unrelated to official business and there is no limitation on a former employee's testimony as an expert in connection with a particular matter in which the former employee did not participate personally while at the Office.

As discussed above, most documents in the possession of the Office are public records and can be obtained by the public under current regulations. In general, the Office will continue to direct the public to seek documents through its Certification and Documents Section. Parties seeking documents, including certified documents to be used in litigation, must contact the Certification and Documents Section of the Office.

Section 205.23 governs the scope of permissible testimony. When the testimony of an employee is authorized by the General Counsel, an employee may testify as to relevant matters of fact within his or her knowledge so long as the factual matters do not probe into the mental processes employed in formulating a decision of the Office. *United States v. Morgan*, 298 U.S. 468 (1941); *Western Electric Co., Inc. v. Piezo Technology, Inc.*, 860 F.2d 428 (Fed. Cir. 1988). In addition, an employee would be prohibited from giving expert or conjectural testimony.

**List of Subjects in 37 CFR Part 205**

Copyright, Service of process, Testimony by employees and production of documents in legal proceedings.

**Proposed Regulations**

In consideration of the foregoing, the Copyright Office proposes to revise 37 CFR part 205 as follows:

1. Part 205 is revised to read as follows:

**PART 205—LEGAL PROCESSES****Subpart A—General Provisions**

Sec.

205.1 Definitions.

205.2 Address for mail and service; telephone number.

205.3 Waiver of rules.

205.4 Relationship of this part to the Federal Rules of Civil and Criminal Procedure.

205.5 Scope of this part related to Copyright Office duties under title 17 of the U.S. Code.

**Subpart B—Service of Process**

205.11 Scope and purpose.

205.12 Process served on the Register of the Copyright Office and an employee in his or her official capacity.

205.13 Complaints served on the Register of Copyrights pursuant to 17 U.S.C. 411.

**Subpart C—Testimony by Employees and Production of Documents in Legal Proceedings in Which the Office Is Not a Party**

205.21 Scope and purpose.

205.22 Production of documents and testimony.

205.23 Scope of testimony.

**Authority:** 17 U.S.C. 702.

**Subpart A—General Provisions****§ 205.1 Definitions.**

For the purpose of this part:

*Demand* means an order, subpoena or any other request for documents or testimony for use in a legal proceeding.

*Document* means any record or paper held by the Copyright Office, including, without limitation, official letters, deposits, recordings, registrations, publications, or other material submitted in connection with a claim to register a copyright.

*Employee* means any current or former officer or employee of the Copyright Office, as well as any individual subject to the jurisdiction, supervision, or control of the Copyright Office.

*General Counsel*, unless otherwise specified, means the General Counsel of the United States Copyright Office or his or her designee.

*Legal proceeding* means any pretrial, trial, and post trial stages of existing or

reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards or other tribunals, foreign or domestic. This phrase includes all phases of discovery as well as responses to formal or informal requests by attorneys or others involved in legal proceedings. This phrase also includes state court proceedings (including grand jury proceedings) and any other state or local legislative and administrative proceedings.

*Office* means the United States Copyright Office, including any section, division or operating unit within the United States Copyright Office.

*Official business* means the authorized business of the United States Copyright Office.

*Testimony* means a statement in any form, including a personal appearance before a court or other legal tribunal, an interview, a deposition, an affidavit or declaration under penalty of perjury pursuant to 28 U.S.C. 1746, a telephonic, televised, or videotaped statement or any response given during discovery or similar proceeding, which response would involve more than the production of documents, including a declaration under 35 U.S.C. 25 or a declaration under penalty of perjury pursuant to 28 U.S.C. 1746.

*United States* means the Federal Government, its departments and agencies, individuals acting on behalf of the Federal Government, and parties to the extent they are represented by the United States.

**§ 205.2 Address for mail and service; telephone number.**

(a) Mail under this part should be addressed to the General Counsel, Copyright GC/I&R, PO Box 70400, Southwest Station, Washington, DC 20024-0400.

(b) Service by hand shall be made upon an authorized person from 8:30 a.m. to 5 p.m. E.S.T., Monday through Friday in the Public Information Office, U.S. Copyright Office, Library of Congress, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC. Persons authorized to accept service of process are the General Counsel of the Copyright Office and his or her designees.

(c) The Office of the General Counsel may be reached by telephone during normal business hours specified in paragraph (b) of this section at 202-707-8380.

**§ 205.3 Waiver of rules.**

In extraordinary situations, when the interest of justice requires, the General Counsel may waive or suspend the rules of this part, *sua sponte* or on petition of an interested party, subject to such requirements as the General Counsel may impose on the parties. However, the inclusion of certain legal process within the scope of these rules, *e.g.*, state legal proceedings, does not represent a waiver of any claim of immunity, privilege, or other defense by the Office in a legal proceeding, including but not limited to, sovereign immunity, preemption, or lack of relevance. This rule does not create any right or benefit, substantive or procedural, enforceable at law by a party against the Copyright Office or the United States.

**§ 205.4 Relationship of this part to the Federal Rules of Civil and Criminal Procedure.**

Nothing in this part waives any requirement under the Federal Rules of Civil or Criminal Procedure.

**§ 205.5 Scope of this part related to Copyright Office duties under title 17 of the U.S. Code.**

This part relates only to legal proceedings, process, requests and demands relating to the Copyright Office's performance of its duties pursuant to title 17 of the United States Code. Legal proceedings, process, requests and demands relating to other matters (*e.g.*, personal injuries, employment matters, etc.) are the responsibility of the General Counsel of the Library of Congress and are governed by 36 CFR part 703.

**Subpart B—Service of Process****§ 205.11 Scope and purpose.**

(a) This subpart provides the procedures governing service of process on the Copyright Office and its employees in their official capacity. These regulations provide the identity of Copyright Office officials who are authorized to accept service of process. The purpose of this subpart is to provide a centralized location for receipt of service of process to the Office. Such centralization will provide timely notification of legal process and expedite Office response. Litigants also must comply with all requirements pertaining to service of process that are established by statute, court rule and rule of procedure including the applicable provisions of the Federal Rules of Civil Procedure governing service upon the United States.

(b) This subpart does not apply to service of process made on an employee

personally for matters not related to official business of the Office. Process served upon a Copyright Office employee in his or her individual capacity must be served in compliance with the applicable requirements for service of process established by statute, court rule, or rule of procedure.

**§ 205.12 Process served on the Copyright Office and its employees in their official capacities.**

(a) Summonses, complaints and all other process directed to the Copyright Office, the Register of Copyrights or any other Copyright Office employee in his or her official capacity should be served on the General Counsel of the Copyright Office or his designee as indicated in § 205.2. To effect proper service, the requirements of Rule 4(i) of the Federal Rules of Civil Procedure must also be satisfied by effecting service on both the United States attorney for the district in which the action is brought and the Attorney General, Attn: Director of Intellectual Property Staff, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC 20530.

(b) Any employee of the Office served with a summons or complaint in connection with the conduct of official business shall immediately notify and shall deliver the summons or complaint to the Office of the General Counsel of the Copyright Office.

(c) Any employee receiving a summons or complaint shall note on the summons or complaint the date, hour, and place of service and mode of service.

(d) The Office will accept service of process for an employee only when the legal proceeding is brought in connection with the conduct of official business carried out in the employee's official capacity.

(e) When a legal proceeding is brought to hold an employee personally liable in connection with an action taken in the conduct of official business, rather than liable in an official capacity, the employee is to be served in accordance with any applicable statute, court rule, or rule of procedure. Service of process in this case is inadequate when made only on the General Counsel. An employee sued personally for an action taken in the conduct of official business shall immediately notify and deliver a copy of the summons or complaint to the General Counsel of the Copyright Office.

**§ 205.13 Complaints served on the Register of Copyrights pursuant to 17 U.S.C. 411(a).**

When an action has been instituted pursuant to 17 U.S.C. 411(a) for

infringement of the copyright of a work for which registration has been refused, notice of the institution of the action and a copy of the complaint must be served on the Register of Copyrights by sending such documents by registered or certified mail to the General Counsel of the Copyright Office, GC/I&R, PO Box 70400, Southwest Station, Washington, DC 20024-0400, or delivery by hand addressed to the General Counsel of the Copyright Office and delivered to the Public Information Office, U.S. Copyright Office, Library of Congress, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC. The notice must be in the form of a letter that is clearly identified as a 411(a) notice. Both the letter and the envelope should state: "Section 411(a) Notice to the Register of Copyrights." In compliance with FED. R. CIV. P. Sec. 4(i), a notice of the institution of the action and a copy of the complaint must also be served on both the United States attorney for the district in which the action is brought and the United States Department of Justice, directed to the Attorney General, Attn: Director of Intellectual Property Staff, Civil Division, Department of Justice, Washington, DC 20530.

**Subpart C—Testimony by Employees and Production of Documents in Legal Proceedings in Which the Office Is Not a Party**

**§ 205.21 Scope and purpose.**

(a) This subpart prescribes policies and procedures of the Copyright Office governing testimony, in legal proceedings in which the Office is not a party, by Office employees in their official capacities and the production of Office documents for use in legal proceedings pursuant to a demand, request, subpoena or order.

(b) The purpose of this subpart is:

- (1) To conserve the time of Office employees for conducting official business;
- (2) To minimize the possibility of involving the Office in the matters of private parties or other issues which are not related to the mission of the Office;
- (3) To prevent the public from confusing personal opinions of Office employees with Office policy;
- (4) To avoid spending the time and money of the United States for private purposes;
- (5) To preserve the integrity of the administrative process, minimize disruption of the decisionmaking process, and prevent interference with the Office's administrative functions.

(c) An employee of the Office may not voluntarily appear as a witness or voluntarily testify in a legal proceeding relating to his or her official capacity without proper authorization under this subpart.

(d) This subpart does not apply to any legal proceeding in which:

- (1) An employee is to testify regarding facts or events that are unrelated to official business; or
- (2) A former employee is asked to testify as an expert on a matter in which that employee did not personally participate while at the Office so long as the former employee testifies concerning his or her personal opinion and does not purport to speak for or on behalf of the Copyright Office.

**§ 205.22 Production of documents and testimony.**

(a) Generally, all documents and material submitted to the Copyright Office as part of a completed application to register a claim to copyright are available for public inspection and copying. Most documents are therefore available through Office services that do not require the utilization of litigation processes. Anyone seeking such documents must contact the Certifications and Documents Section of the Office. 37 CFR 201.2(b)(1). Certified copies of public documents and public records are self-authenticating. FED. R. EVID. 902 and 1005; *see also*, FED. R. CIV. P. 44(a)(1). In certain specified circumstances, information contained in the in-process files may be obtained by complying with the procedures of 37 CFR 201.2(b)(3). Correspondence between a copyright claimant or his or her agent and the Copyright Office in a completed registration, recordation, or refusal to register is also available for public inspection. Section 201.2(d) of this chapter prescribes the method for requesting copies of copyright registration records. Reproduction of deposit copies of works submitted for registration are, upon approval of the General Counsel, available to an attorney engaged in actual or prospective litigation involving the requested work upon written request and a completed Litigation Statement or a court order. The fees associated with various document requests, searches, copies, and expedited handling are listed in 37 CFR 201.3. Other publications containing Copyright Office procedures and practices are available to the public without charge from the Copyright Office or its Web site: <http://www.loc.gov/copyright>. The Office Web site also allows online searching of copyright registration information and information pertaining

to documents recorded with the Copyright Office beginning January 1, 1978. Pre-1978 copyright registration information and document recordation information is available to the public in the Copyright Office during regular business hours. If the information sought to be obtained from the Office is not available through these Office services, demands and subpoenas for testimony or documents may be served as follows:

(1) *Demands for testimony or documents.* All demands, requests, subpoenas or orders for production of documents or testimony in a legal proceeding directed to the Copyright Office, the Register of Copyrights or any other Copyright Office employee in his or her official capacity must be in writing and should be served on the General Counsel of the Copyright Office as indicated in § 205.2 of this part and in accordance with the Federal Rules of Civil or Criminal Procedure.

(2) *Affidavits.* Except when the Copyright Office is a party to the legal proceeding, every demand, request or subpoena shall be accompanied by an affidavit or declaration under penalty of perjury pursuant to 28 U.S.C. 1746. Such affidavit or declaration shall contain a written statement setting forth the title of the legal proceeding; the forum; the requesting party's interest in the legal proceeding; the reasons for the demand, request, or subpoena; a showing that the desired testimony or document is not reasonably available from any published or other written source, (e.g. **Federal Register**, Compendium II: Compendium of Copyright Office Practices, other written practices of the Office, circulars, the Copyright Office Web site) and is not available by other established procedure, e.g. 37 CFR 201.2, 201.3. If testimony is requested in the affidavit or declaration, it shall include the intended use of the testimony, a detailed summary of the testimony desired, and a showing that no document could be provided and used in lieu of the requested testimony. The purpose of these requirements is to permit the General Counsel of the Copyright Office to make an informed decision as to whether testimony or production of a document should be authorized. The decision by the General Counsel will be based on consideration of the purposes set forth in § 205.21(b), on the evaluation of the requesting party's need for the testimony and any other factor warranted by the circumstances. Typically, when the information requested is available through other existing Office procedures or materials, the General Counsel will

not authorize production of documents or testimony.

(b) No Copyright Office employee shall give testimony concerning the official business of the Office or produce any document in a legal proceeding other than those made available by the Certifications and Documents Section under existing regulations without the prior authorization of the General Counsel. Without prior approval from the General Counsel, no Office employee shall answer inquiries from a person not employed by the Library of Congress or the Justice Department regarding testimony or documents in connection with a demand, subpoena or order. All inquiries involving demands, subpoenas, or orders shall be directed to the General Counsel of the Copyright Office.

(c) Any Office employee who receives a demand, request, subpoena or order for testimony or the production of documents in a legal proceeding shall immediately notify the Copyright Office General Counsel at the phone number indicated in § 205.2 and shall immediately forward the demand to the Copyright Office General Counsel.

(d) The General Counsel may consult or negotiate with an attorney for a party or the party, if not represented by an attorney, to refine or limit a demand, request or subpoena to address interests or concerns of the Office. Failure of the attorney or party to cooperate in good faith under this part may serve as the basis for the General Counsel to deny authorization for the testimony or production of documents sought in the demand.

(e) A determination under this part regarding authorization to respond to a demand is not an assertion or waiver of privilege, lack of relevance, technical deficiency or any other ground for noncompliance. The Copyright Office reserves the right to oppose any demand on any appropriate legal ground independent of any determination under this part, including but not limited to, sovereign immunity, preemption, privilege, lack of relevance, or technical deficiency.

(f) Office procedures when an employee receives a demand or subpoena:

(1) If the General Counsel has not acted by the return date, the employee must appear at the time and place set forth in the subpoena (unless otherwise advised by the General Counsel) and inform the court (or other legal authority) that the demand has been referred for the prompt consideration of the General Counsel and shall request the court (or other legal authority) to

stay the demand pending receipt of the requested instructions.

(2) If the General Counsel makes a determination not to authorize testimony or the production of documents, but the subpoena is not withdrawn or modified and Department of Justice representation cannot be arranged, the employee should appear at the time and place set forth in the subpoena unless advised otherwise by the General Counsel. If legal counsel cannot appear on behalf of the employee, the employee should produce a copy of these rules and state that the General Counsel has advised the employee not to provide the requested testimony or to produce the requested document. If a court (or other legal authority) rules that the demand in the subpoena must be complied with, the employee shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

#### § 205.23 Scope of testimony.

(a)(1) If a Copyright Office employee is authorized to give testimony in a legal proceeding, the testimony, if otherwise proper, shall be limited to facts within the personal knowledge of the Office employee. An Office employee is prohibited from giving expert testimony, or opinion, answering hypothetical or speculative questions, or giving testimony with respect to subject matter which is privileged. If an Office employee is authorized to testify in connection with his or her involvement or assistance in a proceeding or matter before the Office, that employee is further prohibited from giving testimony in response to an inquiry about the bases, reasons, mental processes, analyses, or conclusions of that employee in the performance of his or her official functions.

(2) The General Counsel may authorize an employee to appear and give expert testimony or opinion testimony upon the showing, pursuant to § 205.3 of this part, that exceptional circumstances warrant such testimony and that the anticipated testimony will not be adverse to the interest of the Copyright Office or the United States.

(b) If an Office employee is authorized to testify, the employee will generally be prohibited from providing testimony in response to questions which seek, for example:

(1) To elicit information about the employee's:

(i) Qualifications to examine or otherwise consider a particular copyright application.

(ii) Usual practice or whether the employee followed a procedure set out

in any Office manual of practice in a particular case.

(iii) Consultation with another Office employee.

(iv) Familiarity with:

(A) Preexisting works that are similar.

(B) Registered works, works sought to be registered, a copyright application, registration, denial of registration, or request for reconsideration.

(C) Copyright law or other law.

(D) The actions of another Office employee.

(v) Reliance on particular facts or arguments.

(2) To inquire into the manner in and extent to which the employee considered or studied material in performing the function.

(3) To inquire into the bases, reasons, mental processes, analyses, or conclusions of that Office employee in performing the function.

(4) In exceptional circumstances, the General Counsel may waive these limitations pursuant to § 205.3 of this part.

Dated: February 17, 2004.

**David O. Carson,**

*General Counsel.*

[FR Doc. 04-3725 Filed 2-20-04; 8:45 am]

BILLING CODE 1410-30-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 81

[CA 112-RECLAS, FRL-7625-7]

### Clean Air Act Reclassification, San Joaquin Valley Nonattainment Area; California; Ozone

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to grant a request by the State of California to voluntarily reclassify under the Clean Air Act ("CAA" or "the Act") the San Joaquin Valley Ozone Nonattainment Area ("San Joaquin Valley Air Basin" or "SJVAB") from a severe to an extreme 1-hour ozone nonattainment area. EPA is also proposing that the State submit, by no later than October 1, 2004, an extreme ozone nonattainment area plan addressing the requirements of CAA section 182(e) and that the State submit revised Title V and New Source Review rules that reflect the extreme area requirements no later than 12 months from the effective date of the final reclassification.

Final reclassification of the SJVAB will stop the sanctions and federal

implementation plan clocks that were started under CAA section 179(a) upon EPA's 2002 finding that the State failed to submit the statutorily required severe area attainment demonstration for the area.

Several Indian tribes have reservations located within the boundaries of the SJVAB. EPA implements relevant reclassification provisions of the CAA in these reservations and is also proposing that these areas be reclassified from a severe to an extreme 1-hour ozone nonattainment area. Thus, this action could potentially affect these tribes. Accordingly, EPA has notified the affected tribal leaders of our proposed action and is inviting consultation with interested tribes.

EPA will accept comments on all aspects of this proposed rule. However, as discussed in section II. below, EPA believes that the CAA compels the Agency to grant a voluntary reclassification when requested by a State.

**DATES:** Comments on this proposed action must be received by March 24, 2004.

**ADDRESSES:** Send comments to David Wampler, Planning Office (AIR-2), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901 or e-mail to [wampler.david@epa.gov](mailto:wampler.david@epa.gov), or submit comments at <http://www.regulations.gov>.

You can inspect and copy the docket for this action at our Region IX office during normal business hours (*see ADDRESSES* above). Due to increased security, we suggest that you call at least 24 hours prior to visiting the Regional Office so that we can make arrangements to have someone meet you. The **Federal Register** notice is also available as an electronic file on EPA's Region 9 Web Page at <http://www.epa.gov/region09/air>.

**FOR FURTHER INFORMATION CONTACT:** David Wampler, Planning Office (AIR-2), Air Division, EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972-3975.

**SUPPLEMENTARY INFORMATION:** Throughout this document, the words "we," "us," or "our" mean U.S. EPA.

### I. Background

The San Joaquin Valley Ozone Nonattainment Area ("San Joaquin Valley Air Basin" or "SJVAB") consists of the following counties in California's central valley: San Joaquin, the western

portion of Kern,<sup>1</sup> Fresno, Kings, Madera, Merced, Stanislaus and Tulare.

Upon the date of enactment of the 1990 Clean Air Act Amendments, the SJVAB was classified as a serious ozone nonattainment area for the 1-hour ozone National Ambient Air Quality Standard ("NAAQS"). (56 FR 56694, November 6, 1991 and CAA section 181(a)(1)).

In December 2001, EPA reclassified the SJVAB from a serious to a severe nonattainment area for the 1-hour ozone NAAQS. (66 FR 56476, November 8, 2001). This reclassification resulted from the failure of the SJVAB to attain the standard by November 15, 1999 as required for serious nonattainment areas. CAA section 181(a) and (b)(2). In our final action, we explained that the State of California would need to submit by May 31, 2002 a state implementation plan ("SIP") revision addressing the severe area planning requirements including, but not limited to, a demonstration of attainment of the severe 1-hour ozone standard by November 15, 2005, and a rate of progress ("ROP") demonstration of creditable ozone precursor emission reductions of at least 3 percent per year until attainment. (66 FR 56476, 56481, November 8, 2001).

On October 2, 2002 (67 FR 61784; effective September 18, 2002), EPA found that the State failed to submit by May 31, 2002 the following required severe area SIP revisions for the SJVAB: (1) A demonstration of attainment of the 1-hour ozone NAAQS by no later than 2005; (2) a ROP demonstration as described above; (3) an emission control rule for lime kilns; (4) an emissions inventory; and (5) contingency measures. In our final action, we stated that, pursuant to CAA section 179(a), if the State did not submit the required plan revisions, the offset sanction identified in CAA section 179(b) would be applied in the affected area followed by the highway sanction 6 months after the offset sanction was imposed. We also stated that the sanction clock would stop upon a finding by EPA that the State has made complete<sup>2</sup> submittals addressing these severe area requirements. Finally, we explained that, under CAA section 110(c), EPA must promulgate a federal implementation plan ("FIP") no later than two years after the finding under section 179(a) unless the Agency takes

<sup>1</sup> See 66 FR 56476 (November 8, 2001) (boundary change for the San Joaquin Valley establishing the eastern portion of Kern County as its own nonattainment area).

<sup>2</sup> The requirements regarding completeness of SIP submittals are found in CAA section 110(k)(1) and 40 CFR part 51, appendix V.