DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 51

RIN 1024–AC72

Concession Contracts

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: This rule amends 36 CFR Part 51, the National Park Service (NPS) regulations concerning NPS concession contracts, to comply with the requirements of Title IV of the National Parks Omnibus Management Act of 1998 (the 1998 Act). The 1998 Act provides new legislative authorities, policies and procedures for the solicitation, award and administration of concession contracts by NPS. This rule was published as proposed for public comment in the **Federal Register** as a matter of policy on June 30, 1999. NPS provided a 60-day public comment period on the proposed rule. This was extended by 45 days upon public request. NPS has fully considered all public comments received and considers this final rule to be lawful, consistent with the policies of Congress as expressed in the 1998 Act, and as accommodating to the concerns of commenters as possible in light of the legal and administrative responsibilities of NPS under the 1998 Act and other applicable authorities.

EFFECTIVE DATE: May 17, 2000.

FOR FURTHER INFORMATION CONTACT: Wendelin Mann, Concession Program, National Park Service, 1849 C Street, NW, Washington, DC 20240 (202/565–1219).

SUPPLEMENTARY INFORMATION: The 1998 Act has established a new statutory framework for the solicitation, award and administration of NPS concession contracts. Concession contracts are the form of governmental authorization used to permit persons (concessioners) to provide accommodations, facilities, and services to visitors to areas of the national park system. These services include, for example, lodging, food, merchandising, transportation, outfitting and guiding, and similar activities.

NPS has been awarding and administering concession contracts for this purpose in various forms since 1916 under the terms of 16 USC 1 *et seq.*, the NPS ''Organic Act.'' In 1965, Congress formally established by the Concession Policies Act of 1965, 16 USC 20 *et seq.* (the 1965 Act), a number of policies and procedures regarding concession contracts. NPS regulations contained in 36 CFR Part 51 implemented the 1965 law. On November 13, 1998, the Congress substantially revised these policies and procedures by passage of the 1998 Act. Many of the policies and procedures adopted by NPS in 36 CFR Part 51, as amended, and standard NPS concession contracts developed under the 1965 Act are reflected in the terms of the 1998 Act.

The Congress had two primary objectives in revising the 1965 Act: making the NPS concession management program more efficient and enhancing competition in NPS concession contracting.

The first objective is reflected in provisions of the 1998 Act that call, among other matters, for contracting to private businesses certain aspects of NPS concessions management and the establishment of an NPS Concessions Management Advisory Board to advise NPS on the conduct of its concessions management program. These provisions, although very important, will be implemented administratively by NPS rather than through program regulations.

The second objective, enhancement of competition in NPS concession contracting, is reflected in the 1998 Act in a number of ways. Primarily, however, the 1998 Act achieves greater competition in two ways.

First, to achieve greater competition, the 1998 Act repealed, except for smaller and outfitter and guide concession contracts, the ''preference in renewal'' provision of the 1965 Act. The 1965 Act's preference in renewal provision required NPS to give existing satisfactory concessioners a preference in the renewal of their concession contracts, if the contract was to be continued after its expiration. This preference required NPS to permit existing satisfactory concessioners to meet the better terms and conditions of the best competing proposal for the renewal of its concession contract. Because of this preference, NPS estimated in 1993 that since 1965 over 99.9% of the renewals of NPS concession contracts had been awarded to the existing concessioner. In fact, from 1965 to 1993, only seven NPS concession contracts out of approximately 1900 awarded were not awarded to the incumbent concessioner (where the incumbent sought the contract). True competition simply did not exist.

The legislative history of the 1998 Act states as follows in connection with the repea1 of the preference in renewal:

> Under the 1965 Act, all satisfactory concessioners are entitled to preference in renewal of their concession contracts or permits. However, in light of the current circumstances of units of the National Park System and in recognition of present business conditions, the Committee considers that generally there is now no need to continue to provide a preferential right of renewal to concessioners in order to obtain qualified operators. Accordingly, to foster appropriate competition in the award of National Park Service concession contracts, the preferential right of renewal provided as a statutory right to existing satisfactory concessioners is repealed by the S. 1693 [the bill that became the 1998 Act]. S. Rep. No. 105–202, at p.31 (1998).

The 1998 Act's other primary means to enhance competition in concession contracting was its reform of the 1965 Act's ''possessory interest'' concept. Under the 1965 Act, a concessioner that constructed real property improvements on park area lands under the terms of a concession contract obtained a compensable interest in the improvements in the form of a ''possessory interest.'' The value of the possessory interest as of the date of the expiration or other termination of the concession contract was the ''sound value'' of the improvements to which the possessory interest related, but, not to exceed the ''fair market value of the improvements,'' unless NPS and the concessioner agreed to an alternative value.

The Congress in considering S. 1693 noted that possessory interest under the 1965 Act was frequently criticized as ''anti-competitive'' because ''the value of an existing concessioner's possessory interest was difficult to establish, thereby discouraging submittal of competitive offers for renewal of concession contracts.'' S. Rep. No. 105–202, at p. 35 (1998).

The 1998 Act reformed the possessory interest provisions of the 1965 Act through the leasehold surrender interest concept. Instead of obtaining a possessory interest in real property improvements as provided by the 1965 Act, the 1998 Act provides a ''leasehold surrender interest'' in ''capital improvements'' a concessioner constructs on park area lands ''under the terms of a concession contract.'' The legislative history states as follows about the purposes of leasehold surrender interest:

> The Committee considers that the leasehold surrender interest described by this section will provide concessioners with adequate security for investments in capital improvements they make. This will assist in encouraging such investment in visitor facilities in the National Park System. However, the value of a leasehold surrender interest, i.e., the original construction cost, less depreciation as evidenced by physical

condition and prospective serviceability, plus what amounts to interest on the investment based on the Consumer Price Index, should accurately reflect the real value of the improvements and should not result in undue compensation to a concessioner upon expiration of a concession contract. Additionally, the value of the leasehold surrender interest will be relatively easy to estimate so that a prospective new concessioner and the Secretary [of the Interior] can accurately calculate the amount for purposes of competitive solicitation of concession contracts. *Id.*

This final rule has three major purposes. The first is to set forth procedures as to how concession contracts are to be solicited and awarded by NPS under the 1998 Act. With certain exceptions, the 1998 Act requires competitive award of concession contracts. In some circumstances, an existing satisfactory concessioner may have a right to match the terms of a better competing proposal for a new concession contract. In fact, although the preference in renewal was the most mentioned issue in the comments received, more than 75% of the some 630 current NPS concessioners will continue to benefit from a preference in the renewal of their concession contracts. This is because the 1998 Act extends a preference in renewal to concessioners with contracts that have gross receipts of less than $500,000 or are outfitter and guide concessioners (more than 75% of the total).

Second, unlike the existing 36 CFR Part 51, the final rule sets forth in detail the nature of the compensatory interest in capital improvements a concessioner may construct on park lands under the terms of a concession contract. This leasehold surrender interest is defined in general terms in the 1998 Act. This rule establishes appropriate specific terms and conditions for leasehold surrender interests under the authority of the 1998 Act. Clarity as to the scope of leasehold surrender interest is important to both NPS and concessioners. Accordingly, the leasehold surrender interest subpart of this rule is lengthy. However, concession contracts will be proportionately shorter as for the most part they will refer to this rule with respect to leasehold surrender interest terms and conditions.

Finally, the rule descibes a number of provisions that concession contracts will contain in implementation of the 1998 Act.

The final rule reflects NPS's interpretation of the various provisions of the 1998 Act to appropriately administer the Act's requirements and purposes that are suitable for regulatory implementation. Section 417 of the 1998 Act requires NPS to promulgate regulations ''appropriate for its implementation.''

A. Response to Public Comments

NPS responds to public comments as follows. The symbol ''***'' under a section heading indicates that no (non-duplicative) comments requiring a response expressly addressed the section.

Scope of Comments

NPS received 125 public comments on the proposed rule. Of these, the vast majority were from existing concessioners, attorneys representing existing concessioners, or existing concessioner organizations. Several organizations with members that are existing NPS concessioners commented on the proposed regulations. Most of these organizations are generally interested in ''outfitter and guide'' concession contracts. One organization, referred to in the discussion below as the ''general concessioner organization,'' is an organization with more than 150 existing concessioner members (according to its comment). Several of the members of this organization submitted separate comments that endorsed the comments of the general concessioner organization. Where NPS states below that the general concessioner organization or other organizations made comments, this refers collectively to the comments of the organization and comments separately submitted in support of the organization's views.

Only a handful of ''non-incumbent concessioner'' individuals and groups commented on the proposed regulations. The vast majority of comments received were from existing concessioners or concessioner organizations. Nonetheless, NPS has taken into account in developing the final rule the interests of the general public and non-incumbent concessioners, *i.e.,* persons that may now seek to become concessioners under the more competitive terms of the 1998 Act. NPS has an obligation to consider these interests under the mandates of the 1998 Act and 16 U.S.C. 1 *et seq.*, the NPS Organic Act, which requires NPS to preserve the resources of the national park system and to provide for their enjoyment by visitors by such means as will leave them unimpaired for the enjoyment of future generations.

1. General Comments

Repeal of the 1965 Act's Preference in Renewal

The major concern of existing concessioners was the 1998 Act's repeal of the 1965 Act's preference in renewal. Some existing concessioners consider it unfair (and illegal) to deprive them of a preference in the renewal of their existing contracts or permits (1965 Act concession contracts). Many commenters criticized NPS in this regard, although the repeal of the preference in renewal was by statute. The basis for this criticism is the perception that NPS has discretion to determine that the 1998 Act's repeal of the 1965 Act's preference in renewal is not applicable to the renewal of 1965 Act concession contracts. This is not the case.

Section 415(a) of the 1998 Act expressly repealed the 1965 Act, including its Section 5 (16 U.S.C. 20d) which required NPS to give existing satisfactory concessioners a preference in renewal of their contracts. In addition, Section 403(7) of the 1998 Act states that, except as provided in the express circumstances set forth in the 1998 Act, NPS ''shall not grant a concessioner a preferential right to renew a concession contract, or any form of preference to a concession contract.''

NPS has fully reviewed the legal arguments made by existing concessioners and their attorneys. NPS considers, however, that nothing contained in these arguments provides it with a reasonable basis to conclude that the 1998 Act's repeal of the 1965 Act's preference in renewal is not applicable to NPS 1965 Act concession contracts or permits. NPS also points out that a contrary interpretation would be in direct conflict with the 1998 Act's purpose of enhancing competition in concession contracting.

In this connection, one commenter on the proposed regulations, a major existing concessioner (that looks forward to the opportunity to compete freely for additional NPS concession contracts) submitted an opinion of counsel along with its comments on the regulations. The opinion of counsel supports the views of NPS on this issue.

The NPS position is based on the express terms of the 1998 Act and the fact that standard 1965 Act concession contracts do not refer to a preference in renewal.

In this connection, Section 415(a) of the 1998 Act states that the Act is applicable to 1965 Act concession contracts, as follows:

(a) Repeal.—Public Law 89–249 (commonly known as the National Park Service Concession Policy Act; 16 U.S.C. 20 *et seq.*) is repealed. The repeal of such Act shall not affect the validity of any concessions contract or permit entered into under such Act, but the provisions of this title shall apply to any such contract or permit except to the extent such provisions are inconsistent with the terms and conditions of any such contract or permit. References in this title to concessions contracts awarded under authority of such Act also apply to concessions permits awarded under such authority.

Accordingly, unless the provisions of the 1998 Act are ''inconsistent with the terms and conditions'' of a 1965 Act concession contract, the 1998 Act applies in full to 1965 Act concession contracts.

NPS points out that standard 1965 Act concession contracts make no reference to a preference in renewal. The reason for this is that the preference in renewal provision contained in the 1965 Act did not establish the preference in renewal as a contract right. Section 5 of the 1965 Act states as follows in pertinent part:

The Secretary shall encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary.

This provision does not state that an existing satisfactory concessioner has a right to a preference in renewal of an existing concession contract as a contract right or otherwise. It also does not authorize NPS to grant such a contract right. Rather, it imposes a statutory obligation on NPS (acting for the Secretary of the Interior) to give preference in the renewal of concession contracts to existing satisfactory concessioners.

In contrast, other provisions of the 1965 Act state that they authorize NPS to grant contract rights. Section 3(a) of the 1965 Act states that the Secretary ''may include in [concession] contracts * * * such terms and conditions as, in his judgment, are required to assure the concessioner of adequate protection against loss of investment * * * resulting from the discretionary acts, policies, or decisions of the Secretary occurring after the contract has become effective. * * *'' (Emphasis added.)

In addition, Section 4 of the 1965 Act states that the Secretary ''may grant to such concessioners a preferential right to provide such new or additional accommodations, facilities or services as the Secretary may consider necessary or desirable for the accommodation and convenience of the public.'' (Emphasis added.) Prior to 1979, standard NPS concession contracts contained an express provision that provided a preferential right to additional services.

The 1965 Act, accordingly, clearly distinguished among its provisions that were intended to authorize the establishment of contract rights and provisions that were intended to impose a statutory obligation on the Secretary without establishing a contract right. In furtherance of these authorities and this distinction, existing 1965 Act concession contracts contain a number of contractual provisions authorized by Section 3(a) and Section 4 of the 1965 Act, but make no reference to a preference in contract renewal.

In this connection, NPS notes that, although not required by law to do so, NPS published for public comment in both 1979 and 1992 revisions to its standard concession contract, and, published the final new standard concession contracts in the **Federal Register**. Neither of these standard concession contracts includes a term or condition regarding preference in renewal or even refers to a preference in renewal. Prior standard concession contracts, going back to the passage of the 1965 Act, also do not refer to a preference in renewal.

Accordingly, the 1998 Act's repeal of the 1965 Act's preference in renewal is not ''inconsistent with the terms and conditions'' of NPS standard concession contracts. Rather, the 1998 Act repeals a statutory requirement obliging the government to give concessioners a preference in renewal.

There is also the matter of congressional understanding of the application of Section 415(a) of the 1998 Act to the 1965 Act's preference in renewal. The legislative history of the 1998 Act set forth above (from both the Senate and House of Representatives) expressly describes the 1965 Act's preference in renewal as a ''statutory right'' and states that it is repealed by S. 1693. There is no suggestion in the 1998 Act's legislative history that the repeal does not apply to existing concession contracts.

In this connection, Congress must be presumed to know that the 1965 Act described the preference in renewal as a statutory obligation for the Secretary to perform and that 1965 Act concession contracts, formally published in the **Federal Register** in 1979 and 1993, do not provide or refer to a preference in renewal.

The fundamental argument of incumbent concessioners as to why they retain a preference in renewal of their existing contracts is that the contracts contain an implied term granting a preference in renewal. NPS has duly this position. NPS considers this position wrong for three basic reasons.

First, it is firmly established that a ''promise'' contained in a statute is not binding on the government (or analogous to a contractual promise), since it is presumed that laws are always susceptible to change by future legislatures. As the Supreme Court has put it, the presumption is that a ''law is not intended to create private contractual vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.'' *National R.R. Passenger Corp.* v. *Atchinson Topeka and Santa Fe Ry. Co.,* 470 U.S. 451, 466 (1985) (quoting *Dodge* v. *Board of Education,* 302 U.S. 74, 79 (1937)).

This well-established presumption is grounded in the elementary proposition that the principal function of the legislature is not to make contracts, but to make laws that establish the policy of the state. Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of the legislative body. National RR Passenger Corp., 470 U.S. 451, 465 (internal citations omitted).

The Supreme Court has consistently rejected the argument that the statutory or regulatory regime existing at the time of contract formation is implicitly written into the contract by force of law. To the contrary, the Court has always insisted that, regardless of the state of the law at the time of the contract, the contract itself must affirmatively promise future regulatory treatment in order to create an enforceable obligation against the government to provide such future treatment. As stated in *Bowen* v. *Public Agencies Opposed to Social Sec. Entrapment,* 477 U.S. 41, 52–53 (1986), with respect to commercial contracts, absent an ''unmistakable'' contract provision, ''contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign.'' Id. at 52 (quoting *Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130, 147 (1982)).

NPS also notes that the 1965 Act's preference in renewal imposed a statutory obligation on the Secretary to give existing concessioners a preference in renewal. Section 5, however, unlike Sections 3(a) and (4) of the 1965 Act, makes no mention of any authority to grant concessioners a preference in renewal as a contract right. Authority for a government official to turn a statutory obligation of the official into a contractual right must be provided by

the legislative branch in clear and unmistakable terms. *Home Telegraph & Telephone Co.* v. *Los Angeles,* 211 U.S. 265, 277 (1908). Section 5 of the 1965 Act by no means meets this test.

Finally, even if these considerations are not controlling law, the argument that an implied provision of NPS concession contracts gives the concessioner a contractual right to a preference in renewal is inconsistent with the express terms of almost all current NPS concession contracts and permits with annual gross receipts in excess of $500,000. Almost all of such contracts expressly state (or state in analogous terms) that:

> This Contract [or permit] and the administration of it by the Secretary shall be subject to the laws of Congress governing the Area and rules, regulations and policies whether now in force or hereafter enacted or promulgated. (Emphasis added.)

Accordingly, almost all NPS concession contracts and permits with annual gross receipts in excess of $500,000 expressly state that they are subject to changes in law. The existing concessioners' implied contractual right argument, even if it were otherwise of legal merit, fails under these express terms of NPS concession contracts and permits.

NPS notes that the comments of the general concessioner organization point out that the version of Section 415 of S. 1693 (the bill that became the 1998 Act) that initially passed the Senate referred to ''express'' terms and conditions of 1965 Act concession contracts while the bill as reported out of the House of Representatives and ultimately enacted did not contain the word ''express.'' The comments suggest that this means that Congress intended Section 415 of the 1998 Act to apply to implied, as well as express, terms of 1965 Act concession contracts.

NPS notes, however, that the legislative history of the 1998 Act provides no guidance as to the intentions of the Congress in deleting the word ''express'' from S. 1693. In fact, Senator Thomas, the principal author of S. 1693, in commenting on the competitive results of the bill after the unexplained deletion of the word ''express,'' stated as follows:

> We have eliminated the preferential right of renewal so that there is competition for those services as they are renewed. Cong. Rec., S. 12540, Daily Ed., October 14, 1998. (Emphasis added.)

Clearly, Senator Thomas considered that S. 1693's repeal of the preference in renewal was of immediate and comprehensive effect.

NPS also notes Section 419 of the 1998 Act (described in the 1998 Act as a ''savings provision''). Section 419 was included in S. 1693 at the same time the word ''express'' was deleted from Section 415. Section 419(a) ''grandfathered'' certain existing prospectuses for cruise ship concession permits for Glacier Bay National Park, requiring their award ''under provisions of existing law.'' Section 419(b) then requires that:

> Notwithstanding any provision of this title, the Secretary, in awarding future Glacier Bay cruise ship concession permits for which a preferential right of renewal existed prior to the effective date of this title, shall provide for such cruise ship entries a preferential right of renewal, as described in subparagraphs (C) and (D) of section 403(7). (Emphasis added).

This ''savings'' provision clearly indicates that the 1965 Act's preference in renewal no longer existed as of the passage of the 1998 Act. Moreover, if 1965 Act concession contracts had an implied contractual right of preference in renewal, as argued by existing concessioners, there would have been no need for the Congress to include Section 419(b) in the 1998 Act, that is, to provide a further preference in renewal after the effective date of the 1998 Act for concession contracts that were to be awarded ''under provisions of existing law.'' The general concessioner organization's argument as to the intention of Congress in deleting the word ''express'' from S. 1693 is contradicted by the terms of Section 419.

For these reasons, NPS concludes that it is not authorized under the 1998 Act to promulgate concession regulations that implement a preference in renewal except as expressly authorized by Sections 403(7) and (8) of the 1998 Act. However, the final rule, generally tracking a similar provision in the proposed rule, permits any existing concessioner holding a 1965 Act concession contract that makes express reference to a preference in renewal to request the Director to determine whether such express reference may result in a continuing preference in renewal by operation of law. This right of appeal is discussed further under Section 51.116.

Evaluation of Proposals

Another general concern of commenters was the method contained in the proposed regulations for evaluating concession contract proposals and selecting the best proposal. The commenters objected to the lack of a numerical evaluation method and to the fact that environmental considerations and the amount of franchise fee offered were ''tie-breakers'' in the evaluation system. The commenters argued that these provisions were in conflict with the intent of Congress that consideration of revenue to the United States is subordinate to protection of resources and providing quality visitor services.

NPS does not agree with these perceptions of the consequences of the proposed rule. NPS, however, in the final rule, has accommodated these concerns through several incremental changes, including incorporation of a numerical scoring system into the narrative evaluation methodology contemplated by the proposed rule and by changing the ''tie-breaker'' provision to track the terms of the 1998 Act. The modifications are discussed below in the section-by-section analysis.

Leasehold Surrender Interest

A further general concern was the terms and conditions of leasehold surrender interest. Commenters considered several of the provisions of the proposed regulations to be inconsistent with the 1998 Act and to give NPS too much authority to determine the scope of a concessioner's leasehold surrender interest. NPS, in the final rule, has made a number of incremental changes to the leasehold surrender interest provisions of the regulations to accommodate the commenters' concerns. These are also discussed in the section-by-section analysis. The general concessioner organization and others also made the point that it is not clear which provisions of the regulations regarding leasehold surrender interest will be incorporated as terms and conditions of concession contracts and not be subject to modification by amended regulations or changes in law. The new NPS standard concession contract will make this clear.

2. Section by Section Analysis of Public Comments and Description of Changes in the Final Rule

Subpart A—Authority and Purpose

Section 51.1 What Does This Part Cover?

(a) This subsection has been modified to more closely track the language of the 1998 Act with regard to the purpose of concession contracts and, in response to comments, to reference Section 415(c) of the 1998 Act which states that the 1998 Act does not supersede the requirements of 16 USC 3101 in regard to revenue producing visitor services in Alaska park areas.

(b) A number of comments mentioned commercial use authorizations as described by Section 418 of the 1998 Act and stated that the regulations should have encompassed them. However, the proposed regulations referenced the separate authority of NPS to issue commercial use authorizations. NPS is in the process of drafting regulations for commercial use authorizations and intends to publish proposed regulations for public comment as a matter of policy. These regulations will also address the scope of the statutory exemption granted non-profit organizations by Section 418 of the 1998 Act, an issue mentioned in several comments.

A comment also stated that the term ''incidental visitor services'' should be defined. NPS considers incidental visitor services to be supporting services that must be provided to program participants in order to conduct a related interpretive program.

An individual expressed concern that NPS should not allow non-profit organizations to compete with concessioners. However, some competition of this nature does exist and the 1998 Act does not preclude non-profit organizations from being concessioners. In fact, several existing NPS concessioners are non-profit organizations.

An individual commented on the sentence in this section that states that the Director may not authorize the conduct of visitor services by any means other than a concession contract except as may otherwise be authorized by law. The individual interprets this to mean that under this section visitor services may not be authorized under an historic lease entered into pursuant to Section 111 of the National Historic Preservation Act, as amended. The individual objects to this result. However, the sentence to which the individual objects reflects an express statutory requirement contained in Section 403 of the Act. NPS points out that many historic buildings in areas of the national park system are utilized for visitor service purposes by concessioners. NPS also notes that it is in the process of drafting regulations for the leasing of property under Section 802 of the 1998 Act. These regulations, which NPS intends, as a matter of policy, to publish for public comment, will address the scope of activities that may be authorized under NPS leases as opposed to concession contracts.

This subsection also has been modified to more closely track the language of the 1998 Act with respect to the fact that, unless otherwise authorized by law, concession contracts are to be utilized to authorize the provision of necessary and appropriate accommodations, facilities and services to park area visitors (''visitor services'').

Section 51.2 What Is the Policy Underlying Concession Contracts?

A comment stated that the policies for permitting visitor services in park areas should require a ''balanced and diverse mix'' of prices for services. NPS supports the concept that visitor services should encompass a mix of services (*e.g.,* moderate and low cost accommodations in addition to more expensive facilities). However, Section 51.2 as written paraphrases the statutory policies on visitor services set forth in Section 402 of the Act. NPS considers that decisions as to the scope of services to be authorized under concession contracts should be developed on a case-by-case basis through planning under the general guidance of Section 402 of the Act.

Another comment stated that Section 51.2 should require consideration of the factors specific to the park area to be affected. NPS considers that this thought is implicit in Section 51.2, as the findings required by Section 402 of the Act necessarily must be made on a park-by-park basis.

An individual commented that removal of concession facilities from a park area might damage the park more than leaving the facility there. Again, NPS considers that determinations as to what are necessary and appropriate visitor services, including the possible removal of existing facilities, must be made on a case-by-case basis.

A comment stated that there is no clear definition of visitor services contained in the regulations. However, NPS considers that the visitor services definition (as modified) contained in Section 51.3 in the final rule provides a clear definition of visitor services. The comment also states that a United States Post Office should be considered as providing visitor services and therefore, apparently must be awarded a concession contract. NPS, however, does not consider Post Offices as concession operations within the meaning of the 1998 Act. Finally, the comment states that non-profit cooperating associations that provide visitor services should be subject to the requirements of Section 51.2. NPS notes that all visitor services provided in park areas under the authority of the 1998 Act are subject to the requirements of Section 51.2.

Subpart B—General Definitions

Section 51.3 How Are Terms Defined in This Part?

A number of comments were made concerning the definition of terms used in the regulations. Some of these comments, however, in fact were directed at underlying substantive issues, particularly the repeal of the 1965 Act's preference in renewal (discussed under General Comments) and the scope of a preference in renewal under the 1998 Act (discussed under Subpart E). The comments that specifically concerned the wording of the definitions *per se* are as follows.

The ''1965 Act''

A comment stated that the words ''as amended'' should be added. However, the 1965 Act, although repealed by the 1998 Act, was never amended.

''Concession Contract (or Contract)''

The general concessioner organization requested clarification of this definition with respect to when a concession contract can be something other than a written agreement. NPS has deleted the phrase ''unless otherwise indicated in this part'' in response to this comment.

The general concessioner organization also asked NPS to clarify its position regarding circumstances where an existing concessioner may continue to operate after the expiration of a concession contract. Particularly, the comment requested NPS to make clear that (i) an incumbent concessioner is not required to continue to operate after the expiration of its contract; (ii) that if the concessioner does not choose to continue to operate, NPS must honor the obligations of the expired contract; (iii) that if the concessioner does continue to operate the continuation is to be on the same terms and conditions as the expired contract unless otherwise agreed by the parties; and (iv) the concessioner, if it continues to operate, ''shall not be placed in any worse economic position upon the commencement of the new contract than the concessioner would have been had the new contract commenced upon the original expiration date of the prior contract.''

NPS considers that the first three statements must be examined in the context of particular contracts and need no amplification in the regulations. The last point seems to suggest that a concessioner that continues to operate after the expiration or other termination of a concession contract may be harmed economically by this action. However, as a concessioner is not obliged to continue operations upon the expiration

or other termination of a concession contract (unless the terms of a concession contract otherwise provide), a concessioner's decision to continue operations would seem to obviate any concerns about possible ''economic harm'' resulting from the continued operations. In any event, NPS does not consider that changes to the definition of ''concession contract (or contract)'' are warranted on the basis of these comments. (NPS points out that it uses the phrase ''expiration or other termination'' of a concession contract in this paragraph as the 1965 Act utilizes this terminology. Under the 1965 Act, the ''expiration'' of a concession contract is considered a form of contract termination.)

Several comments also objected to the statement in this definition that concession contracts are not contracts within the meaning of 41 USC 601 *et seq.* (the Contract Disputes Act) and are not service or procurement contracts within the meaning of statutes, regulations, or policies that apply only to federal service contracts or other types of federal procurement actions.

NPS has fully considered these views and disagrees with their conclusions. The Contract Disputes Act, by its terms, applies to procurement contracts. A procurement contract is a contract under which the government bargains for, pays for, and receives goods or services. *YRT Services Corporation* v. *United States,* 28 Fed. Cl. 366, 392, n.23 (1993).

The court in YRT Services concluded that an NPS concession contract for lodging facilities ''did not constitute a procurement'' as NPS is not paying for the [concessioner's] services but is ''collecting fees in exchange for granting a permit to operate a concession business.'' Id.

Several comments on this issue discussed a series of Interior Department Board of Contract Appeals (IBCA) decisions that held that NPS concession contracts are subject to the Contract Disputes Act as procurement contracts. However, several General Accounting Office decisions take a contrary view. NPS has reviewed the IBCA decisions and notes that all but one preceded the decision of the Court of Claims in YRT Services, and all concern 1965 Act concession contracts, not 1998 Act concession contracts. (This final rule, issued under the terms of the 1998 Act, supercedes these IBCA decisions.)

NPS points out that the 1998 Act, unlike the 1965 Act, contains an express statement as to the purposes of NPS concession contracts:

> In furtherance of the findings and policy stated in Section 402, and except as provided by this title or otherwise authorized by law, the Secretary shall utilize concession contracts to authorize a person, corporation or other entity to provide accommodations, facilities and services to visitors to units of the national park system. (Section 403 of the 1998 Act. Emphasis added.)

This statutory provision tracks the reasoning in YRT Services as to why 1965 Act concession contracts are not procurement contracts. The purpose of concession contracts is not to procure goods or services for the government. Furthermore, NPS notes that the existing 36 CFR Part 51, the NPS regulations that implemented the 1965 Act, expressly state that concession contracts ''are not Federal procurement contracts or permits within the meaning of statutory or regulatory requirements applicable to Federal procurement actions.'' (36 CFR 51.1.) The Congress, in passing the 1998 Act, must be presumed to have been aware of this regulatory interpretation and the decision of the court in YRT Services. In fact, it appears that the inclusion of the sentence in Section 403 of the 1998 Act to the effect that concession contracts are contracts that ''authorize a person to provide accommodations, facilities and services'' to park area visitors is a direct confirmation of the position of the court in YRT Services and the NPS interpretation of the 1965 Act contained in the existing 36 CFR Part 51.1. NPS concession contracts do not procure services for the government; rather, they authorize third parties to provide services to park area visitors.

The NPS Organic Act, 16 USC 1 *et seq.*, also expressly recognizes this distinction. 16 USC 17b provides that the Secretary of the Interior is authorized to contract with persons that provide services or other accommodations to the public in national parks to furnish such services or accommodations to the Government without compliance with the 41 USC 5. 41 USC 5 is the title of the United States Code that establishes procurement contract requirements. Accordingly 16 USC 17b makes clear that if the government contracts with a concessioner to provide services and accommodations to the Government (that the concessioner is authorized to provide to the public), the contract is a procurement of services to the government otherwise subject to 41 USC 5. In addition, by implication, this authority also makes clear that a concessioner's authorization to provide goods and services to park visitors is not a procurement contract as the goods and services are not provided to the Government.

NPS, in reviewing this issue, did consider the fact that concession contracts in one sense could be argued to result in ''services'' to the government, *i.e.,* that concession contracts may require the concessioner to repair and maintain government property assigned to a concessioner under the terms of a concession contract. However, these services (repair and maintenance of government property) flow from the assignment (the equivalent of a lease of government property) of property to a concessioner for use in concession operations.

In this connection, the 1998 Act expressly exempts NPS concession contracts from the application of Section 321 of the Act of June 30, 1932 (40 USC 303b), ''relating to the leasing of buildings and properties of the United States,'' thereby permitting NPS to accept the repair, maintenance and improvement of government property from a concessioner instead of collecting cash rent for the use of the property. The legislative history of the 1965 Act (and a related 1962 law) indicates that this provision was included in the 1965 Act (and a related 1962 law) in response to a Comptroller General Opinion that concession contracts are leases. Accordingly, to the extent that the repair and maintenance of assigned property may be considered as ''services'' to the government, these services are recognized by the 1998 Act as an authorized function of the assignment of government property under concession contracts, not as a procurement of services for the government.

For these reasons, NPS does not consider that NPS concession contracts are subject to the Contract Disputes Act or to other statutes that apply only to federal procurement contracts. Accordingly, it has left this statement in the final rule. NPS also points out that it does not consider the solicitation of NPS concession contracts to be subject to the Competition in Contracting Act (''CICA'') as it applies to procurement contracts. YRT Services at p. 392. In any event, even if it were determined that NPS concession contracts are subject to CICA, the express provisions of the 1998 Act describing mandatory NPS concession contracting procedures make CICA inapplicable to NPS concession contract under its own terms. 41 USC 253(a)(1)(1988).

A comment asked whether the term ''concession contract'' refers to ''concession permits'' awarded under the 1965 Act. It does, as indicated in the definition of ''concession contract.''

A sentence has been added to this definition in the final rule to clarify that concession contracts must include terms and conditions as are required by law, this part, or are otherwise appropriate in furtherance of the purposes of this part and the 1998 Act.

''Concessioner''

The definition of concessioner has been modified in the final rule to track the terms of the 1998 Act.

A comment submitted by a municipality that holds a concession contract suggested that this definition be modified to make clear that municipalities may be concessioners. This is clear under the definition in the final rule. The municipality also offered to pay a higher than minimum franchise fee in consideration of not being required to compete for the award of concession contracts. NPS has not accepted this suggestion, as it is impermissible under the terms of the 1998 Act.

''Director''

The term ''Director'' has been modified in the final rule in response to comments that expressed concern that the ''Director'' would be the decision-maker on an appeal from a decision of the ''Director.'' The term Director as used in the regulations applies to the Director personally and duly delegated subordinates of the Director. In circumstances where the rule calls for an appeal to the Director, the appeal must be to a higher authority than the initial deciding official.

''Franchise Fee''

Several comments requested that the term ''and rights'' be included in this definition after the word ''privilege.'' NPS has not made this change as the definition of franchise fee contained in the final rule tracks the terms of the 1998 Act.

''Offeror''

The definition of the term ''offeror'' has been modified in order to make clear that an organization does not have to be formally in existence as of the time of submission of a proposal for a concession contract in order for the proposal to be considered by NPS.

''Possessory Interest''

A comment took issue with the sentence of this definition that states that possessory interest does not include any interest in personal property even though a prior concession contract may have provided a compensable interest in personal property described as ''possessory interest.'' The comment makes the point that ''this is true only to the extent that such property does not come within the definition of possessory interest'' as set forth in the 1965 Act. NPS agrees with this latter statement and has modified the definition accordingly. The comment also suggests that the regulations address the circumstances of the disposition of personal property when a new concessioner is selected for award of an existing concession contract. NPS has done this in Section 51.68 of the final rule.

Other comments objected to the fact that NPS generally does not intend to include in new concession contracts provisions that require a new concessioner to purchase the personal property of a prior concessioner. NPS considers that such provisions in concession contracts are a barrier to competition as a new concessioner is required to buy equipment that it may not need and that may not be in good condition. NPS considers that the marketplace should control in this situation. A prior concessioner may sell its personal property to a new concessioner on a mutually agreeable basis. If agreement cannot be reached, the prior concessioner is free to sell its personal property on the open market. A commenter stated in this connection that the 1965 Act required that new concessioners purchase the personal property of prior concessioners. This was not the case.

''Preferred Offeror''

The general concessioner organization stated that the words ''the Director has determined'' should be stricken from this definition. The basis of the comment is that the existence of a concessioner's status as a preferred offeror is not always subject to the Director's discretion. However, NPS considers that the definition is accurate. The main body of the regulations describes the circumstances under which the Director may determine an existing concessioner to be a preferred offeror. A comment asked whether there ever may be more than one preferred offeror for a qualified concession contract. The answer is no as only one entity can be a concessioner under the terms of a concession contract as of its termination or expiration.

''Prior Concession Contract'' and ''Prior Concessioner''

Several comments suggested changes to these definitions. However, in consideration of these comments, NPS has determined that these definitions are not needed to understand the final rule. The definitions have been deleted in the final rule.

''Qualified Concession Contract''

NPS has included in the general definitions section of the final rule for the sake of clarity the definition of a ''qualified concession contract'' as set forth in the text of the regulation.

''Qualified Person''

One comment suggested adding the word ''conserve'' to the phrase ''protect and preserve'' as used in this definition. The request is based on the statement that the word ''conserve'' reflects language of the 1998 Act and also points out that hunting and fishing, authorized uses in certain park areas, are not considered by some to be consistent with the concept of ''preservation.'' NPS has not made this change as this definition tracks the statutory description of a qualified person contained in Section 403(4)(B) of the 1998 Act. In any event, NPS considers that the statutory language was not intended to alter park area uses such as hunting and fishing where such uses are otherwise permissible.

The definition of ''qualified person'' in the final rule has been modified in accordance with the changes to the definition of the term ''concessioner'' and shortened without changing its meaning.

''Right of Preference''

NPS has modified the definition of ''right of preference'' to more closely track Section 403(7)(C) of the 1998 Act in response to comments concerning the right of preference as described in the proposed regulations.

A comment suggested deletion of the last sentence of this definition, stating that it suggests that NPS can ''defeat'' a right of preference by changing contract terms and conditions. NPS has not made the requested change. The questioned sentence only states that a right of preference does not give a preferred offeror the right to establish or negotiate the terms of a new concession contract. See the discussion under Section 51.33 with respect to the right of NPS to establish the terms and conditions of new concession contracts.

''Visitor Services''

A comment asked NPS to explain why this definition is limited to accommodations, facilities and services that are provided for a fee or charge as this limitation suggests that services provided free to guests are not permissible. This was not the intention of the definition and it has been clarified accordingly. The definition

also has been clarified to state that activities that are ''necessary and appropriate'' are to be determined by the Director under the guidance of Section 402 of the Act. The definition has been further modified to more closely track the terms of the 1998 Act and to clarify that NPS itself may provide ''visitor services,'' *e.g.,* operate campgrounds for visitors, as indicated in this section in the proposed regulations.

Another comment suggested that the regulations should contain language that advises NPS managers as to how the courts have interpreted the term ''necessary and appropriate'' as used in this definition in litigation concerning the 1965 Act. NPS has not accepted this suggestion. Decisions as to what visitor services are ''necessary and appropriate'' for a particular area are necessarily made on a case-by-case basis by NPS with public participation in planning processes as appropriate. NPS takes into account relevant judicial decisions in its planning decisions. However, planning decisions are fact driven. Every park area is different with respect to resources and the types of visitors and visitor needs and desires.

''Responsive Proposal''

NPS has moved the definition of ''responsive proposal'' from Section 51.15 of the proposed regulations to the general definitions section of the final rule for the sake of clarity. It has also modified the definition of ''responsive proposal'' to make clear that the determination is made by the Director.

Subpart C—Solicitation, Selection and Award Procedures

Section 51.4 How Will the Director Invite the Public To Apply for the Award of a Concession Contract?

One comment suggested that the regulations should include procedures and guidelines regarding the contents and scope of a prospectus. NPS considers that the regulations, in accordance with the requirements of the 1998 Act, adequately describe the contents of prospectuses.

This section, in response to a comment from an attorney who argued that rights of an existing concessioner may be impacted by the issuance of a prospectus, has been modified by NPS to clarify that the determinations contained in prospectuses and/or in proposed concession contracts published with prospectuses do not become final NPS administrative decisions until such time as a concession contract is awarded in accordance with this part. NPS also notes that Section 51.47 in the final rule provides an appeal right for concessioners regarding preferred offeror status. Finally, the final rule precludes issuance of a prospectus for a new concession contract earlier than eighteen months prior to the expiration of an existing concession contract that the new contract is to replace, thereby assuring that an existing concessioner does not have to compete for a new contract in circumstances where assessment of the feasibility of the terms and conditions of the new contract would be unduly speculative.

Section 51.5 What Information Will the Prospectus Include?

The general concessioner organization requested that the words ''and enhancement'' be deleted from this section for the reasons discussed in the commenter's statements under sections 51.20 and 51.21. In those sections, the commenter generally objected to the use of environmental enhancement measures as a factor in the selection of concession contract proposals. For the reasons discussed by NPS under those sections, NPS does not agree with the position of the commenter. However, NPS has modified this section to delete references to environmental ''enhancement.''

The general concessioner organization objected to the use of the term ''minimum'' as to the capital investment required by an offeror as referred to in Subsection (a)(5) on the grounds that the 1998 Act does not contain this modifier and its use suggests that NPS is providing itself discretion, ''contrary to the law,'' to accept proposals that offer a higher capital investment than the ''minimum.''

The comment is correct in stating that the 1998 Act does not contain the word ''minimum.'' Rather, the Act states as follows in pertinent part: ''any facilities, services, or capital investment required to be provided by the concessioner.'' NPS does not consider that this section of the Act, referring to capital investment required to be provided by the concessioner, may reasonably be interpreted as forbidding NPS from taking into account in the selection of proposals for a concession contract the relative amount of capital investment an offeror may be willing to provide. Moreover, the amount of capital an offeror is prepared to invest in the park is demonstrably an appropriate proposal selection concern. The level of concessioner investment in many cases may directly relate to the quality of the visitor facilities to be provided or measures to be taken with respect to the protection, conservation and preservation of the resources of the park area.

NPS has included the phrase ''if any'' in the final rule in response to a comment that stated that many NPS concession contracts do not require capital investment by the concessioner.

A comment suggested that the term ''fixed'' be included with respect to ''minimum'' franchise fees. NPS has not made this change. A franchise fee can be in the form of a fixed fee, a percentage of gross receipts, or other measures as may be described in a concession contract. The regulation does not need to amplify this further.

A comment suggested that the word ''ensure'' be changed to ''assure'' in Section 51.5(a)(4). NPS has not made this change as the word ''ensure'' comes from Section 403 of the 1998 Act.

A comment stated that subsection (e) should make clear that any subfactor set forth in a prospectus must be a subset of the principal selection factor to which it relates. NPS agrees with this comment but considers the regulation is clear in this regard.

A comment suggested that subsection (f) be clarified to acknowledge that some information provided to the Director by concessioners is not subject to public release as confidential. NPS has not accepted this suggestion for the reasons discussed under section 51.113. However, NPS has amended this subsection to fully track Section 403(3)(G) of the 1998 Act that requires NPS to include in concession contract prospectuses:

> Such other information related to the proposed concession operation as is provided to the Secretary pursuant to a concession contract or is otherwise available to the Secretary, as the Secretary determines is necessary to allow for the submission of competitive proposals.

In addition, NPS has moved to this subsection from Section 51.113 (which has been deleted in the final rule), certain information that NPS considers is necessary (where applicable) to allow for the submission of competitive proposals.

A comment suggested that the ''estimate'' of leasehold surrender interest value to be contained in a prospectus should be provided by the existing concessioner. NPS has not accepted this suggestion. It would be an obvious conflict of interest for an existing concessioner to estimate the value of its own leasehold surrender interest for competitive selection purposes.

A comment suggested that prospectuses should set forth all of the fees a concessioner may be required to pay, not just franchise fees. NPS

considers that this section, which refers to franchise fees and other forms of consideration to be paid to NPS under the new contract, meets the concerns of this comment.

NPS has modified this section in the final rule to make clear that concession contracts may contain terms, where appropriate, incorporating measurable performance standards as suggested in general terms by commenters.

Section 51.6 Will a Concession Contract be Developed for a Particular Potential Offeror?

A law firm suggested a change to this section. However, as the comment refers to the ''last paragraph'' of this section and the section only contains one sentence, it appears that the reference to Section 51.6 was in error. NPS was not able to identify the section to which the comment was intended to apply.

A comment suggested that this section be amended to make clear that it does not preclude consultation with an existing concessioner as to the proposed content of a prospectus. NPS has amended this section to indicate that consultations with an existing concessioner may occur but that the concessioner may not be provided any information as to the content of a proposed or issued prospectus that is not available to the general public.

A comment suggested that the phrase ''as they relate to the visitor services to be provided'' be added after ''requirements of the Director'' in this section. NPS has not made this change. The term ''requirements'' as used in this section is not limited to visitor services requirements.

Section 51.7 How Will Information Be Provided to a Potential Offeror After the Prospectus Is Issued?

A comment suggested that NPS should hold meetings with potential offerors as a means to ensure that information is equally shared. NPS, in fact, routinely does hold offeror information meetings after the issuance of concession contract prospectuses, particularly with respect to larger contracts. This practice will continue under the final rule, subject to applicable administrative guidelines.

Section 51.8 Where Will the Director Publish the Notice of Availability of the Prospectus?

A comment suggested that NPS should also provide notice ''directly to the existing concessioner, both because such concessioner is a logical bidder and because a smooth bidding process requires the incumbent to be apprised of the timing and particulars of the offering.''

NPS is unaware of any occasion where an existing concessioner was not aware of the issuance of a prospectus concerning the continuation of the concessioner's operations. NPS, therefore, does not see a need to make this change even if it was otherwise considered appropriate.

A comment suggested that the word ''may'' in this section be changed to ''shall'' in order to ensure even-handed solicitation practices. NPS has not made this change as the decision is discretionary.

A comment suggested that notice of the concession opportunity also be included in the **Federal Register**. NPS has not accepted this suggestion. Federal Register publication is expensive and may not significantly increase public awareness of the concession offering. The costs of publication outweigh the limited benefits of publication.

A comment suggested that NPS should maintain a list and notify persons who have expressed interest in concession opportunities. NPS does this now and intends to continue to do so as a matter of administrative practice.

Section 51.9 How Do I Get a Copy of the Prospectus?

A comment suggested that the word ''may'' in this section be changed to ''shall.'' NPS has not accepted this suggestion as it generally intends to impose a fee for prospectuses only when it anticipates that a large number of requests for copies of a prospectus will be received.

Section 51.10 How Long Will I Have To Submit My Proposal?

A comment suggested that this section should contain guidance as to what constitutes circumstances that would make a shorter than normal response time appropriate. As circumstances may vary greatly, NPS has not made this change. However, in general, a shorter time period is appropriate for smaller concession contracts where potential offerors are likely to be local to the park area and familiar with the circumstances of the concession opportunity.

A comment also suggested that the sixty-day usual response time for submission of proposals be changed to ninety days. Another comment recommended one hundred and twenty days. NPS has not accepted these suggestions as it considers that sixty days is a reasonable response time for routine NPS concession contracting opportunities and does not wish to unduly expand the length of the concession contracting process. In addition, NPS may, under the terms of this section, increase the time if determined appropriate.

Section 51.11 May the Director Amend, Extend, or Terminate a Prospectus or Solicitation?

Several comments addressed this section. They criticize the fact that the Director's right to cancel a concession contract solicitation at any time prior to award of the contract contains no guidelines as to when such a cancellation may occur and that an explanation of a cancellation is not required. One suggested that a cancellation should be only ''for cause.'' The comments also requested an ''appeal right'' in the event of a cancellation. In response to these comments, NPS has included in this section a sentence describing the circumstances under which a concession contract solicitation may be cancelled. NPS has not accepted the suggestion of an ''appeal right.'' NPS does not consider that any person has an entitlement to the issuance of a concession contract solicitation and that, therefore, the cancellation of a solicitation in and of itself, a discretionary decision by NPS as indicated in the final rule, does not affect the rights of any person. (NPS has changed the term ''termination'' of a solicitation to ''cancellation'' in the final rule as ''cancellation'' is the usual terminology.)

Section 51.12 Do I Have Any Rights If the Director Amends, Extends or Terminates a Prospectus or Solicitation?

Several comments addressed this section. One suggested that an amendment to a concession contract solicitation should only be for ''cause.'' This, of course, is the case. An amendment would be made by NPS only if circumstances called for an amendment. Another comment suggested that the phrase ''except for any existing rights'' be included at the beginning of this section. However, NPS does not consider that this section as written could be construed as affecting the existing legal rights of any person, as discussed under the previous section.

The final rule has combined Section 51.12 with Section 51.11 for the sake of clarity. Section 51.12 has been deleted in the final rule.

Section 51.13 (Section 51.12 in the final rule) Are There Any Other Procedures That I Must Follow or That Apply to the Solicitation or to the Selection of the Best Proposal?

Several comments expressed concern that NPS, by referencing a lottery system in this section, intended to generally select concessioners by lottery. This is not the case. The use of a lottery was intended to apply only in very limited circumstances. However, in light of other changes made in the regulations with respect to selection procedures (discussed in the next several paragraphs), NPS does not consider that mention of a lottery system is appropriate in the final rule. Reference to it has been deleted from the regulations.

A number of comments criticized NPS for not including in the proposed regulations ''simplified procedures for small, individually-owned, concession contracts'' as called for by Section 403(1) of the 1998 Act. This section of the proposed regulations, however, did incorporate such simplified procedures, stating that the Director will include simplified solicitation and/or information requirements in prospectuses for concession contracts that are likely to be awarded to a sole proprietorship. NPS notes that, because of the express statutory requirements of the 1998 Act prescribing concession contract solicitation procedures, it is not possible to establish in general a greatly simplified regulatory solicitation procedure for smaller concession contracts. NPS does not consider that Section 403(1) was intended to repeal by implication the numerous statutory requirements regarding the selection process set forth in the 1998 Act. Rather, NPS considers that the simplified procedures referred to in the 1998 Act relate to administrative practices utilized by NPS and any regulatory procedures NPS may adopt in furtherance of the 1998 Act. In any event, NPS considers that the basic elements of the 1998 Act with respect to solicitation procedures, *i.e.,* issuance of a prospectus, evaluation of proposals under specified criteria, and selection of the best proposal, necessarily have to be contained in any selection process, whether or not legally required. Accordingly, the greatest opportunity for simplified procedures is with respect to the information requirements of prospectuses.

NPS, in the development of prospectuses for smaller concession contracts, intends to limit as appropriate the information that needs to be submitted by offerors and the number of subfactors and related information requirements applicable to the principal selection factors. In this way, although the solicitation process will follow the statutory requirements for concession contracting, the paperwork burden will be significantly reduced for smaller concession opportunities.

In addition, NPS has provided for the possible elimination with respect to smaller concession contracts of the secondary selection factor (quality of environmental program) contained in Section 51.17(b)(1) of the final rule, thereby simplifying the selection procedures for smaller concession contracts. NPS has made corresponding changes to Section 51.12 in the final rule to make clear its intentions with respect to simplified procedures for smaller concession contracts.

A municipality that holds a concession contract suggested that the term sole proprietorship be amended to include local governments. NPS does not consider this lawful under the Act as the term ''individually owned'' clearly refers to a business, not a governmental unit.

Section 51.14 (Section 51.13 in the final rule) When Will the Director Determine If Proposals Are Responsive?

A comment suggested that a time limit be adopted as to when NPS must determine a proposal to be non-responsive. NPS has not accepted this suggestion in light of the varying complexity of concession contract proposals. This section has been changed in the final rule to make clear that a determination of responsiveness must be made prior to or as of the selection of the best proposal.

Section 51.15 (Deleted in the final rule) What Is A ''Responsive Proposal?''

A comment suggested that the definition of a responsive proposal needs to be more clearly articulated. NPS has made a change to the definition (discussed under Section 51.3). The commenter's real concern, however, appears to be that the commenter considers that the requirement for submission of a responsive proposal deprives offerors of the ability to object to any of the terms of the solicitation or to submit a conditional proposal. The commenter objected to this as it wishes to have the right to disagree with the terms of the solicitation or the new concession contract, in other words, to disagree with the minimum requirements of the prospectus. NPS does not agree with this point of view. NPS determines the nature and scope of proposed new concession opportunities. They are not a matter of negotiation with prospective offerors. This is made clear by Section 403(3)(A) of the 1998 Act that states that a prospectus shall include the ''minimum requirements'' of the solicited contract. The 1998 Act also describes certain of these ''minimum requirements'' in Section 403(3).

However, NPS, in response to this comment, has added a sentence to Section 51.15 in the final rule that makes clear that offerors are permitted to suggest changes to the terms and conditions of a concession contract so long as they agree to be bound by the terms and conditions of the solicitation.

NPS has moved the definition of ''responsive proposal'' in the final rule to the general ''definitions'' section, Section 51.3, and deleted this section in the final rule.

Section 51.16 (Section 51.14 in the final rule) What Happens If No Responsive Proposals Are Submitted?

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Section 51.17 (Section 51.15 in the final rule) May I Clarify, Amend or Supplement my Responsive Proposal After It Is Submitted?

A comment suggested that this section be amended to delete the word ''responsive.'' The word has been eliminated from the first sentence. NPS considers, in agreement with the comment, that the Director should have the discretion (but not the obligation) to allow an offeror to clarify a non-responsive proposal. NPS has added a sentence to this section explaining that ''clarification'' of a proposal refers to making clear any ambiguities that may have been contained in a proposal, not a right to substantively amend or supplement the terms of a proposal.

A comment suggested that permitting amendment of proposals after the submission date may lead to an auction of concession contracts. NPS has not changed the regulation in response to this comment as the overall terms of the regulations preclude an ''auction'' of concession contracts. However, in response to this comment, NPS has added a sentence to clarify that permitted amendments of proposals are limited to correcting aspects of proposals resulting from a general failure of offerors to understand requirements of the prospectus or to generally fail to submit required information. Amendments are not permitted for the purpose of allowing a particular offeror or offerors to correct proposal deficiencies that were not generally common to all proposals received.

Section 51.18 (Deleted in the final rule) How Will the Director Select an Offeror for Award of the Concession Contract?

As discussed in the response to ''General Comments,'' a number of comments were received that criticized the evaluation and selection process that was contained in the proposed regulations. The comments generally focused on three concerns. The first was that the evaluation was not based on a numerical rating system. The second was that the ''tie-breaker'' concept was inappropriate and inconsistent with the intentions of the 1998 Act with respect to franchise fees. The third was that the proposed regulations gave environmental aspects of proposals undue weight in the selection process. NPS has modified the regulations to accommodate all of these concerns as discussed below.

In this connection, Section 51.18 has been deleted in the final rule. The method under which the Director will select the best proposal in response to a prospectus is contained in Section 51.16 in the final rule (as discussed further under Section 51.21).

A comment suggested that NPS should not permit members of evaluation panels to be NPS officials that are acquainted with the incumbent concessioner. NPS has not accepted this suggestion. NPS evaluation panels usually include officials from the applicable park area in order to ensure that the circumstances of the park area are understood in the evaluation process. The fact that an official may be acquainted with the existing concessioner is not considered inappropriate by NPS. The contract is awarded to the offeror that submits the best overall proposal.

Section 51.19 (Deleted in the final rule) How Will the Director Select the Best Proposal?

This section also has been deleted in the final rule. Section 51.16 of the final rule describes the method for selecting the best proposal.

Section 51.20 (Section 51.17 in the final rule) What Are the Five Principal Selection Factors?

Several comments objected to the fact that this section and other sections refer to five principal selection factors instead of four as mentioned in the 1998 Act.

The regulations encompass five principal selection factors because one of the statutory factors, Section 403(5)(i), is, in fact, a double factor. This selection factor in the 1998 Act refers to ''the responsiveness of the proposal to the objectives of protecting, conserving, and preserving resources of the unit of the National Park System and of providing necessary and appropriate facilities and services to the public at reasonable rates.'' (Emphasis added). There are unmistakably two distinct factors here, resource preservation and appropriate visitor services. For the sake of clarity, the regulations separate them. To the extent that the commenters may consider that this clarification somehow results in a change to the relative weight of the selection factors, NPS notes that the 1998 Act gives NPS discretion to weight the principal selection factors. NPS could have achieved the same result as splitting selection factor (1) into two factors by doubling the weight given to principal selection factor one so that both of its distinct elements would be of equal weight to the other selection factors. NPS considers, however, that better clarity is achieved by separating principal selection factor (1) into two factors. NPS has changed this section to refer to selection factors in general to conform to changes made to the secondary factor section of the proposed rule in response to public comments.

This section has also been changed in the final rule to delete reference to environmental enhancement as an element of principal selection factor (1) as requested by several comments. As discussed below, the matter of the ''environmental enhancement'' content of proposals is an element of a secondary factor in the final rule, also as requested by several commenters. See Section 51.17(b)(1). NPS has also made a change to this secondary factor by permitting it to be excluded from prospectuses in certain circumstances. See the discussion under Section 51.13. It has also rephrased the term ''environmental enhancement'' programs for clarification purposes. NPS considers that a secondary selection factor that is concerned with the conservation of resources in general is appropriate. Park areas are not immune from general environmental impacts. Progressive environmental management practices such as energy conservation and recycling ultimately assist in the preservation of park resources as well as in general environmental enhancement.

This section has also been changed in the final rule to delete the word ''quality'' in selection factor two as suggested by a commenter as the word ''quality'' is not contained in the related statutory provision. NPS, however, does not consider that this change results in any change in the meaning of the selection factor.

NPS, in response to a comment, included the phrase ''if any,'' after the term franchise fee in the text of principal selection factor (5) to reflect the fact that it is possible that a concession contract will not call for a franchise fee in special circumstances. NPS did not add the phrase ''and/or other forms of financial consideration'' to the last two sentences of this selection factor as requested by a commenter as this would be inconsistent with the statutory provision concerning franchise fees.

A comment requested that the word ''facilities'' be included in the selection factor concerning past experience. NPS has not made this change as the term used in the regulation, ''visitor services,'' is defined in Section 51.3 as including ''facilities.''

NPS has modified Section 51.20(a)(5) (Section 51.17(a)(5) in the final rule) to delete its last two sentences as unnecessary in light of the terms of principal selection factor (5) (which repeat the statutory mandate of Section 403(5)(iv) of the 1998 Act regarding consideration of franchise fees in awarding concession contracts).

A comment suggested that the term ''park area'' is ambiguous as used in this section, i.e., that it is not clear whether it refers to areas outside of park boundaries. NPS has not made a change in response to this comment. The term is generally intended to apply to property within park boundaries.

A commenter suggested that an offeror should be rated on its commitment to further the goals of the park area and to operate in a manner that is supportive of the ideals of the park. NPS considers that these interests are implicit in the established selection criteria.

Finally, several comments requested changes in the wording of the principal selection factors to reflect particular interests such as historic preservation, environmental enhancement and the circumstances of particular park areas. NPS, however, has retained the terms used by the statute as appropriate for the general regulations. Particular prospectuses can address special concerns and the circumstances of the applicable park area through subfactors or secondary factors.

Section 51.21 (Section 51.16 in the final rule) How Will the Director Apply the Five Selection Factors and Select the Best Proposal?

This section has been modified by NPS to incorporate a numerical scoring system while retaining the basic approach of evaluating on the basis of narrative analysis. A numerical scoring system was recommended by a number of commenters (discussed under

''General Comments''). Under the numerical scoring system, the first four principal selection factors may score as high as five points each. The fifth principal selection factor, the franchise fee offered, may only receive up to four points, reflecting that, pursuant to the 1998 Act, revenue to the United States is subordinate to the objectives of protecting, conserving, and preserving resources of the park area and of providing necessary and appropriate visitor services to the public at reasonable rates. The secondary factor concerning ''environmental enhancement'' activities (rephrased for clarification in the final rule) may receive up to three points. Any additional secondary factors contained in a prospectus may not have an aggregate score of more than three total points.

One comment suggested that the basis of a numerical point score system should be 100 points. However, NPS considers that evaluation of proposals on the basis of such a large scale results in scores that are difficult to explain, e.g., why did this proposal get rated as 74 while this one received a score of 76? NPS believes that scoring proposals on a lower scale such as contained in the final rule, based on the required narrative explanation of the basis for the score, leads to more credible, objective evaluations. However, the point score system described in the final rule does permit an evaluation panel to award whole number or fractional points, e.g., 2 points, 2.5 points, etc., as appropriate in the circumstances of a particular evaluation. A comment suggested that the same member of an evaluation panel evaluate all proposals with respect to particular selection factors. NPS has not accepted this suggestion. To the contrary, it may be better to have several persons evaluate varying elements of a proposal.

Another comment suggested that the franchise fee offered not be considered in an evaluation of proposals unless two or more proposals were determined as substantially equal. This suggestion has not been accepted as contrary to the intentions of the 1998 Act.

Section 51.22 (Deleted in the final rule) When Will the Director Apply Secondary Factors?

This section has been deleted from the final regulations as unnecessary in light of the changes made to sections 51.20 and 51.21. However, the last sentence of this section has been included in Section 51.17(b)(2) in the final rule. In addition, NPS has included reference to minority and women-owned businesses in this section in the final rule consistent with NPS policy and in response to a suggestion to this effect from a commenter. In connection with this section, NPS recognizes that minority, women and Native American-owned businesses are severely under-represented in the concessioner community. To remedy this, NPS strongly encourages minority, women and Native American-owned businesses to apply for concession contracts. In order to encourage this, NPS will provide interested persons and firms maximum allowable information and assistance by:

(1) Making reasonable efforts to include on all source lists of potential concessioners, minority, women and Native American-owned firms that have expressed interest in becoming a concessioner;

(2) Seeking the advice and assistance of the Minority Business Development Agency in locating and counseling these firms, as well as providing public information on concession opportunities to these firms; and

(3) Providing advice and counseling to these firms on how to participate in concession contract opportunities.

Section 51.23 (Deleted in the final rule) How Will the Director Select the Best Proposal If Two or More Proposals Are Assessed as Substantially Equal after the Director Has Applied the Principal and Secondary Factors?

This section has been deleted from the final regulations in light of the changes made to Sections 51.20 and 51.21. Section 51.16(c) of the final rule describes how the Director will select the best proposal in the event that two or more proposals receive the same highest score after evaluation under Section 51.16(a) and (b).

NPS notes, as discussed in ''General Comments,'' that a number of comments objected to the ''tie-breaker'' concept contained in this and other sections of the proposed regulations. A concern in this connection was that the tiebreaker concept might lead to franchise fee bidding. The tiebreaker concept has been deleted from the final rule, both with respect to environmental enhancement and franchise fee considerations. In the event that two or more proposals receive the same highest numerical score after evaluation by NPS, the final rule provides that the Director will select as the best proposal the proposal (among those with the same highest score) that the Director considers will, on an overall basis, best achieve the purposes of the 1998 Act. This change is consistent with Section 403(5) of the 1998 Act that calls for NPS to select the best proposal after considering the statutory principal selection factors and any secondary factors that may be included in a prospectus.

Section 51.24 (Section 51.18 in the final rule and retitled) What Happens If a Proposal Is Rated as ''Unacceptable'' Under Any of the First Four Principal Selection Factors or If the Offeror Is Not a Qualified Person?

A comment suggested that this section should expound upon or give examples as to when a proposal may be considered unacceptable.

NPS, in response to this and other criticisms, has modified this section in the final rule to delete its first sentence and to add to it the balance of the provisions of Section 403(4)(B) of the 1998 Act, i.e., that a proposal must be rejected if it is not responsive to the general objectives of resource protection and proper visitor service. The modified provision, in addition to inclusion of the responsive proposal requirement, contains only the requirements of Section 403(4)(B) of the 1998 Act. NPS does not consider that further amplification of this statutory provision is necessary.

Section 51.25 (Section 51.19 in the final rule) Must the Director Award the Concession Contract That Is Set Forth in the Prospectus?

A comment made the point that the 1998 Act does not permit material amendments to the terms and conditions of a concession contract as set forth in the prospectus. NPS has amended this section in the final rule to reflect this comment.

Section 51.26 (Section 51.20 in the final rule) Does This Part Limit the Authority of the Director?

Several comments expressed concern about this section, asserting that the Director should not have unconditioned authority to determine when to solicit or award a concession contract, to cancel a solicitation, or to terminate a concession contract in accordance with its terms. NPS, however, considers that the provision is a proper statement of its authority and responsibility for the administration of concession contracts under the terms of the 1998 Act. Section 404(10) of the 1998 Act states that ''nothing in this title shall be construed as limiting the authority of the Secretary to determine whether to issue a concession contract or to establish its terms and conditions in furtherance of the policies expressed in this title.''

Section 51.27 (Section 51.21 in the final rule.) When Must the Selected Offeror Execute the Concession Contract?

A comment suggested that the time frame for execution of the concession contract by the concessioner should be specified as thirty days in all cases. NPS does not agree with this, as, given the varying type and scope of concession contracts, it needs to retain flexibility as to the time for execution by the selected offeror.

A comment suggested that if the selected concessioner does not receive a concession contract from NPS within ninety days from the date of the selection of the best proposal, or within ten days of the commencement of the contract period, whichever is later, it should have the right to withdraw its proposal. NPS has not included the ninety-day suggestion in the final rule because there may be circumstances in which NPS would not be able to issue a final contract in the specified time.

Section 51.28 (Section 51.22 in the final rule and retitled.) After the Selected Offeror Executes the Concession Contract, When May the Director Execute the Concession Contract?

A comment asked whether the gross receipts referred to in this section are the gross receipts of the concessioner or the franchise fees received by NPS from concessioners. The gross receipts referred to in this section are the gross receipts of the concessioner.

A sentence has been added to this section in the final rule stating that the NPS may execute a concession contract that is not required to be submitted to the Congress at any time after selection of the best proposal and execution by the concessioner.

Subpart D—Non-Competitive Award of Concession Contracts

Section 51.29 (Section 51.23 in the final rule) May the Director Extend an Existing Concession Contract Without a Public Solicitation?

A comment stated that this section should not be used to delay competitive bidding for existing contracts that have already been extended. NPS notes, however, that it does not intend to unduly delay competitive solicitations of concession contract proposals for a concession contract and that the extension authority provided by this section is limited as to when it may be exercised, *i.e.,* that the extension is necessary to avoid interruption of visitor services. NPS, however, has added a sentence to this section making clear that extensions under the 1998 Act in excess of an aggregate of three years are not permissible. It has also added a sentence requiring that notice of an extension be must published in the **Federal Register** thirty days in advance of the award of the extension (except in emergency situations).

Another comment suggested that this section be amended to provide the public with an opportunity to comment on the proposed extension of any concession contract. NPS notes that the 1998 Act does not require public notice in these circumstances. Moreover, NPS considers that public comment is not appropriate in light of the limited term of extensions and the limited circumstances in which a concession contract may be extended non-competitively.

Section 51.30 (Section 51.24 in the final rule) May the Director Award a Temporary Concession Contract Without a Public Solicitation?

A comment made the same point discussed above regarding public notice of an intention to extend concession contracts. NPS has also accepted the suggestion of requiring public notice of an intention to award a temporary concession contract. A sentence to this effect has been included in the final rule.

NPS has also clarified this section to make clear that that temporary concession contracts cannot be extended and may be issued for only a three year term in the aggregate with no ability to issue further temporary contracts for the continuation of the related visitor services. In addition, this section has been clarified to make clear that temporary concession contracts may not be awarded to continue to authorize the continuation of visitor services provided under an extended concession contract.

However, Subsection (b) of this section in the final rule makes a special exception to this latter requirement. It permits the Director to award a temporary concession contract to continue the visitor services provided by an extended concession contract if the concession contract was in effect as of November 13, 1998, and had been extended by that date or was due to expire by its terms by December 31, 1998, and was subsequently extended. This special rule is needed because more than 280 NPS concession contracts in effect as of November 13, 1998, were already extended or were due to expire by December 31, 1998. Due to limited resources, it may not be possible for NPS to award new concession contracts to replace all of these extended contracts within the three year extension period permitted by the 1998 Act. The Director, however, may not award a temporary concession contract in these circumstances unless the Director personally determines that the award is necessary to avoid interruption of visitor services and that all reasonable alternatives to the award of the temporary contract have been considered and found infeasible. The section in the final rule also requires the Director to follow the notice procedures set forth in 51.29 in the final regulations before awarding a temporary concession contract in these circumstances

The general concessioner organization objected to the last sentence of this section that concerns the status of the holder of a temporary concession contract with respect to a preference in renewal. The comment stated that this section should be amended to state that if a ''permanent'' concessioner is extended on a temporary basis by a temporary concession contract that its right of preference, if any, will be recognized when the temporary contract expires. NPS concurs with this suggestion (except for its anomalous reference to a ''permanent'' concessioner) and has amended this section accordingly.

Section 51.31 (Section 51.25 in the final rule) Are There Any Circumstances in Which the Director May Award a Concession Contract Without Public Solicitation?

A comment stated that NPS should include a substantive discussion as to how it intends to interpret and administer this section. NPS notes in this connection that the language of the section tracks a related statutory provision, Section 403(11)(C) of the 1998 Act. Given that it is impossible to describe prospectively what ''extraordinary circumstances'' may exist under which ''compelling and equitable considerations'' require the award of a concession contract to a particular person in the public interest, thereby permitting the non-competitive award of a full term concession contract, NPS does not believe that further regulatory guidance is generally practicable. However, NPS notes that the legislative history of the related statutory provision makes clear that the occasions when NPS determines that compelling equitable circumstance warrant award of a concession contract to a particular party should be extremely rare. The legislative history further states that ''indisputable equitable concerns are to be the determinant of such circumstances.'' S. Rep. No.105–202, at p. 33 (1998).

NPS has included this last sentence in the final rule. It has also made a change

to clarify that the required notice must identify the person to whom the contract is to be awarded. In addition, it has changed the notice period in the final rule to sixty days. Finally, the final rule requires that the Secretary of the Interior approve any such contract award in addition to the Director.

A local government that is a concessioner (along with numerous comments from individuals in support of the position of the local government) suggested that this section be amended to permit non-competitive awards of concession contracts to governmental entities. NPS does not consider this to be within its legal authority under the Act even if otherwise appropriate.

Another comment requested that this section be clarified to make clear what official initiates a determination to award a concession contract under this authority. Under current internal delegations, the initiating official generally would be the Superintendent of the park area in question. However, no amendment is needed in this regard, as the regulations make clear that the term ''Director'' applies to subordinates of the Director with appropriate delegated authority.

One commenter requested that a clear direction be given as to whom it should contact in order to obtain the award of a concession contract under this section. The comment implies that a person has a right to a non-competitive award of a concession contract. This is not the case. The award of a contract under this section is in the discretion of NPS under the limited circumstances described in this section.

Subpart E—Right of Preference

As discussed above, a number of comments were received concerning this subpart to the effect that it fails to recognize that existing concessioners have a contractual right to a preference in renewal under 1965 Act concession contracts. The following discussion of comments relates only to the substance of procedures relating to a right of preference under the 1998 Act, not as to whether existing satisfactory concessioners under 1965 Act concession contracts have a contractual right of preference in renewal (discussed under ''General Comments'').

NPS has added in the final rule for clarity a new section (Section 51.27) explaining what a right of preference is under the 1998 Act (in accordance with the definitions in Section 51.3). NPS has also split Subpart E of the proposed regulations into two subparts in the final rule, Subpart E concerning the operation of a right of preference and Subpart F describing how a concessioner obtains a right of preference. NPS has also rearranged the order of the sections as contained in the proposed regulations to conform to the content of the new subparts as contained in the final rule. These changes are editorial, not substantive.

Section 51.32 (Section 51.50 in the final rule and retitled) Does the Existence of a Preferred Offeror and a Possible Right of Preference Limit the Authority of the Director to Establish the Terms of a Concession Contract?

A comment stated that this section gives NPS unilateral authority to modify the terms of existing concession contracts. NPS considers this an obvious misreading of this section but has added the word ''new'' to this section to resolve any ambiguity in this connection.

Section 51.33 (Section 51.36 in the final rule) What Three Conditions Must Be Met Before the Director Determines That a Prior Concessioner is a Preferred Offeror?

Several comments expressed concerns about this section to the effect that it provides NPS the ability to deprive a concessioner of a right of preference by amending the facilities and services authorized by a new concession contract to materially differ from those authorized by the prior concession contract. Although this was not the intention of NPS, the concern has been addressed in the final rule.

To understand the issue, the relevant provisions of the 1998 Act must be examined. The 1998 Act states as follows in pertinent part about the right of preference:

> As used in this title, the term preferential right of renewal [''right of preference'' as defined in the proposed regulations and final rule] means that the Secretary of the Interior, subject to a determination by the Secretary that the facilities or services authorized by a prior concession contract continue to be necessary and appropriate within the meaning of section 402, shall allow a concessioner qualifying for a preferential right of renewal the opportunity to match the terms and conditions of any competing proposal which the Secretary determines to be the best proposal for a proposed new concession contract which authorizes the continuation of the facilities and services provided by the concessioner under its prior contract. Section 403(7)(c) of the 1998 Act. (Emphasis added).

In addition, Section 403(10) of the 1998 Act states:

> (10) Nothing in this section shall be construed as limiting the authority of the Secretary of the Interior to determine whether to issue a concession contract or to establish its terms and conditions in furtherance of the policies expressed in this title.

Accordingly, a right of preference under the 1998 Act only exists if the new concession contract ''continues'' the facilities and services provided under a prior concession contract. In this connection, NPS clearly has the authority under Section 403(10) of the 1998 Act to establish the terms and conditions of new concession contracts in furtherance of the purposes of the 1998 Act, even if any changes made may mean that the facilities and services authorized under a prior concession contract are not continued under a new concession contract. The concern of the commenters is that NPS will abuse this authority in order to deprive incumbent concessioners of a right of preference.

The proposed regulations state in Section 51.33(a) that in order for an otherwise eligible prior concessioner to obtain a right of preference to a new concession contract, the new concession contract must provide only for the continuation of the visitor services authorized under the prior concession contract. In addition in this connection, the proposed regulations state that the visitor services to be continued under the new contract may be expanded or diminished in scope but may not materially differ in nature and type from those authorized under the prior concession contract. NPS considers that this section properly reflects the intentions of the 1998 Act and properly reflects the discretion vested in NPS under the 1998 Act in this connection.

However, in response to the comments of existing concessioners, NPS has deleted the word ''only'' from Section 51.33(a) in conformance with Section 403(7)(C) of the 1998 Act.

This change appears in Section 51.37 in the final rule. NPS, for editorial purposes, has moved the right of preference condition regarding continuation of visitor services in a new concession contract from this section to Section 51.37. This is because the nature of the new concession contract (*i.e.,* whether it ''continues'' the previous visitor services) is more logically an element of determining what contracts are qualified new concession contracts. Moving this requirement to Section 51.37 in the final rule did not alter its meaning with respect to the circumstances in which an existing concessioner is entitled to a right of preference.

As a conforming amendment, Section 51.36 in the final rule has been clarified to state affirmatively that to be a preferred offeror the applicable new concession contract must be a qualified

concession contract. NPS has also modified this section in the final rule to clarify that a qualified prior concession contract for purposes of this section refers only to whether the prior concession contract was an outfitter and guide concession contract in accordance with the terms of the 1998 Act, not to the level of its gross receipts. It is possible that a prior concession contract with annual gross receipts in excess of $500,000 may be estimated to have less than $500,000 in annual gross receipts under the new concession contract, thereby providing a right of preference to the holder of the prior contract if otherwise qualified.

The general concessioner organization requested that a 50% test be incorporated into the regulations, *i.e.*, that if the new contract authorized the continuation of no less than 50% of the facilities and services of the prior concession contract, that the right of preference would obtain. NPS does not consider this suggestion to be within its authority under the 1998 Act as the 1998 Act states that there must be a continuation of the facilities and services, not a continuation of half of the facilities and services. Even if this change were within its authority under the 1998 Act, however, NPS considers that it would be inappropriate in light of the policies of the 1998 Act regarding competitive award of concession contracts.

NPS considers that the changes made to Section 51.33(a) in the final rule duly accommodate the concerns of the commenters.

Section 51.34 (Section 51.37 in the final rule) How Will the Director Determine That a Concession Contract Is a Qualified Concession Contract?

One comment suggested that the $500,000 figure contained in this section be subject to upward adjustment based on inflation as measured by the Consumer Price Index. However, the 1998 Act states the $500,000 figure with no reference to inflation while elsewhere the Act specifies that inflation is to be taken into account in the calculation of certain figures. NPS considers that adding an inflation adjuster to the $500,000 figure is not authorized by the 1998 Act. If it were authorized, NPS considers that such a change would be inappropriate in light of the competitive award objectives of the 1998 Act.

Another comment stated that the term ''first calendar year'' as used in this section is ambiguous, *e.g.*, if a contract is awarded mid-year, one may construe the period for calculating the gross annual receipts to be less than one full year. The comment suggested that the term the ''first twelve months'' be used instead of the ''first calendar year.'' NPS has made this change.

Two comments were concerned about the fact that the period for which the $500,000 figure will be determined is the first year of the new contract rather than the entirety of the term of the new contract. The 1998 Act provides no express guidance in this connection. NPS has considered this comment but continues to believe that, in light of the difficulty in accurately projecting future revenues, limiting the determination of gross receipts to the first year of the new contract is reasonable.

The comments also suggest that if a concession contract that is to be continued under a new concession contract had gross revenues in excess of $500,000 in its last year, that it automatically should be considered that the new concession contract will have revenues in excess of $500,000 in the first year of a new contract. NPS considers that, although the revenues of a prior contract must be taken into account in determining the projected revenues of the new contract, the 1998 Act clearly indicates that the $500,000 figure relates to the revenues of the new concession contract, not to the revenues of the prior concession contract.

Another comment suggested that the $500,000 figure is arbitrary. NPS notes that the figure was set by the 1998 Act. The same comment objected to the fact that NPS is to determine whether prospective concession contract will have gross receipts in excess of $500,000, suggesting that the decision should be based on submittals to NPS under the prior concession contract. Further, the comment suggested that an existing concessioner should be consulted by NPS and provided an appeal if the concessioner disagrees with the decision of NPS. NPS has not accepted these suggestions in general, although it notes that a concessioner has an appeal right under Section 51.47 in the final rule as to a determination, among other matters, that a new contract will have gross receipts in excess of $500,000. In addition, a major basis of determining the gross receipts of a new concession contract will be the annual financial reports submitted under the previous concession contract. NPS considers that the procedures set forth in the final rule are appropriate and that further procedures regarding the determination of the gross receipts of a new concession contract are unnecessary.

Section 51.35 (Section 51.38 in the final rule) How Will the Director Determine That a Concession Contract Is an ''Outfitter and Guide'' Concession Contract?

Several comments expressed a concern about this section. One asked why outfitters and guides have a preference in renewal. Outfitters and guides have a preference in renewal under Section 403(8) of the 1998 Act.

Other comments focused on the phrase ''solely authorizes'' in this section. The comments suggest in general that minor or incidental services additional to outfitter and guide services should be permitted by NPS without loss of a right of preference by an outfitter and guide concessioner. However, NPS notes that Section 403(8) of the1998 Act contains the ''solely authorizes'' phrase which is merely repeated in the regulations. NPS, accordingly, has not made the suggested changes. However, a further discussion of a related issue is contained under Section 51.37.

Section 51.36 (Section 51.39 in the final rule) What Are Some Examples of Outfitter and Guide Concession Contracts?

A comment suggested that these examples include educational activities conducted by non-profit organizations. NPS has not accepted this suggestion as the examples given are of activities that are applicable whether or not the concessioner is a profit or non-profit organization.

Other comments suggested that guided mountain biking, float trips and other activities be added to the list of examples of outfitter and guide concession contracts. NPS has not done this, as the listed activities are only examples and not meant to be exclusive. Inclusion or exclusion of an activity as an example does not necessarily indicate that a particular related concession contract will be determined to be an outfitter and guide contract.

Section 51.37 (Deleted in the final rule) What Facts and Circumstances Will the Director Take Into Account When Determining if a Concession Contract Is an Outfitter and Guide Concession Contract?

A number of comments criticized this section with respect to its third and fourth sentences. Rather than modify these two sentences, NPS has deleted this section in light of the description of outfitter and guide concession concession contracts contained elsewhere in this subpart.

A concern was also expressed that activities of an outfitter and guide

concessioner outside of a park area should not be relevant in determining whether the concession contract is an outfitter and guide concession contract. NPS notes, however, that the relevant test is not whether activities take place outside of park area boundaries but whether activities are authorized by a concession contract. In any event, this issue is academic in light of the deletion of this section in the final rule.

Section 51.38 (Section 51.40 in the final rule and retitled) What Are Some Circumstances That Will Indicate That Outfitter and Guide Operations Are Conducted in the Backcountry?

A commenter was concerned that ferry boat service to an island in an urban setting might be considered as a ''backcountry activity'' within the meaning of this section as the service occurs in an area ''remote from roads.'' The comment requested clarification in the regulations in this respect. NPS does not consider that this section needs clarification as it is meant to be applied on a case-by-case basis.

Another comment suggested that this section be changed to state that if an activity met any one of the factors stated in this section that it should be considered as a backcountry activity. NPS has not accepted this suggestion. The determination of whether outfitter and guide operations are conducted in the backcountry of a park area must be made on a case-by-case basis. There are no precise definitions of backcountry. Accordingly, while the regulations provide some factors that generally indicate that outfitter and guide operations are conducted in the backcountry of a park area, none of these factors can be considered as individually determinative of the issue. This section also has been modified to make clear that the determination of ''backcountry'' is to be made on a park-by-park basis taking into account the particular geographical circumstances of the relevant park area and the general factors identified.

The same comment suggested that the phrase that operations occur ''in areas remote from roads and developed areas'' be changed to ''in areas not readily accessible to the public.'' NPS did not accept this suggestion as it considers that the term backcountry as used in the 1998 Act relates to more remote areas of a park rather than areas ''not generally accessible to the public.''

The same comment also suggested that a sentence be added to this section to the effect that a concession contract's operations may be determined to be conducted in the backcountry even if none of the circumstances specified in this section were met. NPS considers that the section makes this clear, particularly as amended in the final rule.

A comment stated that the term ''backcountry'' might describe an experience rather than actual physical setting, suggesting that rock climbing in a front country location should be considered as a backcountry activity. NPS has not made this change as NPS considers that the 1998 Act's reference to backcountry relates to physical location, not the nature of an experience.

Another comment suggested three revisions to this section:

1. The phrase regarding search and rescue should be deleted on the basis that search and rescue could be necessary even in park areas next to a parking lot;

2. The section should state that the health and safety of park visitors is more readily ensured by the supervision of experienced outfitter and guide services, regardless of the proximity to developed areas of a park; and

3. The role of outfitters and guides in protecting park resources by supervising visitation and reducing impacts should be recognized by adding the statement ''the operations assist in dispersing visitors away from signature resources, features and other areas of intense visitation.''

NPS has not accepted these suggestions. With respect to the first, although it is true that in certain cases search and rescue many be necessary even in close proximity to a parking lot, this is not relevant to the meaning of backcountry in this part.

NPS considers the second two suggestions to be policy positions that are not relevant to the determination of what is backcountry within the meaning of the 1998 Act.

Section 51.39 (Section 51.41 in the final rule) If the Concession Contract Grants a Compensable Interest in Real Property Improvements, Will the Director Find That the Concession Contract Is an Outfitter and Guide Concession Contract?

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Section 51.40 (Section 51.42 in the final rule) Are There Exceptions to This Compensable Interest Prohibition?

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Section 51.41 (Section 51.43 in the final rule) Who Will Make the Determination That a Concession Contract Is an Outfitter and Guide Contract?

A comment objected to the fact that only the Director personally, or a Deputy or Associate Director, may make the determination as to what concession contracts are outfitter and guide concession contracts. The commenter suggests that these decisions should be made at the field level under appropriate guidance. NPS, however, has not accepted this change. Given the varied nature of each park area and the judgmental factors that must be considered in making these determinations, NPS considers that making them on a national level is necessary for the sake of consistency. The term ''Director'' has been deleted from this section in the final rule to make clear that the Director is able to consider appeals under this section.

Section 51.42 (Section 51.44 in the final rule) How Will the Director Determine If a Prior Concessioner Was Satisfactory for the Purposes of This Part?

A number of comments were received in response to this section. The majority of the comments, including several from existing concessioners, supported the general intention of this section to the effect that a track record of satisfactory operations by an incumbent concessioner is a necessary precondition to entitlement to a right of preference. This intention reflects the requirements of Sections 403(8)(B)(ii) and 403(8)(C)(i) of the 1998 Act which states that an incumbent concessioner, if otherwise qualified, is entitled to a right of preference only if ''the Secretary of the Interior has determined that the concessioner has operated satisfactorily during the term of the contract (including any extensions thereof).'' Several comments stated that NPS has no authority under the 1998 Act to condition a right of preference on satisfactory performance. This view is clearly in conflict with the terms of the 1998 Act.

A comment objected to the phrase ''and other relevant facts and circumstances'' in subsection (a) and ''among other considerations'' in subsection (b) as being too vague. NPS has deleted the second phrase in the final rule in response to this comment but has left the first phrase. This is because there may be occasions when NPS becomes aware of actions of a concessioner that may result in a determination of less than satisfactory performance that were not revealed in a annual evaluations.

The general concessioner organization objected to subsection (b) on the grounds that a concessioner can be found to be less than satisfactory for any two years of the term of the contract and therefore lose its potential right of preference without an opportunity to

recapture the opportunity. To the contrary, another concessioner organization stated that this provision is ''reasonable and promotes diligence to achieve acceptable performance standards.'' Another concessioner organization stated that the provision is ''fair and appropriate to both the goals of performance-based renewal and provision of quality services.''

Several comments suggested that two years of less than satisfactory performance should not automatically mean that a concessioner is determined as not satisfactory for purposes of a right of preference, *i.e.*, that the concessioner should be given an opportunity to correct less than satisfactory performance. NPS has not made this change as less than satisfactory annual evaluations are not a surprise to concessioners. There is ample opportunity to correct deficiencies that may result in less than satisfactory performance.

NPS, however, in this section in the final rule, also has made clear that the determination of unsatisfactory operation that automatically results from two or more less than satisfactory annual evaluations is not to be applied retroactively. This does not necessarily mean that a concessioner that had less than satisfactory evaluations prior to the effective date of the final rule may not be determined to have operated unsatisfactorily over the term of its contract. Rather, it only means that such a result is not required.

One comment suggested that ''unsatisfactory'' performance be defined as an unsatisfactory rating that is not corrected and, that, during the term of the prior concession contract, the overall rating as satisfactory or unsatisfactory be determined by averaging each year's performance rating. NPS considers these suggestions inappropriate, as they would encourage marginal or unsatisfactory performance by concessioners.

For these reasons, NPS has not changed the two-year track record requirement of this section in the final rule.

However, a number of comments particularly objected to the requirement of subsection (b) to the effect that less than satisfactory performance in either of the last two years of the term of a concession contract results in the loss of a right of preference. The comments considered this unfair. NPS has deleted the final sentence of this section in the final regulations. It agrees that the two-year less than satisfactory performance requirement should be the same with respect to all years of a contract.

A comment from a concessioner organization stated that, ''overall, the Park Service has done an admirable and dedicated job'' with respect to its annual performance evaluations. However, the comment, and others, suggested that the regulations should provide guidance as to the standards to be applied in annual concessioner evaluations. NPS has not accepted this suggestion. It would not be practical to include in the regulations generic standards for annual evaluations beyond the statutory standard of satisfactory performance under the terms of the applicable concession contract. NPS does point out, however, that its annual evaluation program permits a concessioner that receives a less than satisfactory rating to appeal this determination to the applicable NPS Regional Director.

NPS also notes that it is the process of considering revisions to its existing evaluation program in light of the 1998 Act and in light of NPS's intention to implement further ''performance-based'' contracting with respect to concession contracts.

Section 51.43 (Section 51.45 in the final rule) Will a Prior Concessioner That Has Operated for Less Than the Entire Term of a Concession Contract Be Considered a Satisfactory Operator?

A number of comments objected to this section and several questioned its legal basis.

The legal basis for this section is found in Sections 403(8)(B)(ii) and 403(8)(C)(i) of the Act which require as a condition to a right of preference that the Secretary determine that ''the concessioner has operated satisfactorily during the term of the contract (including any extensions thereof).'' The intention of these sections is clear. A right of preference, which amounts to a statutory right to have greater rights to the award of a government contract than the general public, must be earned through satisfactory performance. If NPS adopted the position espoused by several of the commenters, a business could purchase a concession contract on the very last day of the term of a concession contract and thereby obtain the statutory right of preference with no demonstration whatsoever of satisfactory performance. NPS does not consider this to be the intention of the 1998 Act or sound public policy.

NPS, however, in response to these comments, has made changes to this section in the final rule. Particularly, instead of requiring that a new concessioner operate satisfactorily for two years under a contract with a term of ten years or less or four years under a contract with a term of more than ten years, NPS has reduced these ''track record'' periods to one year for concession contracts with a term of five years or less and two years for concession contracts with a term of more than five years. NPS notes that the final rule in this respect is less restrictive than the comparable rule contained in 36 CFR 51.5(a) in effect prior to this final rule.

NPS considers that these changes will alleviate concerns about the ability to sell concession contracts toward the end of a contract term (in accordance with Section 408 of the 1988 Act) while providing a sufficient demonstration of satisfactory performance upon which to base a determination of a right of preference.

One comment suggested that the ''track record'' period of satisfactory performance under this section should not apply to contract extensions. However, the sections of the 1998 Act quoted above clearly reference extensions in this connection. In addition, the existing 36 CFR 51.5 contains these same types of ''track record'' requirements regarding the granting of a preference in renewal to existing concessioners. Congress must be presumed to have been aware of these existing requirements while considering the legislation that became the 1998 Act.

The same comment suggested that this section be amended to state that the first day of operation for purposes of the section be changed from the date of approval of the assignment of the concession contract until the first day of actual operations by the new concessioner. NPS has not made this change as a new concessioner lawfully cannot begin to operate prior to the approval of a contract assignment by NPS and, once the assignment is approved, the new concessioner automatically is the lawful operator of the concessioner. The final rule has also been clarified by expressly stating that the two-year track record requirement applies to new concessioners that result from assignments, including assignments of controlling interests in concessioners, as defined in this part.

Section 51.44 (Section 51.46 in the final rule) May the Director Determine That a Prior Concessioner Has Not Operated Satisfactorily After a Prospectus Is Issued?

A comment suggested that NPS delete this section, and, if NPS determines that performance has substantially degenerated after a prospectus is issued, that NPS terminate the contract and bring in an operator on a temporary basis. NPS, however, considers that this

section is necessary for the reasons stated in the next several paragraphs, and, with respect to the latter suggestion, considers it impracticable in light of the time it takes to terminate a contract for unsatisfactory performance. Other comments repeated the position that any requirement regarding satisfactory performance in order to obtain a right of preference is unlawful. NPS disagrees for the reasons discussed in the previous several paragraphs.

The intention of this section is to permit a determination that a concessioner has not operated satisfactorily after the date a prospectus is issued and prior to the award of a contract. It was intended to apply to situations where, after a prospectus is issued, a second less than satisfactory annual evaluation is made that precludes a preference in renewal, or, previously unknown information becomes available which causes NPS to withdraw a previous determination of satisfactory performance. The provision is necessary to avoid a less than satisfactory concessioner from exercising a right of preference by virtue of fortuitous timing of performance evaluations or by lack of knowledge by NPS of relevant information.

However, NPS has changed this section in response to the comments received to make clear the limited circumstances in which it is meant to apply.

As part of this change, NPS has included a provision that permits a performance evaluation for right of preference purposes after issuance of a prospectus on the basis of a shortened operating year if necessary to make a last evaluation of satisfactory performance for right of preference purposes prior to the selection of the best proposal submitted in response to a prospectus.

Section 51.45 (Section 51.48 in the final rule) What Happens to a Right of Preference in Case of Termination of a Concession Contract for Unsatisfactory Performance or Other Breach?

One commenter provided combined comments directed to this section and Section 51.44 but it appears that the comments were in fact directed to Sections 51.42 and 51.43. They have been responded to under those sections.

A comment requested that the last sentence of this section be ''conformed in accordance with our comments on Section 51.44.'' NPS reviewed those comments but considers that the last sentence of Section 51.45 is necessary to make clear that termination of a concession contract is normally a ''last resort'' remedy for NPS and that, therefore, the fact that NPS may not have terminated a concession contract for unsatisfactory performance does not limit the authority of NPS to determine that a concessioner nonetheless operated less than satisfactorily.

Section 51.46 (Section 51.49 in the final rule) May the Director Grant a Right of Preference Except in Accordance With This Part?

The last two sentences of this section have been deleted as unnecessary.

Section 51.47 (Section 51.29 in the final rule) How Will I Know If a Preferred Offeror Exists?

The final regulation contains a new section 51.28 that describes when NPS will determine that a preferred offeror exists.

Section 51.48 (Section 51.26 in the final rule) What Solicitation, Selection and Award Procedures Described in This Part Will Apply to the Solicitation?

One comment was directed to this section but it clearly pertained to Section 51.84, not 51.48.

Section 51.49 (Section 51.30 in the final rule) What Must a Preferred Offeror Do Before He or She May Exercise a Right of Preference?

The general concessioner organization took the position that an existing concessioner under a 1965 Act concession contract not only has a ''continuing contractual right of preference'' but also has a contractual right to exercise the right of preference even if the concessioner chooses not to submit a responsive proposal in response to a prospectus. The organization makes this argument despite the fact that Sections 403(8)(B)(iii) and 403(8)(C)(ii) of the 1998 Act expressly state that in order for an incumbent concessioner to exercise a right of preference it must have ''submitted a responsive proposal for a proposed new concession contract which satisfies the minimum requirements established by the Secretary pursuant to paragraph (4).'' The commenter does not explain the basis of its position, other than to say that the requirement for submission of a responsive proposal was not included in the 1965 Act.

NPS considers this position baseless for several reasons in addition to the fact that it is in direct contradiction of the express terms of the 1998 Act.

The first reason is that the responsive proposal requirement of the 1998 Act reflects the terms of 36 CFR part 51 in effect prior to the passage of the 1998 Act. 36 CFR part 51 required, prior to this amendment, the submission of a responsive proposal by an existing satisfactory concessioner in order to be given a preference in renewal by NPS under the 1965 Act. In fact, the 1998 Act codifies the prior 36 CFR Part 51 in this respect.

In 1995, an incumbent concessioner challenged the validity of the responsive proposal requirement of 36 CFR part 51 after refusing to meet the minimum investment requirements of a prospectus for a new concession contract. *Hotcaveg* v. *Kennedy,* 883 F. Supp. 428, (E.D. Mo. 1995), *aff'd,* 72 F. 3rd 133 (8th Cir. 1995). The district court in *Hotcaveg* held that the responsive proposal requirement was not a violation of the 1965 Act, stating that:

> Requiring concessioners to meet minimum standards to improve the quality of facilities in national parks is a reasonable interpretation of the role of the National Park Service. The Secretary is carrying out his duty mandated by statute. *Id.* at 429.

Congress must be presumed to have been aware of the NPS regulatory requirement regarding submission of responsive proposals when it was considering the 1998 Act and also aware of the fact that the 8th Circuit had upheld this requirement in 1995 as an appropriate implementation of the 1965 Act. NPS points out that the general concessioner organization filed an *amicus* brief in Hotcaveg on behalf of the plaintiff and also objected to, as unlawful, the responsive proposal requirement of 36 CFR part 51 at the time it was proposed by NPS.

Secondly, 1965 Act concession contracts, of course, make no reference to a contractual right to not be obliged to submit a responsive proposal as a condition to being given a preference in renewal. Accordingly, NPS has rejected the commenter's position that the responsive proposal requirements of the 1998 Act do not apply to 1965 Act contracts because of Section 415 of the 1998 Act.

Further, such an interpretation would clearly frustrate the 1998 Act's goal of enhancing competition in concession contracting. If existing concessioners with a preference in renewal are not required to submit responsive proposals, prospective competitors will rightly conclude that submission of a competing proposal is a waste of time as the incumbent concessioner has a ''lock'' on the award of the new contract, evidenced by the fact that the incumbent, unlike the competitor, is not even required to submit a responsive proposal in order to compete for the contract.

Section 51.50 (Section 51.31 in the final rule) What Happens If a Preferred Offeror Does Not Submit a Responsive Proposal?

A comment repeated the argument regarding submission of a responsive proposal. This issue is responded to under Section 51.49.

Section 51.51 (Section 51.32 in the final rule) What Is the Process If the Director Determines That the Best Responsive Proposal Was Not Submitted by a Preferred Offeror?

One comment suggested that this section should make clear that NPS must advise the preferred offeror as to the specific areas in which it must amend its proposal to meet the better terms and conditions of the best proposal. NPS considers that this requirement is implicit in this section. However, NPS has made the requested change.

Section 51.52 (Section 51.33 in the final rule) What If the Preferred Offeror Does Not Timely Amend Its Proposal To Meet the Terms and Conditions of the Best Proposal or Is Not a Qualified Person To Carry Out the Terms of the Amended Proposal?

A comment was directed to Section 51.51 but NPS considers based on its content that it was intended to be directed to Section 51.52. The comment suggests that it is unlawful for the NPS to require ''requalification'' of a preferred offeror if it exercises a right of preference by matching the terms and conditions of a better proposal. NPS disagrees with this as Section 403(4)(B) of the 1998 Act states:

> (B) The Secretary shall reject any proposal, regardless of the franchise fee offered, if the Secretary determines that the person, corporation or entity is not qualified, is not likely to provide satisfactory service, or that the proposal is not responsive to the objectives of protecting and preserving resources of the unit of the National Park System and of providing necessary and appropriate facilities and services to the public at reasonable rates.

NPS considers that this section of law requires that an award of a concession contract, whether or not through the exercise of a preference in renewal, must be to a qualified person within the meaning of the statute. Congress could not possibly have intended the right of preference to require award of a concession contract to an unqualified entity.

However, NPS has modified this section in the final rule to delete express reference to the qualified offeror requirement of the 1998 Act as it would at best rarely occur that an amended proposal from a preferred offeror would need to be rejected by NPS on the basis of the qualified offeror requirement of the 1998 Act.

Section 51.53 (Section 51.34 in the final rule) What Will the Director Do If a Selected Preferred Offeror Does Not Timely Execute the New Concession Contract?

A comment appears to have been made in reference to this section. It suggests that it is not proper to require a preferred offeror to execute a concession contract within the period specified by the Director. The comment suggests that the language of the contract may differ from the prospectus or the proposal (an event not permissible under the statute and the regulations). NPS disagrees and notes that the requirement is equally applicable to all selected offerors, whether or not a preferred offeror.

Section 51.54 (Section 51.35 in the final rule,) What Happens to a Possible Right of Preference If the Director Receives No Responsive Proposals?

The general concessioner organization agreed with the intentions of this section but suggested that the word ''different'' be substituted for ''more favorable'' as it may be difficult to establish whether it is more or less favorable than the prior prospectus. NPS has not made the requested change to this section. This is because the new prospectus would necessarily be different from the old prospectus, *e.g.,* at the least, the commencement date of the new contract would very likely change in a new prospectus because of the passage of time.

Section 51.55 (Section 51.47 in the final rule and retitled,) How Do I Appeal a Decision That a Prior Concessioner Is Not a Preferred Offeror?

Several comments stated that thirty days is not sufficient time to prepare an appeal. (One comment suggested a sixty-day period.) In response to these comments, NPS has provided in the final rule that NPS may extend this period upon request by the concessioner if NPS determines that the concessioner demonstrates good cause for an extension. NPS has also included a requirement in the final rule that an appeal must specify the grounds for the appeal. In addition, in response to comments encouraging competition in concession contracting, NPS has expanded the administrative appeal right contained in the proposed regulations to permit a person an administrative appeal with respect to a determination by the Director that a concessioner is a preferred offeror. NPS considers, in light of the anti-competitive consequences of preferred offeror status, that potential competitors should have a right of administrative appeal with respect to such determinations.

A comment suggested that the appeal should not be considered by the Director personally (or a Deputy or Associate Director) as called for by this section. The concern is that these individuals may be too busy to timely consider an appeal. However, NPS considers that these officials will be able to make timely appeal decisions. Moreover, the fact that an appeal must be considered by the highest levels of NPS is for the benefit of concessioners as it ensures national consistency on the important issue of right of preference.

Another comment suggested, without amplification, that the appeal process contained in this section is ''illusory.'' NPS disagrees. The Director (or a Deputy or Associate Director) will be fully accountable for their appeal decisions.

The general concessioner organization submitted extensive comments on this section. NPS responds below. However, NPS first notes that the underlying premise of the comments is that it is illegal for NPS to require concessioners that, allegedly, have a contractual right of preference under 1965 Act concession contracts, to submit a responsive proposal in order to exercise this right. As a consequence of this argument, the commenter describes a number of hypothetical consequential inequities resulting from this section. The issue of whether a concessioner with a ''contractual right of preference'' has to submit a responsive proposal as required by the statute is addressed under Section 51.49. NPS responds here only to other aspects of the comment's criticisms of this section.

The general concessioner organization's first specific point is that NPS must make the internal decision as to whether the existing concessioner is a ''preferred offeror'' before issuing a prospectus. This is not the case. NPS notes that in most cases an existing concessioner will know that it is a satisfactory concessioner for purposes of a preference in renewal in advance of the issuance of a prospectus. However, NPS will not necessarily make final decisions affecting the existence of a preferred offeror regarding the terms of the new concession contract (i.e., will it have gross receipts of less than $500,000, will it be an outfitter and guide contract, will it continue the previous visitor services), prior to the issuance of the prospectus.

The comment goes on to argue that submitting a responsive proposal is a heavy burden that a concessioner should not have to bear prior to a decision as to whether it is a preferred offeror. This argument is posited on the notion that a concessioner with an asserted ''contractual right of preference'' is not legally required to submit a responsive proposal in response to a prospectus in order to exercise a right of preference. As discussed under Section 51.49, this is not the law. The statutory requirement to submit a responsive proposal is not a burden imposed by this section. It is imposed by the 1998 Act.

Several commenters suggested in effect that the regulations should make clear that a right of appeal is to be provided not only with respect to a concessioner's status as a preferred offeror but also with respect to whether a new concession contract is a qualified concession contract for purposes of a right of preference. NPS agrees with this suggestion and has clarified this section and other sections in the final rule to make clear that an appeal regarding whether a concessioner is a preferred offeror includes appeal as to whether a new concession contract is a qualified concession contract. NPS has made several other conforming amendments to sections of the final rule to reflect an appeal right for a determination that a new concession contract is not a qualified concession contract.

NPS notes, however, that although the final rule expressly provides an appeal from a determination that a new concession contract is not a qualified concession contract, this does not establish an appeal with respect to the content of prospectuses or the terms and conditions of new concession contracts. The content of prospectuses and the terms and conditions of new concession contracts, except to the extent mandated by this part or the 1998 Act, are determined in the discretion of NPS. (See Section 403(10) of the 1998 Act: ''Nothing in this title shall be construed as limiting the authority of the Secretary to determine whether to issue a concession contract or to establish its terms and conditions in furtherance of the policies expressed in this title.'')

In addition to these general comments, the general concessioner organization made a number of more specific arguments concerning this section, asserting for a variety of reasons that it is illegal. NPS responds to them as appropriate as follows.

In its first specific comment, the general concessioner organization misreads Section 51.32 of the proposed regulations to interpret it to mean that NPS may unilaterally modify the terms and conditions of existing concession contracts. Section 51.32, of course, does not give NPS the authority to do this. NPS has amended Section 51.32 in the final regulations to eliminate any ambiguity it may have contained in this regard.

The commenter states that although the NPS now attempts to justify these additional procedural burdens in order to ensure that a right of preference cannot ''block policy,'' the commenter is ''not aware of any significant bidding scenario in the history of the NPS concession program in which a right of preference was successfully used to promote such interference.''

NPS notes that the quoted words do not appear in the proposed regulations or in their preamble.

The comments suggest that it is the intention of the proposed regulations that an appeal under this section is to be made to the initial decision-maker. This, of course, is not the case. The apparent confusion of the commenter is based on the fact that the regulations as a matter of form always refer to the ''Director'' as the responsible official. This is customary practice in NPS regulations and in many regulations of other federal agencies. In fact, it tracks the 1998 Act that always refers to the Secretary of the Interior as the responsible official even though, of course, the Secretary's responsibilities under the Act are delegated to subordinate officials. The proposed regulations were not intended to suggest that appeals from a deciding official would be directed to the deciding official. The proposed regulations state that the term ''Director'' means the Director of the National Park Service or an authorized representative of the Director, except where a particular official is specifically identified in this part.

The comments suggest that this section is illegal in violation of the Administrative Procedures Act on the premise that ajudicatory proceedings must be utilized in such an appeal. However, the Administrative Procedures Act does not require ajudicative procedures in the type of determination at issue in this section. The procedures provided meet all legal requirements.

The comments repeat the concern about an appeal to the deciding official and suggests that the appeal provided by this section fails to provide meaningful, timely relief. The basic argument is that it is improper for a solicitation to proceed while an appeal is ongoing. This argument, in turn, is premised on the notion that an incumbent concessioner with a ''contractual right of preference'' is not required to submit a responsive proposal (contrary to the express terms of the 1998 Act). The argument is that the existing concessioner in these circumstances, if the appeal is not determined prior to the release of a prospectus, will be required to take an action (submission of a responsive proposal), that it is not otherwise legally required to do. NPS has not made this change as the 1998 Act requires submission of a responsive proposal.

The comments assert that the fact that in this section the appellant only receives a ''possible'' right of preference if it wins an appeal does not ''guarantee'' that the concessioner will have a right of preference. But the term ''possible'' with respect to a right of preference only refers to the fact that a concessioner with a ''possible'' right of preference must submit a responsive proposal, as expressly required by the 1998 Act, in order to have an unconditional right of preference. However, to avoid confusion, NPS has deleted reference to a ''possible'' right of preference in the final rule except in circumstances where clarity requires use of the word.

The comments summarily allege that the appeal procedure contained in this section is illegal. NPS disagrees with this position. For the reasons discussed above, the administrative appeal provided by this section conforms with standard administrative practice, deprives no one of any constitutional rights, and is consistent with the purposes of the 1998 Act.

The last specific comment of the general concessioner organization under this section is a restatement of its prior arguments, particularly the argument that an incumbent concessioner with a ''contractual right of preference'' is not required to submit a responsive proposal to a concession contract prospectus in order to exercise the right of preference. The general concessioner organization's argument is baseless as discussed under Section 51.49.

Subpart F—Leasehold Surrender Interest (Subpart G in the final rule.)

Section 51.56 (Section 51.51 in the final rule.) What Special Terms Must I know To Understand This Part?

''Arbitration''

For the purposes of clarity, NPS has added a definition of ''arbitration'' and a description of arbitration procedures to this section in the final rule. This replaces the description of arbitration proceedings contained in Section 51.78 in the proposed regulations. See the

discussion under Section 51.78 as to how the final rule is changed with respect to arbitration procedures. Other references to arbitration in the final rule also refer to Section 51.51 of the final rule.

''Capital Improvement''

The general concessioner organization objected to this definition because it differed from the definition of ''capital improvement'' contained in the 1998 Act. The comment states that ''NPS has no authority to use a different definition.'' This statement is incorrect. NPS, in drafting regulations to implement the 1998 Act, has clear authority to interpret the 1998 Act through appropriate definitions to set forth understandable and workable regulations consistent with the terms of the statute.

NPS, however, in order to accommodate the concerns of the organization in this connection, has amended this definition in the final regulations to track the 1998 Act's definition. This amendment does not result in a substantive change to the meaning of ''capital improvement.''

Several commenters suggested that this definition be clarified to make clear that it encompasses floating docks. NPS, because of the special circumstances of floating docks, has amended the definition of ''fixtures'' in this connection and has also added the term ''barges'' to the capital improvement definition to make clear that barges are not floating docks. Floating docks are considered to be non-removable equipment under this part for leasehold surrender interest purposes only. This change should not be construed as indicating that NPS necessarily considers that possessory interest may be obtained in floating docks.

''Construction Cost''

The general concessioner organization objected to the definition of ''construction cost,'' stating that it does not cover all elements of construction cost. This comment is discussed below under ''Eligible Direct and Indirect Costs.''

The commenter also requested deletion of the reference to a concessioner's income tax returns with respect to construction cost. NPS has done this in the final rule. In addition, as suggested by the general concessioner organization, the final rule states that construction costs must be capitalized by the concessioner in accordance with Generally Accepted Accounting Principles (GAAP).

NPS did not remove the reference in this definition to ''approval by the Director'' as requested by a commenter. However, the approval process in the text of the final rule has been amended to reflect the commenter's concerns in this respect.

''Depreciation''

The general concessioner organization objected to the inclusion of certain terms in the definition of ''depreciation'' as contained in the proposed regulations, arguing that obsolescence should not be an element of depreciation with respect to leasehold surrender interest capital improvements. However, the common definition of depreciation as used in the appraisal industry states that it is the loss of value in property from ''any cause'' and further states, in regard to improvements, that depreciation encompasses both ''deterioration and obsolescence.'' See the definition of ''depreciation'' in The Dictionary of Real Estate Appraisal, 3rd Edition (1993), published by the Appraisal Institute (hereinafter referred to as the ''3rd Edition''). NPS does not consider that there are significant differences, if any, between the depreciation terms of the 1998 Act and the definition of depreciation contained in the 3rd Edition. In this connection, the commenter elsewhere refers to the Appraisal Institute as an appropriate source of definitions regarding leasehold surrender interest terms. In any event, NPS, in the final rule, has deleted the terms to which the commenter objected as unnecessary.

NPS notes that the House and Senate Committee Reports that accompanied S. 1693, in their general description of the bill, mention ''wear and tear'' depreciation but in their section-by-section analyses discuss depreciation in terms of deterioration and prospective serviceability. NPS considers that the reference to ''wear and tear'' depreciation was off-hand and not meant to modify the statutory description of depreciation.

Another commenter asked whether ''depreciation'' refers to depreciation for federal income tax purposes. It does not. It refers to the type of depreciation discussed above.

''Eligible Direct and Indirect Costs''

NPS was surprised that several comments objected to the scope of construction costs (direct and indirect) contained in the proposed regulations. This is because the proposed regulations, to the benefit of concessioners, utilized a significantly more expansive definition of ''construction cost'' than its usual meaning. Particularly, NPS included in the definition a number of indirect costs of a concessioner related to construction, e.g., architect's fees, environmental study costs, and on-site inspection expenses, even though the developer's costs related to construction are not generally considered to be ''construction costs.''

For example, *The Dictionary of Architecture & Construction,* Second Edition (1993), defines ''construction cost'' as:

> The cost of all the construction portions of a project, generally based upon the sum of the construction contract(s) and other direct construction costs; does not include the compensation paid to the architect and consultants, the cost of the land, right-of-way, or other costs which are defined in the contract documents as being the responsibility of the owner.

For another example, the 3rd Edition defines ''construction cost'' as:

> The cost to build, particularly an improvement; includes the direct costs of labor and materials plus the contractor's indirect costs. (Emphasis added.)

The comment from the general concessioner organization took the position that the definition of ''construction cost'' should be that which is utilized in Chapter 16 (page 346) of the Eleventh Edition of ''*The Appraisal of Real Estate*'' published by the Appraisal Institute (hereinafter referred to as the ''11th Edition'').

NPS has reviewed the elements of construction cost that are contained in the 11th Edition. However, NPS notes that the context of the term ''construction cost'' as used in Chapter 16 of the 11th Edition is for purposes of appraising the fair market value of real estate by the reproduction or replacement cost method. For this reason, several costs of the owner (such as marketing expenses and post-construction carrying costs) may be included as indirect costs for the purposes of a fair market value appraisal. The fact that ''construction cost'' has this broader meaning in Chapter 16 is apparent from the fact that the 3rd Edition, referenced above, the American Appraisal Institute's dictionary of appraisal terms, defines ''construction cost'' as the cost to build, including indirect costs of the contractor. No reference to the costs of the owner is made. The 3rd Edition is cited as a reference in the 11th Edition.

Accordingly, NPS does not consider that the 11th Edition's description of ''construction cost'' for fair market value purposes is reflective of the meaning of the term as used in the 1998 Act. The following provision of the legislative history of the 1998 Act makes clear that

a ''fair market value'' definition of construction cost was not intended by the Congress:

> The Committee considers that the leasehold surrender interest described by this section will provide concessioners with adequate security for investments in capital improvements they make. This will assist in encouraging such investments in visitor facilities in the National Park System. However, the value of a leasehold surrender interest, i.e., the original construction cost, less depreciation as evidenced by physical condition and prospective serviceability, plus what amounts to interest on the investment based on the Consumer Price Index, should accurately reflect the real value of the improvements and should not result in any undue compensation to a concessioner upon expiration of a concession contract. Additionally, the value of the leasehold surrender interest will be relatively easy to estimate so that a prospective new concessioner and the Secretary can accurately calculate the amount for purposes of competitive solicitation of concession contracts. S. Rep. No. 105–202, at p. 35 (1998).

NPS also notes that ''fair market value'' was an express element of the value of possessory interest under the 1965 Act. If Congress had intended the term construction cost to be construed in a fair market value context, it would have so stated consistent with the terms of the 1965 Act. NPS considers that the definition of construction cost and of the terms ''eligible direct and indirect construction costs'' as set forth in the proposed regulations are appropriate interpretations of the term ''construction cost'' as used in the 1998 Act.

However, in an effort to accommodate the reasonable concerns of the general concessioner organization, NPS in the final rule has included all the direct construction costs set forth in the 11th Edition. In addition, NPS has included in the final rule as many of the specific indirect costs mentioned in the 11th Edition as it considers reasonable in light of its understanding of the term ''construction cost'' as used in the 1998 Act.

NPS has not included in the final rule the following indirect costs mentioned in the 11th Edition: marketing expenses; sales commissions; leasing commissions; legal fees; title transfers; the cost of carrying the investment after completion of construction; and tenant improvements (tenant improvements may be eligible direct costs).

NPS also has not included as an indirect cost the cost of carrying the investment in land as mentioned in the 11th Edition, as a concessioner makes no investment in land.

NPS particularly would like to comment on a concessioner's administrative expenses related to construction. The 11th Edition mentions the ''administrative expenses of the developer'' as possible indirect costs for fair market value appraisal purposes. NPS has not included this very broad item of indirect costs in the final rule, but, consistent with the proposed rule, has included administrative expenses of the concessioner related to direct, on-site construction inspection. NPS notes that, unlike the administrative expenses of a ''developer'' as contemplated by the 11th Edition, a concessioner's administrative expenses flow from all of its business activities. In any event, NPS does not consider that additional administrative expenses of a concessioner are appropriate to include as eligible indirect construction costs for the reasons discussed in the preceding paragraphs.

The general concessioner organization also requested that ''entrepreneurial profit'' be treated as a construction cost. However, the 11th Edition describes ''entrepreneurial profit'' as the difference between the ''cost of development'' and the ''value of the property'' after completion.'' 11th Edition, p. 346. Accordingly, entrepreneurial profit is not a direct or indirect construction cost even as described by the 11th Edition for fair market value appraisal purposes.

NPS also has not accepted the commenter's suggestion that construction costs include ''extra costs'' associated with dealing with the NPS. The costs of the construction are what they are. Any ''extra'' construction costs that may exist (NPS does not agree that there are such ''extra'' costs) with respect to the fact that a concessioner's construction activities are subject to oversight by NPS are necessarily included within the actual construction cost.

The general concessioner organization questioned the portion of this definition that limits construction costs to ''amounts no higher than those prevailing in the locality of the project.'' NPS considers this limitation necessary and has retained it in the final rule. This limitation is important in circumstances where construction work is performed directly by the concessioner, *i.e.,* force account work, or performed by an affiliate of a concessioner. In this connection, a comment suggested that construction costs should include the costs of the concessioner when the concessioner acts as a contractor, *e.g.,* constructs or installs a capital improvement with its own labor force. The definition of construction costs in the final rule makes this clear. NPS notes, however, that only actual expenses of the concessioner capitalized in accordance with Generally Accepted Accounting Principles are construction costs for leasehold surrender interest purposes.

Another commenter, in addition to making generally the same suggestions as discussed above, requested that the cost definitions be amended to make clear that a current concessioner is not required to pay for environmental studies that are to be used by NPS to develop a prospectus. NPS has not made any changes in this connection as it considers that the regulations cannot be read to require a concessioner to pay for environmental studies in these circumstances.

This commenter also suggested that costs of concessioner initiated studies that facilitate the work and enhance the environment should be eligible costs . NPS considers that the cost definitions in the final regulations achieve this objective to the extent consistent with the term ''construction cost'' as used in the 1998 Act.

''Fixtures and Non-Removable Equipment''

The general concessioner organization objected to the second sentence of this definition as being too restrictive as to the meaning of these terms. It also suggested an alternative test. NPS has adopted as appropriate the alternative test in the final regulations and has deleted the examples to avoid possible confusion. To avoid unnecessary discussion, NPS deleted the examples of fixtures and non-removable equipment as several commenters objected to one or more of them as being incorrect. Their deletion, however, should not be considered as indicating that NPS necessarily considers any of the examples to be incorrect.

''Ineligible Costs''

NPS has deleted this definition in the final rule as unnecessary. The deletion obviates concerns expressed about this definition.

''Leasehold Surrender Interest''

One commenter asked whether ''related capital improvements'' as used in this definition may refer to improvements a concessioner makes that are not related to its operations. The definition contained in the proposed regulations relates only to capital improvements built on park lands under the terms and conditions of a concession contract. If a concessioner makes capital improvements to park lands under some other form of authorization, no leasehold surrender interest would be obtained.

A comment (that attached a letter from a bank) suggested that banks will not lend money on the basis of a leasehold surrender interest under the limitations of the 1998 Act. NPS disagrees. The leasehold surrender interest concept will permit concessioners to obtain loans using leasehold surrender interest as collateral. NPS notes that the objections of the bank to leasehold surrender interest apply equally to possessory interest under the 1965 Act. Many lending institutions made loans to concessioners secured by possessory interest.

''Leasehold surrender interest value''

NPS has added to the definition of leasehold surrender interest value in the final rule reference to Section 405(a)(4) of the 1998 Act that permits a different valuation of leasehold surrender interest in certain circumstances effective nine years after the effective date of the 1998 Act. It has also clarified the proposed rule in the final rule to indicate that, in the event a concessioner ceases to utilize a related capital improvement under the terms of a concession contract prior to the termination or expiration of a contract (*e.g.,* where the Director takes a capital improvement out of service for resource protection purposes), the applicable depreciation and entitlement to payment of leasehold surrender interest value is established as of the date the concessioner ceases to utilize the related capital improvement.

''Major rehabilitation''

NPS has modified the definition of ''major rehabilitation'' in the final rule to adopt a 50% test rather than a 100% test as discussed under Section 51.75.

''Related Capital Improvement or Fixture''

* * * * *

''Structure''

A comment suggested that the term ''structure'' be amended to include landscaping and plantings that are installed as integral to the construction of a capital improvement. NPS has adopted this suggestion in the final rule to the extent that landscaping is an integral component of the construction of a structure. Landscaping includes necessary initial plantings but does not include ''re-landscaping'' (except as part of a major rehabilitation), landscape maintenance or subsequent plantings.

''Substantial Completion''

For the purpose of clarity, NPS has added a definition of ''substantial completion'' in the final rule. The definition tracks the definition of the term in the 3rd Edition. A commenter questioned the use of the term in the proposed regulations. The term is needed in order to establish the completion date of a capital improvement.

Section 51.57 (Renumbered as Section 51.52 in the final rule.) How Do I Obtain a Leasehold Surrender Interest?

The general concessioner organization objected to the second sentence of this section, stating that ''NPS cannot qualify the right to leasehold surrender interest by contract, and to do so is inconsistent with the 1998 Act.''

This position cannot be reconciled with the express language of Section 405 of the 1998 Act:

> (a) Leasehold Surrender Interests Under New Concession Contracts.—On or after the date of enactment of this title, a concessioner that constructs a capital improvement upon land owned by the United States within a unit of the National Park System pursuant to a concession contract shall have a leasehold surrender interest in such capital improvement subject to the following conditions. * * * (Emphasis added).

Under this authority, the terms and conditions of a concession contract may detail leasehold surrender interest requirements so long as the provisions are consistent with the 1998 Act. In this connection, Section 403(10) of the 1998 Act states that ''Nothing in this title shall be construed as limiting the authority of the Secretary to determine whether to issue a concession contract or to establish its terms and conditions in furtherance of the policies expressed in this Title.'' (Emphasis added.) Further, Section 417 of the 1998 Act requires the Secretary to promulgate regulations appropriate for implementation of the 1998 Act. There is nothing in the 1998 Act that suggests that such regulations may not place appropriate conditions on leasehold surrender interest.

Section 51.58 (Deleted in the final rule) If a Concessioner Does Not Comply with the Requirements of This Part or the Terms and Conditions of a Concession Contract, What Happens?

The general concessioner organization objected to this section because ''a concessioner is entitled to a leasehold surrender interest in all capital improvements it constructs on park lands.'' This statement, however, leaves out the phrase of the 1998 Act discussed under the previous section that grants a leasehold surrender interest for capital improvements that are constructed ''pursuant to a concession contract.'' The commenter also argues that this section is vague in referring to the requirements of this part and the terms and conditions of the concession contract without further guidance. NPS does not consider that these regulations or its concession contracts are vague as to leasehold surrender interest requirements or otherwise. However, in consideration of comments in this connection, NPS has deleted this section in the final rule as unnecessary in light of the leasehold surrender interest terms of the 1998 Act, this part, and concession contract terms and conditions.

Another commenter suggested that this section improperly gives NPS the ability to deprive a concessioner of leasehold surrender interest by determining that the concessioner had failed to meet the requirements of its concession contract. NPS considers that the commenter misconstrued the meaning of this section. In any event, the section has been deleted in the final rule.

Section 51.59 (Section 51.53 in the final rule and retitled) Why May the Director Authorize the Construction or Installation of a Capital Improvement?

The general concessioner organization suggested in a comment on this section that the phrase ''under the terms of a concession contract'' be added after the first use of the word ''concessioner'' in this section. NPS has been made this change.

Section 51.60 (Section 51.54 in the final rule) What Must a Concessioner Do Before Beginning To Construct or Install Capital Improvements in Which The Concessioner Seeks a Leasehold Surrender Interest?

Several comments were received objecting to the ability of NPS to determine that construction costs are ''unreasonable.'' In response to these comments, NPS has amended this section in the final rule to delete reference to disapproval of the construction of a capital improvement if NPS considers the costs unreasonable.

Another commenter suggested that approvals under this section should be delegable to the park area superintendent. See the changes to the definition of Director in Section 51.3.

Section 51.61 (Section 51.55 in the final rule) What Must a Concessioner Do After Substantial Completion of The Capital Improvement?

The general concessioner organization made several comments on this section.

The first sentence of its comment on this section appears to be incomplete. NPS thinks the comment meant to say

that, although construction invoices should be available and a certification by certified public accountant is appropriate, the invoices should not be submitted to NPS but only be made available to NPS for inspection for a period of three years after project completion. This suggestion, if NPS has accurately interpreted it, is not acceptable to NPS. Other commenters made similar suggestions. The existence of a leasehold surrender interest in effect places on the government a burden to pay a concessioner, or require a third party to pay a concessioner, the construction cost of a building perhaps twenty or more years after the building is completed. This obligation, in the view of NPS, requires submission to NPS of the information required by this section in order to properly fulfill NPS's administrative responsibilities for this financial obligation.

The comment also requested that the costs of obtaining the certified public accountant certification be a construction cost element for leasehold surrender interest purposes. NPS has not accepted this suggestion in light of the definition of ''construction cost'' set forth in Section 51.56.

NPS has modified this section in the final rule to clarify that the construction cost of a project incurred after substantial completion of a project are included as construction cost for leasehold surrender interest purposes.

Section 51.62 (Section 51.56 in the final rule) How Will the Director Determine the Construction Cost for Purposes of Leasehold Surrender Interest Value?

Several comments suggested in effect that this section provides NPS with undue latitude to define eligible construction costs for which a leasehold surrender interest will be obtained after construction is complete, thereby placing an undue risk on the concessioner. NPS has amended this section in the final rule to make clear that the review of constructions costs by NPS after project completion is limited to a determination that the construction costs claimed are eligible costs within the meaning of these regulations. NPS considers that this change will satisfy the concerns of the commenters in this connection. NPS feels strongly, however, that NPS review of submitted construction costs is an absolute requirement in light of the financial obligation leasehold surrender interest creates for the government or a successor concessioner.

A comment objected to the fact that this section imposes no time constraints on the Director with respect to approval of leasehold surrender interest construction costs. NPS has not changed this section in response to this comment as it is impossible to state a standard time period for the review of construction costs in light of the fact that some projects may be for as little as $10,000 and others in excess of $10 million. This is likewise true with respect to a time limit for appeals under Section 51.63.

Section 51.63 (Section 51.57 in the final rule and retitled) May the Concessioner Appeal the Director's Determination of Construction Cost?

Several comments objected to the appeal process provided by this section on the general grounds that it does not provide sufficient rights to the concessioner. NPS has changed this section in the final rule to make a dispute over construction cost subject to binding arbitration at the request of a concessioner.

Section 51.64 (Section 51.58 in the final rule) What Actions May or Must the Concessioner Take With Respect to a Leasehold Surrender Interest?

The general concessioner organization objected to subsection (c) of this section with respect to its statement that a concessioner may agree to an alternative value for leasehold surrender interest. While not necessarily agreeing with this comment, NPS has deleted the phrase regarding alternative values in the final rule. Other comments suggested that this section should state that NPS cannot require waiver of a leasehold surrender interest. NPS has not changed this section in this respect as it merely repeats an express term of the 1998 Act.

Section 51.65 (Section 51.59 in the final rule) Will Leasehold Surrender Interest Be Extinguished by Expiration or Termination of a Concession Contract or May It Be Taken for Public Use?

The general concessioner organization made a comment on this section that ''only payment pursuant to the 1998 Act constitutes just compensation for any purpose.'' NPS considers that the payment terms of the final rule are consistent with the 1998 Act regarding leasehold surrender interest. The commenter also made an argument under this section as to when payment for leasehold surrender interest must be made. This argument is addressed under Section 51.67.

Section 51.66 (Section 51.60 in the final rule) How Will a New Concession Contract Awarded to a Prior Concessioner Treat a Leasehold Surrender Interest Obtained Under a Prior Concession Contract?

The general concessioner organization objected to this section on the same grounds as it objected to Section 51.65. NPS has modified this section (and Section 51.65) in the final regulations to delete as unnecessary the phrase ''the new concession contract'' and to replace it with ''this part.''

Section 51.67 (Section 51.61 in the final rule) How Is a Prior Concessioner That Is Not Awarded a New Concession Contract To Be Paid for a Leasehold Surrender Interest?

Several comments objected to this section with respect to the timing of payment for leasehold surrender interest, particularly to the fact that the section does not necessarily require payment for a concessioner's leasehold surrender interest immediately upon expiration or termination of the concession contract. Rather, the proposed section permits payment within one year of contract expiration or termination if a successor concessioner is to acquire the leasehold surrender interest and two years if the payment is to be made by NPS.

The comments of the general concessioner organization take the position that a concessioner has a right under the 1998 Act ''to continue to operate the facilities under the terms of the concession contract until it is paid for its leasehold surrender interest, as required by the 1998 Act.'' This position suggests that a concessioner that is providing unsatisfactory service to the public, is not maintaining its buildings, or, that is engaged in environmentally damaging activity, among other possibilities, has a right, paramount to the preservation and protection of the park area and its visitors, to continue to operate until leasehold surrender interest payment is received.

This position is manifestly contrary to the purposes of the 1998 Act.

The position is also without legal merit. NPS points out that Section 405(a)(1) of the 1998 Act states that a concessioner has a leasehold surrender interest in capital improvements under a concession contract, ''consisting solely of a right to compensation for the capital improvement to the extent of the value of the concessioner's leasehold surrender interest in the capital improvement.'' (Emphasis added.) This provision makes no mention of a right to continue operations until the date of

payment as asserted by the general concessioner organization. NPS considers that such a right, that would be in stark conflict with the purposes of the 1998 Act as discussed further, cannot be read by implication into the 1998 Act as argued by the general concessioner organization.

In addition, Section 405(a)(2)(C) of the 1998 Act states that a leasehold surrender interest ''shall not be extinguished by the expiration or other termination of a concession contract,'' a provision that is in direct conflict with the view that leasehold surrender interest value must be paid on the date of contract expiration or termination. (Emphasis added.) Finally, Section 405(c) of the 1998 Act states that, upon expiration of or termination of a 1998 Act concession contract, a concessioner shall be ''entitled'' under the terms of a concession contract to receive from the United States or a successor concessioner the value of any leasehold surrender interest. This value is to be calculated as of the date of expiration or termination. However, the statute does not state that the value must be paid on the date of termination or expiration of the contract. The statute also states that the entitlement is ''under the terms of the concession contract.''

The regulations expressly establish in the concessioner, as of the date of contract expiration or termination, an unconditional entitlement under the terms of the concession contract to be paid its leasehold surrender interest value. The regulations also call for the leasehold surrender interest depreciation deduction to be calculated as of the date of contract expiration or termination (or, if applicable, as of a prior relinquishment date). These provisions appropriately implement the requirements of the 1998 Act.

The general concessioner organization apparently reads the 1998 Act to mean that there is an absolute entitlement to payment of the leasehold surrender interest value on the date of expiration or termination, and, if payment is not received on that date, an entitlement to continue operations until payment is received. NPS disagrees with this interpretation on the basis of the text of the statute as discussed above. Further, such an interpretation of the 1998 Act flies in the face of the overwhelming thrust of the 1998 Act that preservation of park area resources and protection of park area visitors is the paramount mandate with respect to visitor services in areas of the national park system.

It is the primary responsibility of NPS to preserve and protect areas of the national park system and their visitors under both the NPS Organic Act (16 USC 1 *et seq.*) and the 1998 Act. The 1998 Act and the Organic Act state that the ''preservation and conservation of park resources and values require that such public accommodations facilities and services as have to be provided within [park areas] should be provided only under carefully controlled safeguards against unregulated and indiscriminate use.'' (Emphasis added.) Section 402(b)(2) of the 1998 Act also states that:

> (b) Policy.—It is the policy of the Congress that that the development of public accommodations, facilities and services in units of the National Park System shall be limited to those accommodations, facilities, and services that are necessary and appropriate for public use and enjoyment of the unit of the National Park System in which they are located and are consistent to the highest practicable degree with the preservation and conservation of the resources and values of the unit.

It is indisputable that there may be circumstances in which NPS must immediately terminate the operations of a concessioner in order to fulfill its statutory responsibilities to park areas and visitors. For example, an area of a park may be found to be endangered species habitat, requiring immediate cessation of human activity, or, the threat of natural disaster such as a threatened volcanic eruption may require that a concession operation be immediately terminated in the interest of public safety. In addition, there may be circumstances where NPS is forced to immediately close a concession operation because of environmental damage such as sewage leakage into a threatened cave system. Finally, there may be circumstances where the performance of a concessioner in breach of contract is so bad (e.g., life/health/safety violations) that the concession operations and the concession contract must be immediately terminated in the interest of public health or safety.

The amount of money due the existing concessioner under a concession contract for a leasehold surrender interest could exceed available funds appropriated to NPS in any given fiscal year. It would not always be possible for NPS to obtain a new concessioner or make immediately available appropriated funds in these circumstances in order to pay leasehold surrender interest as a pre-condition to termination of the concession contract. NPS must have the ability to terminate concession contracts in order to carry out its statutory responsibilities to park areas and visitors.

NPS, however, is aware of the business needs of concessioners to obtain timely payment for leasehold surrender interests. This is why NPS, through the proposed regulations, placed limitations on the time for payment, one year with respect to payment by a new concessioner (it takes approximately a year to prepare for, solicit and award a new concession contract) and two years for payment by the government (the two year period reflecting the federal budget cycle).

Several other comments submitted by concessioners expressed concern about the timing of payment under this section but also made a practical suggestion. These comments suggested that the section be amended to provide interest during any period in which payment was delayed after the expiration or termination of a concession contract. NPS considers these suggestions as appropriate and has included an interest provision in this section in the final rule. NPS considers that the payment of interest (in addition to the CPI adjustment that continues until the date of payment) is fair and will be more than sufficient to encourage lenders to make loans against leasehold surrender interest, a concern raised by other comments in this connection. NPS notes that one commenter suggested that the timing of payments for leasehold surrender interest could result in a $100 million effect on the economy. NPS believes this assertion to be unfounded, but, in any event, considers that the changes in the final rule eliminate any concerns in this respect.

In addition, in order to further accommodate the concerns of commenters, NPS has modified this section in the final rule to state that the date of payment for a leasehold surrender interest, except in extraordinary circumstances beyond the control of NPS, is to be the date of expiration or termination of the concession contract. In addition, NPS has modified the final rule to require payment within one year of the expiration or termination of a concession contract.

Section 51.68 (Section 51.63 in the final rule) When a New Concessioner Pays a Prior Concessioner for a Leasehold Surrender Interest, What Is the Leasehold Surrender Interest in the Related Capital Improvements for the Purposes of a New Concession Contract?

A new sentence has been added to this section in the final rule to expressly require a new concessioner to pay the previous concessioner for any leasehold surrender interest value that is due.

Section 51.69 (Renumbered as Section 51.62 in the final rule) What Is the Process To Determine the Leasehold Surrender Interest Value When a New Concessioner Is To Pay a Prior Concessioner for a Leasehold Surrender Interest?

Several comments objected to elements of this section. The primary concern was that the arbitration to determine the leasehold surrender interest value when a new concessioner is to pay a prior concessioner for leasehold surrender interest was to be undertaken by the new concessioner and the prior concessioner. The commenters recommend that the arbitration be between the prior concessioner and NPS. NPS has concurred in this view. This section has been amended accordingly in the final regulations.

Another comment objected to the fact that the arbitration is limited to establishing the depreciation deduction for purposes of leasehold surrender interest value and does not permit arbitration of the prior determination of construction cost required by this part. NPS has limited the arbitration issues in this manner because the final rule calls for arbitration of the construction cost after construction is completed. However, NPS, in response to this comment, has changed this section to include the calculation of the CPI as an additional subject of arbitration in the event of disagreement by the concessioner and NPS. This issue, as well as depreciation, will be current as of the time of the arbitration proceedings.

Comments also stated that the arbitration should take place in advance of the expiration of the prior concession contract. NPS generally concurs in this suggestion but notes that it may not always be possible to conclude an arbitration prior to the expiration of a concession contract, and, of course, it is unlikely that an arbitration could be concluded prior to a termination of a concession contract for default (which could be immediate in certain circumstances). NPS has changed this section in the final regulations to provide for arbitration in advance of contract expiration or termination where possible.

Several comments objected to this section with respect to the type of arbitration procedures it calls for. This issue is addressed under Section 51.78.

Section 51.70 (Section 51.64 in the final rule and retitled) May the Concessioner Gain Additional Leasehold Surrender Interest by Adding to a Structure in Which the Concessioner Has a Leasehold Surrender Interest?

The general concessioner organization objected to this section by referencing related objections to other sections. Those objections are discussed under the relevant sections.

NPS has modified this section in the final rule to include ''major rehabiliations'' within its scope. This permits deletion of Section 51.72 of the proposed regulations in the final rule.

Section 51.71 (Section 51.65 in the final rule) May the Concessioner Gain Additional Leasehold Surrender Interest by Replacing a Fixture in Which the Concessioner Has a Leasehold Surrender Interest?

The general concessioner organization objected to this section and stated that it is not supported by law on the grounds that when an existing fixture is replaced by the concessioner there can be no reduction of leasehold surrender interest based on the removal of the existing fixture.

The flaw in this argument is apparent. Suppose a concessioner at the beginning of a concession contract with a twenty year term installs a furnace at a cost of $1,000. In ten years, the concessioner replaces the furnace with a new furnace, costing $1,200. At the expiration of the contract, the concessioner is entitled under this section and the 1998 Act to be paid for the value of its leasehold surrender interest. However, the replaced furnace is gone. The 1998 Act does not contemplate that a new concessioner will pay a prior concessioner for a fixture that no longer exists. Under Section 405(a)(3) of the 1998 Act, the leasehold surrender interest value in a capital improvement is the initial construction cost of the capital improvement, in this case the cost of purchasing and installing the furnace, plus a CPI adjustment up to the time of payment for the leasehold surrender interest, less depreciation of the capital improvement as evidenced by its condition and prospective serviceability in comparison with a new unit of like kind. Under any real property appraisal practice, the depreciation of a furnace that was replaced ten years ago is 100%. There is no value to be paid.

NPS has drafted this section carefully in order to fairly deal with the complicated circumstances of fixtures and non-removable equipment under the leasehold surrender interest concept. Under this section in the proposed regulations, if a concessioner replaces a fixture with a new fixture of like kind, there is no adjustment to the leasehold surrender interest in the fixture. Under the proposed regulations, the new fixture replaces the old one and the concessioner's leasehold surrender interest continues unchanged. However, if the new fixture is a substantial upgrade from the replaced fixture, and if the construction cost of the new fixture exceeds the construction cost of the fixture to be replaced, the increase is added to the concessioner's leasehold surrender interest.

This has been changed in the final rule in order to accommodate to the extent reasonable the concerns of commenters. In the final rule, the entire construction cost of a new fixture is added to the leasehold surrender interest and the construction cost of the replaced fixture is subtracted.

Section 51.72 (Deleted in the final rule) Will a Concessioner That Undertakes a Major Rehabilitation of an Existing Structure in Which the Concessioner Has a Leasehold Surrender Interest Increase Its Leasehold Surrender Interest?

Several comments objected to this section on the general grounds that additional leasehold surrender interest should be obtained for any additional construction work undertaken by a concessioner. NPS disagrees. This issue is discussed under Section 51.75.

One comment requested additional guidance as to what constitutes a major rehabilitation. For example, the commenter asked, does adding an additional bathroom to a cabin constitute a major rehabilitation? A major rehabilitation is defined in Section 51.51 of the final rule. The construction of a second bathroom under this definition could be a major rehabilitation if its cost exceeds fifty percent of the pre-rehabilitation value of the cabin. NPS considers that the definition of ''major rehabilitation'' is clear. NPS, however, deleted as unnecessary in the final rule the second sentence in paragraph (2) of the definition of major rehabilitation.

This section has been deleted in the final rule as its content is included in Section 51.64 of the final rule.

Section 51.73 (Section 51.66 in the final rule) In What Circumstances Will the Director Authorize a Concessioner To Obtain a Leasehold Surrender Interest in an Existing Capital Improvement in Which no Leasehold Surrender Interest Exists?

Several comments objected to this section on the same general grounds, that all additional construction should obtain additional leasehold surrender interest. This issue is discussed under Section 51.75.

The general concessioner organization also objected to the last sentence of this section which stated that when an existing building in which a concessioner has no leasehold surrender interest undergoes a major rehabilitation, depreciation for the purposes of the leasehold surrender interest value will apply to the entire building. NPS has amended this sentence in response to the comment. It states in the final rule that depreciation will only apply to the elements of the major rehabilitation.

Finally, for the sake of clarity, this section has been rephrased and split into two subsections in the final rule without a change in its meaning except as noted in the prior paragraphs.

Section 51.74 (Deleted in the final rule) Will a Concessioner Receive New or Additional Leasehold Surrender Interest as a Result of a Rehabilitation That Does Not Qualify as a Major Rehabilitation?

Several comments objected to this section because ''all capital improvements qualify for leasehold surrender interest.'' This issue is discussed under Section 51.75. Section 51.74 has been deleted in the final rule as redundant in light of Section 51.64 in the final rule.

Section 51.75 (Section 51.67 in the final rule) Is a Concessioner Required To Repair and Maintain Capital Improvements, and, If So, Will the Concessioner Obtain Leasehold Surrender Interest as a Result?

Several comments objected to this and other sections of the proposed regulations because, allegedly, ''all capital improvements qualify for leasehold surrender interest.'' In this connection, the general concessioner organization equates the construction of capital improvements with ''any repairs and maintenance'' of a building that are ''capitalized under GAAP.''

In essence, the commenters seek leasehold surrender interest for the capitalized costs of repair and maintenance of an existing structure in addition to leasehold surrender interest resulting from the construction of the structure.

Before discussing the fact that this position is inconsistent with the terms of the 1998 Act, NPS points out the administrative nightmare for both NPS and concessioners that would result if the commenters' position was adopted by NPS. Under the commenters' position, for example, every time a concessioner might replace a section of damaged drywall, or, replace missing shingles on a roof, a new leasehold surrender interest, including a new CPI calculation, would be established. For larger concession operations (one current operation utilizes almost 800 buildings), the number of these additional leasehold surrender interests could well be in the tens of thousands over the term of a twenty year concession contract. NPS does not consider that such a result, even if otherwise lawful, would be in the best interests of concessioners, NPS, or efficient management of the NPS concessions program.

NPS also notes that the expenditures that a concessioner may make for repair and maintenance of existing structures are not lost to the concessioner. To the contrary, repair and maintenance expenditures will necessarily be reflected in a lower depreciation deduction when the final leasehold surrender interest value for the structure is calculated. The concessioner, accordingly, will be compensated for its expenditures for repair and maintenance of existing structures even though the 1998 Act does not permit recognition of leasehold surrender interest as a result of repair and maintenance.

In any event, the view that additional leasehold surrender interest results from expenditures for repair and maintenance of existing structures is inconsistent with the express terms of the 1998 Act. Section 405(a) of the 1998 Act provides a leasehold surrender interest when a concessioner ''constructs'' a capital improvement upon land owned by the United States within a unit of the National Park System pursuant to a concession contract. The statute makes no mention of leasehold surrender interest resulting from the repair and maintenance of an existing capital improvement. ''Construction'' means ''the process or manner of building an improvement.'' 3rd Edition, page 73. ''Repairs'' are ''current expenditures for general upkeep of a property's condition and efficiency.'' 3rd Edition, p. 303. ''Maintenance'' means ''keeping a property in condition to perform its function.'' 3rd Edition, p. 217.

In addition, Section 405(a)(1) of the 1998 Act states that a concessioner shall have a leasehold surrender interest in ''each capital improvement'' it constructs. Section 405(e)(2) of the 1998 Act in turn defines ''capital improvement'' as ''a structure, fixture, or non-removable equipment.'' In other words, the 1998 Act only provides a leasehold surrender interest in ''structures, fixtures, and non-removable equipment'' that a concessioner ''constructs,'' *i.e.,* builds, under the terms of a concession contract. The law does not suggest that the repair or maintenance of an existing structure results in leasehold surrender interest.

NPS notes in this connection that Section 405(a)(5) of the 1998 Act states that when a concessioner that makes a ''capital improvement'' to an existing ''capital improvement'' in which the concessioner has a leasehold surrender interest, the cost of the additional capital improvement is to be added to the then current value of the concessioner's leasehold surrender interest. The proposed regulations and the final rule reflect this requirement by granting additional leasehold surrender interest for replacement of fixtures and non-removable property, additions to existing structures, and/or the major rehabilitation of existing structures. What the statute does not permit, however, is additional leasehold surrender interest for the repair and maintenance of existing structures (unless a repair and maintenance project is a major rehabilitation as defined in the final rule).

The position of the general concessioner organization, when reduced to its essentials, is that the 1998 Act, when stating that a leasehold surrender interest results from the ''construction'' of a ''structure,'' means that every time a concessioner replaces a rotted beam or a damaged piece of drywall in a building, it has ''constructed'' a ''structure'' within the meaning of the 1998 Act. This position is not credible.

NPS considers, however, that providing leasehold surrender interest for the major rehabilitation of an existing structure is permissible under the terms of the 1998 Act as a major rehabilitation is defined in the final rule as a comprehensive rehabilitation of an existing structure the cost of which exceeds fifty percent of the pre-rehabilitation value of the structure. NPS, accordingly, considers that a major rehabilitation is tantamount to the construction of a new structure (or the addition of a new structure to an

existing structure) in which leasehold surrender interest may be obtained within the leasehold surrender interest limitations of the 1998 Act.

NPS notes that it changed the definition of major rehabilitation in the final rule. In the proposed regulations, the construction cost had to exceed one hundred percent of the pre-rehabilitation value of the structure. The final rule changes this to fifty percent of the pre-rehabilitation value. This change is intended to accommodate to the extent possible the concerns of commenters that seek leasehold surrender interest for repair and maintenance of structures, contrary to the terms of the 1998 Act. NPS considers that a rehabilitation of a structure where the cost exceeds fifty percent of the structure's pre-rehabilitation value is tantamount to construction of a new structure within the meaning of the 1998 Act and therefore eligible for leasehold surrender interest.

Likewise, the proposed regulations and final rule provide leasehold surrender interest for constructing an addition to an existing structure in which a concessioner has a leasehold surrender interest, *e.g.,* a new wing to an existing building or an extension of an existing sidewalk. An addition is treated as a new structure for leasehold surrender interest purposes.

The general concessioner organization suggested that this section be modified in effect to state that if a concession contract contains a repair and maintenance reserve provision that there would be no depreciation deduction for related leasehold surrender interest value. This suggestion is contrary to the 1998 Act's definition of the value of leasehold surrender interest (which requires a deduction for depreciation) and is not valid as a general business matter. The fact that a repair and maintenance reserve exists does not mean that a structure will not undergo deprecation. Even very well maintained buildings depreciate over time. However, NPS considers that the existence of a repair and maintenance reserve will lessen the depreciation deduction that will occur with respect to related leasehold surrender structures. The repair and maintenance reserve, accordingly, in addition to ensuring that concessioner facilities are well maintained, makes good business sense.

The general concessioner organization also stated that any repair and maintenance reserve should be at levels that are commercially reasonable. NPS agrees and considers that the solicitation process for new concession contracts will ensure that any repair and maintenance requirements of the new contract will be reasonable.

Finally, the general concessioner organization suggested that a repair and maintenance reserve provision contained in a concession contract should require that any balance in the reserve at the expiration of the contract should be retained by the incumbent concessioner. This matter will be addressed by NPS in the development of and consideration of public comments on its proposed standard concession contract.

This section has been changed in the final rule to delete references to the obligations of a concessioner to repair and maintain property. The references have been included in Section 51.81 in the final rule.

Subpart G—Possessory Interest (Subpart H in the final rule)

Section 51. 76 (Section 51.68 in the final rule). If a Concessioner Is Not Awarded a New Concession Contract, How Will a Concessioner That Has a Possessory Interest Receive Compensation for Its Possessory Interest?

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Section 51.77 (Section 51.70 in the final rule) If a Concessioner Is Awarded a New Concession Contract, What Happens to the Concessioner's Possessory Interest?

Several comments objected to this section with respect to the fact that it contemplates NPS determining the value of the prior concessioner's possessory interest. However, NPS notes that the intention of the section was that the determination of the value by NPS is subject to the arbitration proceedings called for by Section 51.78 of the proposed regulations. NPS has changed the section in the final regulations to reflect that a determination of value of a prior concessioner's possessory interest is, in the first instance, to be accomplished by mutual agreement of the parties, and, if that fails, through arbitration proceedings.

The general concessioner organization objected to the element of this section that calls for the value of a prior concessioner's possessory interest to be determined on a unit by unit basis on the grounds that this may impact the overall value of an existing concessioner's possessory interest. NPS, in consideration of this comment, has changed this section in the final regulations to require allocation of possessory interest on a unit by unit basis if not determined initially on such basis. If negotiation of the allocation is not successful, it will be subject to arbitration. Allocation on a unit by unit basis is necessary in order to provide for depreciation determinations and possible relinquishment of leasehold surrender interest in particular structures.

Section 51.78 (Section 51.71 in the final rule) What Is The Process To Be Followed If There Is a Dispute Between the Prior Concessioner and the Director as to the Value of Possessory Interest?

Several comments objected to elements of this section on the grounds that the limitations it places on the arbitration proceedings are unfair and unlawful. NPS has changed this section in the final regulations. The thrust of the changes is to require binding arbitration under procedures that are to be determined by the arbitration panel. The arbitration panel will adopt procedures it deems appropriate in the circumstances of the dispute in order to treat each party equally and to give each party the opportunity to be heard and a fair opportunity to present its case. The arbitration panel will utilize adjudicative procedures such as cross-examination of witnesses if the arbitration panel determines that adjudicative procedures are necessary in the particular circumstances of the dispute. The arbitration panel may also adopt appropriate provisions regarding confidentiality of information provided by the parties to the panel or to each other in connection with the arbitration proceeding.

These changes are consistent with the commercial arbitration rules of the American Arbitration Association (''AAA'') which permit arbitration panels flexibility to adopt appropriate arbitration procedures so long as each party is treated equally and each party has the opportunity to be heard and a fair opportunity to present its case.

NPS feels strongly that in most circumstances the establishment of the value of possessory interest or other related matters subject to arbitration under the regulations is best achieved with efficiency, economy, and fairness by informal proceedings rather that full-blown adjudicative procedures. NPS does not consider that it is in the best interests of concessioners, particularly smaller concessioners, or NPS, to have the arbitrated values of leasehold surrender or possessory interests influenced by the party with the more skillful attorneys rather than the party with the more persuasive appraisal. The final regulations, however, do not bind the arbitration panel in this matter. An arbitration panel may adopt whatever procedures it sees fit under the AAA

standard included in the regulations, including AAA or another arbitration organization's adjudicative procedures.

NPS also feels strongly that the members of the arbitration panel should be qualified appraisers to ensure a professional determination on the appraisal issue. The general concessioner organization agreed with this view. However, the final regulations have been changed in this connection to require that only the neutral arbiter be a qualified appraiser so that a party may select their party arbiter as they see fit. In addition, NPS has deleted the requirement of this section regarding judicial review of an arbitration proceeding. The scope of judicial review will be determined by applicable law.

Several comments suggested that it is unfair or unlawful for NPS to establish the terms of the arbitration without the agreement of the affected concessioner. The changes described above relieve those concerns as they provide that the arbitration panel will establish the procedures to be followed. In any event, the commenters are wrong in their presumption that the affected concessioner will not agree to the procedures. The procedures are only applicable under the terms of a concession contract a person may choose to enter into after the effective date of the final rule. They are not applicable to any existing concession contract.

NPS also points out that the procedures described above are consistent with the applicable standard provision of NPS concession contracts entered into over at least the last thirty years. The standard provision calls for a dispute over the value of possessory interest to be determined by a panel of three appraisers after giving both parties an opportunity to be heard. All existing concessioners with possessory interest contract provisions have agreed to this provision under the terms of their concession contracts.

Finally, several comments suggested that the proposed arbitration provisions are inconsistent with the terms of the Federal Arbitration Act, 9 U.S.C. 14 *et seq.*, and the Alternative Disputes Act, 5 U.S.C. 571 *et seq.* However, neither of these Acts by their terms is applicable to NPS concession contracts.

NPS, for the sake of clarity, has moved the description of arbitration proceedings to Section 51.51 of the final rule.

Section 51.79 (Section 51.72 in the final rule) If a New Concessioner is Awarded the Contract, What Is the Relationship Between Leasehold Surrender Interest and Possessory Interest?

Several comments suggested changing this section to eliminate reference to the possibility of the leasehold surrender interest being based on the actual payment to the prior concessioner by the new concessioner for the prior concessioner's possessory interest. NPS has made this suggested change in the final regulations.

Section 51.80 (Section 51.69 in the final rule) What Happens If There Is a Dispute Between the New Concessioner and a Prior Concessioner as to the Value of the Possessory Interest?

Several comments objected to the fact that this section requires a new concessioner to obtain NPS approval before agreeing to the value of possessory interest with a prior concessioner and to allow NPS to assist it in any procedures for resolution of the possessory interest value. The comments suggest that this interferes with the rights of the prior concessioner. NPS disagrees. The section imposes no obligations on the prior concessioner nor does it restrict its rights to receive payment for its possessory interest in accordance with the terms of its contract. Further, it certainly is within the rights of a new concessioner to agree that a third party has prior approval rights over a negotiated purchase price and/or to assist it in a dispute resolution process.

NPS notes that this provision is essential in order to ensure that the new concessioner negotiates or engages in dispute proceedings on an arm's length basis. Without the approval right of NPS or the right to assist in dispute proceedings, a new concessioner and a prior concessioner could collude to inflate the value of a possessory interest that NPS would indirectly be obliged to pay.

This is because the amount of money that a new concessioner has to pay for a prior concessioner's possessory interest directly affects the amount of money the new concessioner will be able to make available as a business matter under the terms of the new concession contract (for new improvements, new equipment, franchise fees, etc).

Several comments also suggested that a dispute about the amount of possessory interest compensation a concessioner is to obtain if it is not awarded a new concession contract should be resolved by the concessioner and NPS, not by the prior concessioner and the new concessioner. However, 1965 Act concession contracts call for dispute resolution between the new concessioner and the prior concessioner. NPS cannot change this provision without the agreement of the concessioner. NPS will consider resolving directly the value of a possessory interest with an existing concessioner at the request of the concessioner.

A new sentence has been added to this section in the final rule making clear that nothing in this part is to be construed as authorizing a new concessioner to refuse to pay a prior concessioner for possessory interest in accordance with the terms of a possessory interest concession contract.

Subpart H—Concession Contract Provisions (Subpart I in the final rule)

Section 51.81 (Section 51.73 in the final rule) What Is the Term or Length of a Concession Contract?

Several comments questioned the content of this section as changing the intent of Congress as expressed in Section 404 of the 1998 Act. In response, NPS has modified this section in the final rule to more closely reflect the terms of Section 404 and to make clear that it is NPS policy to establish the term of concession contracts to be as short as prudent in the circumstances of each concession contract. NPS considers that this policy is consistent with the purposes of the 1998 Act, particularly its purpose of enhancing competition in concession contracts. Long term concession contracts (where a need for a long term does not exist) equate to less competition.

A comment suggested that all outfitter and guide concession contracts should have a term of ten years on the basis of outside investments outfitter and guide concessioners may have to make. NPS has not accepted this suggestion. NPS will determine terms of outfitter and guide concession contracts on the same basis as other concession contracts, giving due consideration to the particular circumstances of each concession contract.

Section 51.82 (Section 51.74 in the final rule). When May a Concession Contract Be Terminated by the Director?

A comment requested clarification as to what termination procedures will be included in concession contracts. The standard NPS concession contract published for comment on September 3, 1999, contains the termination clause NPS proposes to use in standard concession contracts. The comment also

asked NPS to explain why the concessioner is not afforded a right of termination in the event of default by NPS. This is because a concessioner has legal rights to terminate a concession contract in accordance with general contract law in the event of a material breach by NPS.

Several comments objected to this section on the general grounds that it gives NPS too much authority to terminate concession contracts. NPS considers that having the ability to terminate a concession contract when necessary to achieve the purposes of the 1998 Act is necessary in order to properly carry out the purposes of the 1998 Act. NPS has changed this section in the final regulations to refer to the purposes of the 1998 Act rather than the purposes ''of this part.''

Another comment suggested changes to this section to require a right to cure in case of default or unsatisfactory annual evaluations. The standard concession contract published for public comment describes the right to cure provisions in its termination clause.

Section 51.83 (Section 51.75 in the final rule) May the Director Split or Combine Concession Contracts?

Several comments suggested that combining concession contracts should not be undertaken by NPS if the result would be the loss of a preference in renewal. NPS considers that the sentence to which the comments objected is appropriate. However, it has been deleted in the final rule as unnecessary.

One comment suggested that this section misstates Section 417 of the 1998 Act by imposing a blanket prohibition on segmenting concession contracts if the result would be a concession contract with gross receipts under $500,000. Another comment questioned why this segmentation rule was applicable to outfitter and guide concession contracts when Section 417 only addresses concession contracts with gross receipts under $500,000.

In response to these comments, NPS has amended this section to state that NPS will not segment concession contracts for the purpose of establishing a concession contract with gross receipts of less than $500,000.

Section 51.84 (Section 51.76 in the final rule) May the Director Include in a Concession Contract or Otherwise Grant a Concessioner a Preferential Right To Provide New or Additional Visitor Services?

A number of comments were received that addressed this section. Almost all misunderstood it. Accordingly, NPS has clarified it in the final regulations. However, the section did and does not do what the comments perceived. The section only precludes the inclusion of a contractual right in a contract that requires that any new or additional services be offered to the incumbent concessioner. This tracks the requirements of Section 403(9) of the Act. Several comments also asked for amplification of the term ''new or additional services.'' NPS considers that further amplification is unnecessary in light of the clarifications made to this section in the final rule.

NPS also notes that several commenters understood this section to have application to a right of preference to a new contract. This is not the case. The section only concerns the addition of new services under the terms of an existing concession contract.

Several commenters understood this section to mean that a concession contract may not be amended to include additional services. This is not the case. NPS has added a sentence to this section in the final rule to permit by contract amendment minor additions to the visitor services authorized by a contract that are a reasonable extension of the existing services. This language tracks relevant legislative history. H.R. Rep. No.105–767 at p. 41(1998).

Section 51.85. (Section 51.77 in the final rule). Will a Concession Contract Provide a Concessioner an Exclusive Right to Provide Visitor Services?

Several comments objected to this section on the grounds that concession contracts are intended to grant exclusive rights to provide specified visitor services. This is not the case. NPS concession contracts authorize concessioners to provide specified visitor services but do not grant exclusive rights.

The general concessioner organization, although its comment indicated that it understood this section, objected to it on the grounds that it may be in the best interests of NPS to grant exclusive concession contracts. NPS does not consider this to be the case. An exclusive right establishes a monopoly situation that NPS considers contrary to the public interest.

Section 51.86 (Deleted in the final rule). Is There a Special Rule for Transportation Contracts?

This section has been deleted in the final rule as unnecessary in light of Section 412 of the 1998 Act.

Section 51.87 (Deleted in the final rule). Where Will the Director Deposit Franchise Fees and How Will the Director Use the Franchise Fees?

The general concessioner organization objected to the inclusion of ''visitor support activities'' as an authorized use for expenditure of franchise fees by NPS. It objected because this category is not specified in the 1998 Act, and, because ''it could have a very broad meaning inconsistent with the intent of the 1998 Act.'' NPS disagrees with this view and notes that NPS may expend funds for needed visitor facilities in park areas from the franchise fee accounts established by the 1998 Act. This includes the construction of facilities (e.g., parking lots, access roads, and sewer systems) that directly support the operations of a concessioner. However, this section has been deleted in the final rule as unnecessary.

Section 51.88 (Section 51.78 in the final rule and retitled.) Will Franchise Fees be Subject to Renegotiation?

Several comments suggested that this section be clarified to make clear that either the concessioner or NPS may request an adjustment of the franchise fee. This change has been made in the final rule, and, consistent with this change, the final rule also clarifies that a determination as to the existence of extraordinary, unanticipated changes must be made mutually by the concessioner and NPS.

A commenter also objected to the last sentence of this section as it implies that a franchise fee adjustment is appropriate in all circumstances where an adjustment has been requested. This section has been clarified in the final regulations in accordance with these comments.

A comment suggested that the phrase ''extraordinary, unanticipated changes'' be defined in the final rule. NPS has not accepted this suggestion in light of the wide variety of circumstances that may trigger a request for an adjustment of a franchise fee under this section.

Another comment asked whether this section is applicable to 1965 Act concession contracts. It is not, as 1965 Act concession contracts have a different franchise fee adjustment clause under a differing provision of the 1965 Act.

NPS, in response to public comments, has also added a subsection (a) to this section to track the terms of Section 407(a) of the 1998 Act regarding franchise fees.

Section 51.89 (Section 51.79 in the final rule) May the Director Waive Payment of Franchise Fees or Other Payments?

Several comments objected to this section on the grounds NPS should have flexibility to waive franchisee fees.

NPS generally does not consider waiver of franchise fees appropriate, especially in light of Section 407 of the Act. However, it has added a phrase to this section in the final rule that permits a limited partial waiver of franchise fees if permissible under established administrative guidelines for the purpose of recognizing exceptional concessioners.

Section 51.90 (Section 51.80 in the final rule) How Will the Director Establish Franchise Fees for Multiple Outfitter and Guide Concession Contracts in the Same Park Area?

Several commenters objected to this section because it did not reflect their view that Section 411 of the 1998 Act exempts outfitter and guide concession contracts from competition under principal selection factor (5), the amount of the franchise fee offered in a concession contract proposal. However, Section 411 makes no mention of such an exemption. Rather, it states that where multiple outfitter and guide concession contracts are to be awarded in a particular park area concerning the same or similar services, NPS is to establish a comparable franchise fee for such contracts. NPS will do this on a park-by-park basis in the course of its development of franchise fees to be included in prospectuses for new concession contracts. This section was also criticized for failing to give sufficient guidance as to what services are the ''same or comparable.'' This is a matter that is best determined on a case-by-case basis.

Section 51.91 (Section 51.81 in the final rule). May the Director Include ''Special Account'' Provisions in Concession Contracts?

The general concessioner organization, although not objecting to the concept of a repair and maintenance reserve as described in this section, repeated its objections directed to other sections to the effect that repair and maintenance of leasehold surrender interest capital improvements results in additional leasehold surrender interest. The commenter also reiterated its position that any expenditures from repair and maintenance reserves should be deducted from the depreciation element of leasehold surrender interest when valuing leasehold surrender interest. NPS disagrees for the reasons discussed under Section 51.75.

A comment objected to the concept of repair and maintenance reserves because they allegedly will become a means for direct fee bidding in the prospectus process. NPS does not agree with this view and notes that required maintenance and repair reserves are a standard practice in the commercial real estate industry.

A comment objected to the element of this section that requires the concessioner to repair and maintain all concessioner facilities assigned to it under the terms of the concession contract. The comment asked whether this includes infrastructure assigned to the concessioner and stated that basic infrastructure should be constructed and maintained by NPS. NPS notes that concessioners are assigned a variety of facilities for use in their operations, including, occasionally, basic infrastructure. This has been NPS practice for many years. NPS considers it appropriate that NPS concession contracts require a concessioner that utilizes government property in its business to maintain and repair the property.

A comment suggested that all ''special accounts'' be forbidden, e.g., ''resource protection'' funds, as they are a means for NPS to indirectly engage in franchise fee bidding. NPS has not accepted this suggestion. In circumstances where it is otherwise permissible under the 1998 Act or other law, a provision in a concession contract requiring the concessioner to make expenditures from its gross receipts for specified purposes is an appropriate means to carry out the purposes of the 1998 Act.

NPS has added to this section in the final rule the repair and maintenance obligations of concessioners set forth in Section 51.75 of the proposed regulations.

NPS has also added a sentence to this section in the final rule to make clear that repair and maintenance reserve provisions are not to be included in concession contracts in lieu of a franchise fee and funds from such reserves are to be expended only for the repair and maintenance of real property improvements assigned to the concessioner for use in the concessioner's operations.

Section 51.92 (Section 51.83 in the final rule.) Handicrafts [Reserved]

This section was reserved as NPS is in the process of developing regulatory guidelines for handicraft sales under Section 416 of the 1998 Act with the advice of the National Park Service Concessions Management Advisory Board established by Section 409 of the Act.

The general concessioner concessioner organization commented on this section, stating that it should have the right to comment on the proposed handicraft regulations prior to the finalization of the proposed general concession regulations. NPS has published these final regulations prior to the date of possible publication of proposed handicraft regulations. NPS did not consider it to be in the public interest to delay finalization of these general regulations as requested by the general concessioner organization. Numerous concessioners are currently operating under short term extensions of existing contracts. Any delay in the promulgation of the final general concession regulations would have a detrimental effect on not only park visitors but many concessioners as well.

Subpart I—Assignment or Encumbrance of Concession Contracts (Subpart J in the final rule)

Section 51.93 (Section 51.84 in the final rule) What Special Terms Do I Need To Know To Understand This Part?

The comments received did not directly address the proposed definitions contained in this section. Several comments expressed concerns about some of the definitions indirectly. These comments are addressed under the relevant sections of this subpart.

Section 51.94 (Section 51.85 in the final rule) What Assignments Require the Approval of the Director?

Comments stated that the 1998 Act does not allow approval of an encumbrance of a concessioner's revenue stream as contemplated by this section. NPS has deleted as unnecessary the reference to approval of revenue streams in the final rule. This section and other sections within this subpart have been amended accordingly. However, the treatment of revenue streams will necessarily be a consideration in the approval of encumbrances that must be approved in accordance with the requirements of this part under the final rule.

Several comments stated that the 1998 Act does not address approval of a controlling interest in a concession contract, requesting that reference to approval of controlling interests be deleted from this and other sections of the proposed regulations.

NPS has not made this requested change. Requiring approval of the assignment of controlling interests is essential in order to effectuate the purposes of the 1998 Act with respect

to its admonitions that only qualified persons are entitled to own NPS concessions.

In this connection, Section 408(a) of the 1998 Act states as follows:

> (a) APPROVAL OF THE SECRETARY.—No concessions contract or leasehold surrender interest may be transferred, assigned, sold or otherwise conveyed or pledged by a concessioner without prior written notification to, and approval by, the Secretary. (Emphasis added).

The ''controlling interest'' element of this section is generally directed to corporate concessioners. Basically, it recognizes that a concession contract may effectively be conveyed or pledged by a corporate concessioner (''otherwise conveyed or pledged'' under the terms of Section 408(a)) without any legal transfer, assignment or sale of a concession contract *per se* held by a corporate concessioner.

If Section 408(a) of the 1998 Act were interpreted to forbid approvals of the transfer of a controlling interest in a corporation that holds a concession contract, only transfers of concession contracts that are held by individuals or partnerships would be subject to NPS approval. A corporate concessioner need only sell its stock to a new party (sale of a controlling interest) in order to effectuate a transfer of the concession contract. Congress did not intend such an anomalous result. Section 408(b) of the 1998 Act (set forth below) describes the statutory intentions for requiring the approval of the transfer of concession contracts by forbidding approval of a transfer by NPS if:

> (1) the individual, corporation or entity seeking to acquire a concession contract is not qualified or able to satisfy the terms and conditions of the concession contract;
>
> (2) such transfer or conveyance is not consistent with the objectives of protecting, conserving, and preserving the resources of the unit of the National Park System and of providing necessary and appropriate visitor services at reasonable rates and charges; or
>
> (3) the terms of such transfer or conveyance are likely, directly or indirectly, to reduce the concessioner's opportunity for a reasonable profit over the remaining term of the contract, adversely affect the quality of facilities and services provided by the concessioner, or result in a need for increased rates and charges to the public to maintain the quality of such facilities and services.

The position of the comments concerning transfer of controlling interests in concession contracts would nullify these congressional intentions. This is not a hypothetical concern. Many NPS concessioners are corporations that hold a concession contract as their exclusive business activity. In addition, almost all of the largest NPS concessioners are wholly owned subsidiaries of larger corporations. If NPS accepted the position of the commenters, NPS would have no right of approval of the transfer by sale of stock of the Yosemite, Yellowstone, Grand Canyon, Grand Teton, Glen Canyon, Glacier, and Mesa Verde National Park concession contracts, among others.

In any event, NPS considers that the phrase ''or otherwise conveyed or pledged'' directly encompasses the inclusion of controlling interests in this section. NPS also notes that the ''controlling interest'' concept was contained in 36 CFR Part 51 under the terms of the 1965 Act. Congress must be presumed to have been aware of this in considering the 1998 Act.

Another commenter made essentially the same argument with respect to inclusion in the regulations of a right to approve management contracts a concessioner might enter into. NPS considers it must have the ability to review management contracts for the reasons discussed with respect to controlling interests. Congress did not intend that the most qualified offeror be selected for award of a concession contract only to permit the selected qualified concessioner to turn over management to a third party with no right of NPS to determine that the third party is qualified. NPS considers that it has ample authority to require approval of arrangements under which a third party is to operate a concession under the 1998 Act and 16 USC 1 *et seq.*

NPS notes that Section 408(b) of the 1998 Act uses the word ''and'' instead of ''or'' between the second and third determinations that are required for approval of an assignment or encumberance. NPS has interpreted this in the regulations as ''or'' in light of the legislative history of this section and the fact that the word ''and,'' perhaps, and anomalously, could be read as requiring NPS to approve transactions that are detrimental to the resources of the park area or to park area visitors. No commenters on the proposed regulations questioned this interpretation.

Section 51.95 (Section 51.86 in the final rule) What Encumbrances Require the Approval of the Director?

Several comments repeated under this section their similar objections directed to Section 51.94. The changes made to Section 51.94 have also been made to this section in the final regulations. In addition, NPS has deleted subsection (f) of this section in the final regulations in response to public comments.

Section 51.96 (Section 51.87 in the final rule) Does the Concessioner Have an Unconditional Right To Receive the Director's Approval for an Assignment or Encumbrance?

Several comments suggested that the preliminary language in this section be amended to more accurately reflect Section 408 of the 1998 Act, that approval of an assignment or encumbrance is to be granted by NPS unless NPS makes a determination that the approval conditions contained in Section 408 are not met. NPS has made this change in the final rule.

Several comments requested modification of the limitations on the purposes for which encumbrances may be approved. In this connection, Section 405(a)(2)(A) of the 1998 Act provides that a leasehold surrender interest:

> May be pledged as security for financing of a capital improvement or the acquisition of a concession contract when approved by the Secretary of the Interior pursuant to this section.

The limited purposes for which a leasehold surrender interest may be pledged were the primary basis of the encumbrance limitations contained in the proposed regulations. In response to comments, this section has been modified in the final regulations to broaden the purposes for which encumbrances may be made consistent with the purposes and requirements of the 1998 Act.

Section 51.97 (Renumbered as Section 51.88 in the final rule) What Happens If an Assignment or Encumbrance Is Completed Without the Approval of the Director?

NPS has deleted reference to concessioner revenues from this section in accordance with the discussion under Section 51.93.

Section 51.98 (Section 51.89 in the final rule) What Happens If There Is a Default on an Encumbrance Approved by the Director?

* * * * *

Section 51.99 (Section 51.90 in the final rule) How Does the Concessioner Get the Director's Approval Before Making an Assignment or Encumbrance?

Several comments suggested that this section's prior approval requirements insert NPS into a concessioner's business transactions before the transaction is completed. However, Section 408 of the 1998 Act requires written notification and approval before assignments and encumbrances are completed. The changes reducing the scope of transactions subject to NPS

approval under the final regulations will alleviate the concerns of the commenters.

Section 51.100 (Section 51.91 in the final rule) What Information Will the Director Require in the Application?

A number of commenters complained that the information requirements imposed by this section are too burdensome. NPS, in response to these comments, has reduced the information described in this section and has worded the section so as to require submission of information only to the extent requested by NPS as necessary in the circumstances of a particular transaction. NPS, in response to comments, has also modified the scope of the information requirements in a number of respects and has deleted subsection (c) in the final regulations. NPS considers that the remaining information requirements are necessary in order to assist in making the determinations required by Section 408 of the 1998 Act. A comment suggested that the word ''reasonably'' be included in this section to limit what information the Director may request. NPS has not made this change because under applicable law, NPS decisions made pursuant to this part must have an appropriate basis.

The general concessioner organization made a number of specific suggestions regarding the information requirements of this section. They are responded to as follows:

The commenter suggested that NPS should not be provided the actual transaction documents regarding an assignment or encumbrance but should rely on a narrative description of the transaction to be submitted by the concessioner. NPS considers that it must have access to the actual transaction documents in order to be able to make the determinations required by Section 408 of the 1998 Act.

The commenter requested that this section be limited to an opinion of counsel that only goes to the authority of the contracting party and the enforceability of the contract. NPS considers that the broader wording of this section is appropriate. If a proposed acquisition of a concession contract is unlawful, this impacts on the qualifications and ability of the acquiring party to satisfy the conditions of the concession contract within the meaning of Section 408.

The commenter suggested that the last clause of subsection (c) is duplicative. NPS has deleted it.

The commenter objected to the requirement of subsection (g) to the effect that a narrative description of the transaction is required. The commenter suggested that the narrative description of the financial aspects of the transaction as required by Subsection (c) should suffice for NPS purposes. NPS considers that aspects of a transaction beyond financial considerations are very relevant under the approval conditions of Section 408. This provision has not been changed in the final rule.

The commenter suggested changes and a clarification of subsection (h). This section has been clarified accordingly and the requirement for review by an independent accounting firm deleted as requested by the commenter.

The commenter objected to the allocations required by subsection (i). Subsection (i) has been edited in the final rule to delete a specific list of allocations. The general allocation information is needed in connection with the NPS responsibility to determine that the terms of the transaction will not reduce the concessioner's opportunity for a reasonable profit. It is usual practice when examining the financial implications of purchases of stock or assets to review the allocations of the purchase price among particular asset classes.

The commenter suggested several changes to the times included in subsection (j). NPS has generally made the commenter's requested changes in the final rule. The new times established are considered appropriate by NPS in the circumstances of NPS concession contracts.

The commenter requested deletion of subsection (k). It has been deleted in the final rule.

The commenter requested deletion of subsection (l). NPS has not deleted it. Given the variety of circumstances that may relate to assignment or encumbrance of NPS concession contracts, flexibility in requesting information must be retained.

Another commenter requested that the regulation make clear that the information submitted is confidential. NPS has not made a change to this section in this connection because the extent to which information submitted to NPS by a concessioner is available to the public is determined by the requirements of the Freedom of Information Act and related laws, including the 1998 Act.

Section 51.101 (Deleted in the final rule) May the Director Waive Any of These Documentation Requirements?

This section has been deleted in the final regulations in light of the changes made to Section 51.100.

Section 51.102 (Section 51.92 in the final rule) What Are Standard Proformas?

Several comments suggested that the standard proformas that are encouraged but not required to be submitted pursuant to this section do not conform to standard business practice because they call for loans to be amortized during the remaining term of the concession contract. NPS notes, however, that Section 408 of the 1998 Act states that an approval of assignments or encumbrances may not be granted if, among other matters, the transaction is ''likely to reduce the concessioner's opportunity for profit over the remaining term of the contract.''

NPS, nonetheless, in response to these comments, has made a change to this section in the final rule to the effect that a standard pro-forma, if it does not call for amortization of a loan over the remaining term of the contract, must explain why this fact is not inconsistent with the considerations stated in Section 51.87(h) of the final rule.

Another commenter suggested that the responsibility of the NPS to approve transactions with respect to a concessioner's opportunity for profit should be limited to circumstances where NPS determines that a negative effect would result from an unprofitable operation. This interpretation, however, is in conflict with the plain language of the statute.

NPS has also changed this section in the final regulations by deleting subsection (d) in response to comments.

Section 51.103 (Deleted in the final rule) If the Concessioner Submits a Non-Standard Proforma, Is the Director More Likely To Disapprove the Transaction?

Because of the changes made to Section 51.92 in the final rule, this section has been deleted in the final rule.

Section 51.104 (Section 51.93 in the final rule) If the Transaction Includes More Than One Concession Contract, How Must Required Information Be Provided?

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Section 51.105 (Deleted in the final rule) In What Circumstances Will the Director Not Approve an Assignment or Encumbrance?

Several comments misunderstood subsection (a) to mean that a concessioner may not obtain a bank loan without NPS approval of the bank as qualified to operate a concession. This is not the case. However, in case of foreclosure, a new operator selected by

the bank would have to be approved by NPS as qualified. The final rule makes this clear in Section 51.87(c).

A comment requested that time limits for approval of a transaction be imposed in this section. NPS does not consider this to be practical given the scope and variety of transactions that are subject to approval under the terms of the 1998 Act.

Another comment suggested that NPS should rely on banks with respect to the reasonable opportunity for a profit aspect of a transaction approval. In other words, the comment suggested that if a bank will make a loan for a concession transaction, NPS should automatically agree that it does not reduce the concessioner's opportunity to make a reasonable profit. NPS has not accepted this suggestion. In the first instance, adopting such a rule would be an abrogation of its responsibilities under the 1998 Act. Moreover, the fact that a bank may choose to make a loan relating to a concession transaction by no means ensures that the terms of the transaction will not reduce a new concessioner's opportunity to earn a reasonable profit over the remaining term of the concession contract. The general test for a bank loan is whether the lender will receive the principal and interest on its loan. In addition, a loan may be secured by unrelated assets (personal guarantees, stock pledges, etc.) that make the loan secure but do not necessarily indicate that the concessioner has not reduced its reasonable opportunity for a profit in committing to the transaction. NPS in reviewing transactions will take into account the fact that a bank loan is involved.

NPS has deleted this section in the final rule and moved its content to Section 51.87 in the final regulation for the sake of clarity.

Section 51.106 (Section 51.94 in the final rule) What Information Will the Director Consider When Deciding To Approve a Transaction?

This section has been modified in the final rule to clarify that NPS may consider information other than that submitted by the concessioner in determining whether to approve an assignment or encumbrance.

Section 51.107 (Section 51.95 in the final rule) Does the Director's Approval of an Assignment or Encumbrance Include Any Representations of Any Kind?

A sentence has been added to this section in the final rule to clarify that approval of an assignment or encumbrance does not alter the terms of the applicable concession contract unless expressly so stated by NPS in writing.

Section 51.108 (Section 51.96 in the final rule) May the Director Amend or Extend a Concession Contract for the Purpose of Facilitating a Transaction?

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Section 51.109 (Section 51.97 in the final rule) May the Director Open To Renegotiation or Modify the Terms of a Concession Contract as a Condition of the Approval of a Transaction?

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Section 51.110 (Deleted in the final rule)—May the Director Charge a Fee for the Review of a Proposed Transaction?

NPS has deleted this section in response to comments.

Subpart J—Information and Access to Information (Subpart K in the final rule)

Section 51.111 (Section 51.98 in the final rule) What Records Must the Concessioner Keep and What Access Does the Director Have To Records?

Several comments objected to this section with respect to the fact that it applies to related records of parent or affiliated entities of a concessioner. In response, NPS has deleted the references except in circumstances where a concessioner parent or affiliate makes representations or commitments to NPS regarding its support or responsibilities to a concessioner. Access to records of the parent or affiliate in these limited circumstances is necessary in order for NPS to be able to reasonably rely on the representations or commitments.

Section 51.112 (Section 51.99 in the final rule) What Access To Concessioner Records Will the Comptroller General Have?

This section has been amended in accordance with the changes to Section 51.111.

Section 51.113 (Deleted in the final rule) What Information Will the Director Make Publicly Available About the Concessioner and the Concession Contract?

A number of comments raised confidentiality concerns about this section, arguing that it is in violation of the Freedom of Information Act. NPS has deleted this section in the final rule but moved certain of its information requirements to Section 51.5(f) in the final rule. The specific information requirements that are retained are those that were contained in 36 CFR Part 51 prior to this amendment. Other information listed in the proposed regulation has been deleted in the final rule in response to comments. Particularly, the reference to the existing concessioner's net profit has been deleted.

However, NPS considers that Section 403(3)(6) of the 1998 Act precludes NPS from exercising exemptions to the Freedom of Information Act with respect to release of information provided to NPS by a concessioner if NPS determines that the release of the information is necessary to allow for the submission of competitive proposals. NPS considers that the information requirements now contained in Section 51.5(f) in the final rule are necessary for this purpose. These specific information requirements (carried over from the existing 36 CFR Part 51) represent at least some of the information about the general scope of a business that a competitor needs in order to submit a competitive proposal.

Section 51.114 (Section 51.100 in the final rule) When Will the Director Make Proposals and Evaluation Documents Publicly Available?

This section has been edited by inserting the introductory phrase ''in the interests of enhancing competition'' to make clear its intentions. The purpose of this section is to avoid actions that may have anti-competitive results, *e.g.,* where, in the course of a contested selection of the best proposal submitted in response to a prospectus, a competitor seeks to obtain a copy of the best proposal that it may then utilize to enhance its proposal in the event a resolicitation of the contract opportunity is required. This is not only unfair to the offeror that submitted the best proposal in the first instance, but also inhibits legitimate competition in the award of concession contracts, contrary to the purposes of the 1998 Act.

One commenter, a municipality that holds a concession contract, suggested that all concession contract proposals be made public upon receipt as it is obliged to make its proposal public because of its status as a municipality. NPS has not accepted this suggestion for the reasons discussed above regarding the need to maintain the confidentiality of proposals.

Subpart K—The Effect of the 1998 Act's Repeal of the 1965 Act (Subpart L in the final rule)

Section 51.115 (Section 51.101 in the final rule) Did the 1998 Act Repeal the 1965 Act?

NPS has changed this section in the final rule to clarify that this part as well as the 1998 Act applies to 1965 Act concession contracts except to the extent that its provisions are inconsistent with particular terms and conditions of a 1965 Act concession contract.

Section 51.116 (Section 51.102 in the final rule) What Is the Effect of the 1998 Act's Repeal of the 1965 Act's Renewal Preference?

This section is discussed in the General Comments section. As stated, NPS considers that the 1998 Act's repeal of the 1965 Act, including its requirement in Section 5 that NPS give existing satisfactory concessioners preference in renewal of their contracts, applies to the holders of 1965 Act concession contracts. This section of the proposed regulations, however, permits a concessioner to appeal this decision to the Director if a 1965 Act concession contract expressly references a preference in renewal. In circumstances where a 1965 Act concession contract does not make express reference to a preference in renewal, it is the final administrative decision of NPS, based on the considerations discussed in the General Comments section, that the repeal of the 1965 Act's preference in renewal by the 1998 Act is applicable to holders of 1965 Act concession contracts.

This section has also been changed in the final rule to track the language of Section 415 so as to avoid any concern that NPS misinterpreted its meaning with respect to the phrase ''inconsistent with the terms and conditions of any such contract or permit.'' Finally, in response to a comment discussed under Section 51.49 to the effect that a concessioner holding a 1965 Act concession contract not only has a continuing right to a right of preference in renewal, but, also, has a ''right'' to not submit a responsive proposal in response to a prospectus, a sentence has been added to the final rule to clarify that if an appeal is successful under this section, or if a court determines that a concessioner holding a 1965 Act concession contract does have a preference in renewal, that the otherwise applicable terms and conditions of this part regarding the exercise of a preference in renewal, including, without limit, the obligation to submit a responsive proposal, apply to any preference in renewal recognized with respect to holders of 1965 Act concession contracts. NPS considers that it has authority to adopt these requirements under the 1998 Act and, in addition, under 16 USC 1 *et seq.* (with particular reference to 16 USC 3).

By providing this appeal right, NPS does not seek to lead existing concessioners to believe that it is likely that they would qualify for an appeal under this section. To the best of the knowledge of NPS, no 1965 Act concession contract or permit with annual gross receipts of more than $500,000 references a preference in renewal. However, there may be exceptions in which case this section of the final rule will apply.

To avoid requiring concessioners to make administrative appeals that are likely to be unsuccessful, NPS has deleted the sentence in subsection (b) of this section in the proposed regulations that stated that a concessioner must make an appeal under this section in order to be considered as having exhausted administrative remedies with respect to denial of a renewal preference regarding 1965 Act concession contracts. In its place, a sentence has been added to the final rule making final the decision of NPS regarding the repeal of the 1965 Act's preference in renewal with respect to holders of 1965 Act concession contracts.

Section 51.117 (Deleted in the final rule) What Renewal Preference Exceptions Are Made for Glacier Bay Cruise Ships?

A comment asked why this section provides an exemption for Glacier Bay cruise ships and requested a similar exemption for other concessioners in ''exceptional circumstances.'' The Glacier Bay exemption was established by Section 419 of the 1998 Act. NPS has no authority to grant similar exemptions from the requirements of the 1998 Act.

This section has been deleted in the final rule in light of Section 419 of the Act.

Subpart L—Information Collection [Subpart M in the final rule]

Section 51.118 (Section 51.104 in the final rule) Have Information Collection Procedures Been Followed?

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3. Additional Comments and Changes

In addition to this discussion of changes made to the proposed regulations, NPS points out that it has added several clarifying sections to the final rule, including new Sections 51.27 and 51.28, to set forth definitions of terms used in the final rule. It has also added a severability clause in new Section 51.103 of the final rule.

NPS has also added a new Section 51.81 regarding concessioner rate approvals. The new section reiterates most of the rate approval requirements of Section 406 of the 1998 Act. Although NPS administers concessioner rate approvals under administrative guidelines, it has included the text of Section 406 in the final rule so that the final rule is self-explanatory with respect to the nature of rate approvals. NPS considers that its rate approval process requires significant administrative flexibility and therefore is best managed under administrative guidelines, not regulations.

The general concessioner organization suggested that NPS adopt new rate approval policies and procedures without waiting for the advice of the National Park Concessions Management Advisory Board as is contemplated by Section 406(c) of the 1998 Act. NPS has not accepted this suggestion. The recommendations of the Advisory Board are critical to the development of an effective rate approval program under the policies expressed in 1998 Act.

A commenter requested that NPS consider its views and republish the proposed regulations for further public comment. NPS notes that it has accommodated many of the concerns of the commenter through incremental changes in the final rule. However, NPS has determined not to reissue the proposed regulations for further public comment. There is an urgent need to recommence concession contracting actions that were necessarily halted in November of 1998 in order to promulgate contracting regulations under the new law. More than 280 of the 630 NPS concession contracts are operating under contract extensions as of January 1999. Both the concessioners and NPS are in need for the contracting process to resume so that new full term concession contracts may be awarded. Concessioners in general dislike operating on extended contracts with no certainty as to the future.

Particularly, concessioners are reluctant to make capital investments under extended concession contracts and have difficulty in retaining experienced employees in light of the uncertainties created by contract extensions. In addition, the public has an obvious need for concession operations to be stabilized under new full term concession contracts. NPS published the proposed regulations for comment as a matter of policy. The regulations are exempt from mandatory publication as proposed regulations

under 5 U.S.C. 553(b)(B) as regulations relating to government agency contracts and public property. Even if the regulations were required to be republished as proposed, it is considered that this would be impractical and contrary to the public interest in light of the backlog of contracting actions that face NPS.

NPS also considers that solicitation of further public comments is unnecessary and not in the public interest. NPS has fully considered the public comments received and has made incremental modifications to the proposed rule that reflect these comments. The final rule, in the view of NPS, is a logical outgrowth of the proposed regulations in consideration of public comments. Further opportunity for public comment would be detrimental to concessioners and visitors to park areas, and, would not, in the view of NPS, significantly alter the content of the final rule. A delay in the commencement of concession contracting under the 1998 Act may make it impossible for NPS to award a number of expiring concession contracts this year (in light of the length of time required to solicit and award concession contracts), thereby requiring further, otherwise unnecessary, contract extensions.

An environmental consulting firm suggested including in numerous places in the proposed regulations specific references to environmental protection matters. NPS has not done this as references in the regulations to ''protection of resources,'' etc., include by implication the commenter's environmental concerns.

Several comments objected to the fact that the proposed regulations do not include provisions regarding the NPS Concessions Management Advisory Board established by Section 409 of the 1998 Act. However, there is no need for regulations governing this Board. Its activities are described by Section 409 and the Board's administrative charter.

A comment asked why the regulations make no reference to NPS 48, the NPS internal guidelines for concessions management. The regulations do not mention NPS 48 as there is no need for them to do so. Administrative guidelines are necessarily subordinate to the content of the regulations.

Several comments asked NPS to rule in the final regulations on the status of particular concessioners or classes of concessioners under varying provisions of the regulations. NPS has not done this. The final rule establishes the framework for concession contracting decisions. Particular decisions must be made as the need arises after finalization of the regulations.

A comment criticized the proposed regulations for not describing how NPS intends to carry out Section 410 of the 1998 Act. Section 410 requires NPS, to the maximum extent possible, to contract with private entities to assist NPS in the conduct of elements of the NPS concessions management program that are considered to be suitable for non-governmental performance. NPS has not made changes to the regulations in light of this comment. Decisions as to what elements of NPS concessions management should be contracted to third parties are administrative in nature.

Several comments criticized the fact that NPS published for public comment its proposed new standard concession contract after publishing the proposed regulations for public comment. The comments suggested that it is difficult to fully comprehend the proposed regulations in the absence of the proposed new standard concession contract. NPS does not agree with this view as the standard concession contract is subordinate to the terms and conditions of the regulations. NPS also notes that it is under no obligation to publish its standard concession contract for public comment. It does so as a matter of policy. In any event, the proposed new standard concession contract was published for public comment almost six weeks in advance of the deadline for submitting public comments on the proposed regulations. Commenters had ample time to review the documents together.

The general concessioner organization criticized the preamble to the proposed regulations with respect to the fact that it concludes that the proposed regulations do not have takings implications within the meaning of Executive Order No. 12630. NPS has reviewed the position of the general concessioner organization in consultation with the Office of the Solicitor. The NPS and the Office of the Solicitor are of the view that the final rule does not have any takings implications as discussed further below.

Several comments stated that the question and answer format of the regulations is confusing. NPS disagrees. It considers that the question and answer format provides an effective means for readers to locate a particular section of the regulations and to understand its relationship to the other sections.

In addition to the changes made to the proposed regulations in the final rule, NPS has made a number of editorial and conforming changes, including, without limit, changing the introductory questions at the beginning of each section to reflect changed content of the section.

Drafting Information

The primary officials that authored this rule are Wendelin M. Mann, Concession Program, National Park Service, and Pamela L. Barkin, Office of the Solicitor, Department of the Interior.

Compliance With Laws, Executive Orders and Departmental Policy

Regulatory Planning and Review (E.O. 12866)

This rule is a significant rule under Section 3(f)(4) of Executive Order 12866 and accordingly has been reviewed by the Office of Management and Budget.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule does not have an annual effect on the economy of $100 million or more. In fact, NPS does not consider that the rule will have any measurable effect on the economy. The rule merely establishes the procedures for award of NPS concession contracts and the terms and conditions of NPS concession contracts. This rule will not result in increased costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions as the rule does not change the manner in which a concessioner's rates and charges to the public are established. Further, this rule will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. To the contrary, the rule enhances competition in the award of concession contracts. The primary effect of the proposed rule is to establish procedures for the solicitation, award and administration of National Park Service concession contracts required by the 1998 Act.

Regulatory Flexibility Act

The purpose of this rule is to describe procedures and terms for the solicitation, award and administration of NPS concession contracts in accordance with the 1998 Act. As such, it is not a rule that is required to be published as proposed for public comment by 5 U.S.C. 553 or other law. 5 U.S.C. 553 exempts from its application regulations that involve a ''matter relating to agency management or personnel or to public property, loans, grants, benefits and contracts.'' The NPS regulations address NPS

concession contracts and public property (park areas). In addition, although Section 417 of the 1998 Act requires NPS to promulgate regulations for its implementation, it does not require that this be done through a general notice of proposed rulemaking. Accordingly, NPS does not consider that this regulation is subject to the Regulatory Flexibility Act as that Act, by its terms, only applies to rules and regulations that are required by 5 U.S.C. 553 or other laws to be promulgated after required publication of a general notice of proposed rulemaking.

On November 22, 1999, however, NPS published in the **Federal Register** a discussion of the proposed regulations that meet the spirit of the Regulatory Flexibility Act in the form of an initial regulatory flexibility analysis. The notice also asked for public comments on the suggestion of NPS that the Regulatory Flexibility Act may not apply to these regulations.

Only two comments were received in response to the notice, both from law firms representing incumbent concessioners. Both comments summarily concluded that the proposed regulations are subject to the Regulatory Flexibility Act. NPS does not agree with this view but considers the matter academic as NPS has fully complied with spirit of the Regulatory Flexibility Act in promulgating these regulations.

NPS also points out that the preamble to the proposed regulations states that it is likely that the number of NPS concession contracts and permits will decrease as a result of the proposed regulations. This statement was erroneously included in the preamble after it had been determined by NPS to be incorrect. The **Federal Register** notice regarding the initial regulatory flexibility analysis stated that this statement should be disregarded.

Upon consideration of public comments on its initial analysis, NPS has concluded that the proposed regulations and final rule, even if subject to the Regulatory Flexibility Act, will not have a significant impact on a substantial number of small businesses within the meaning of the Regulatory Flexibility Act for the reasons discussed in the initial notice.

Nonetheless, NPS sets forth below the required elements of a final regulatory flexibility analysis in the spirit of the Regulatory Flexibility Act, as follows:

(1) A succinct statement of the need for, and objectives of the rule.

The final rule is needed to comply with Section 417 of the 1998 Act that requires promulgation of appropriate regulations for its implementation. The objectives of the rule are to provide appropriate procedures, terms and conditions for NPS concession contracting in furtherance of the purposes of the 1998 Act.

(2) A summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

As stated, only two comments were received in response to the initial regulatory flexibility analysis. The NPS response to the issues raised by the comments on the initial regulatory flexibility analysis (except for restated arguments regarding the preference in renewal issue) are as follows:

a. *Comment.* The environmental requirements of the proposed rule go beyond statutory requirements and impose duties that should be borne by the government.

NPS disagrees with this comment. The environmental requirements of the proposed rules, i.e., that concessioners should undertake activities in the conduct of their operations that enhance the environment (such as recycling and energy conservation) are clearly reasonable operating conditions that NPS may place on a concessioner under the terms of a concession contract. Further, NPS does not understand why the commenter suggests that these type of programs should be borne by the government. NPS considers that concessioners should be responsible for conserving energy in its operations and recycling trash. Finally, the suggestion that a small business (defined by SBA as a business grossing less than $5 million dollars) cannot afford to undertake progressive environmental management practices such as recycling and energy conservation is not supported by practical experience. Not only are such practices commonplace in the United States, many of them are cost effective. In any event, NPS has modified the environmental requirements in the final rule as discussed above.

b. *Comment.* The restrictions on assignments and sales take the proposed regulations well beyond the statute.

NPS does not consider that the proposed regulations regarding sales and transfers exceeded reasonable implementation of the requirements of Section 408 of the 1998 Act. Section 408 did not exempt small businesses from its application. The information requirements set forth in the proposed regulations are necessary for NPS to carry out its responsibilities under Section 408. In any event, in the final rule NPS has made the information requirements discretionary in the circumstances of particular transactions. The smaller the business, the less information NPS will generally need in order to approve a sale or transfer. In addition, the final rule has eliminated reference to approval of encumbrances of net revenue as mentioned by the commenter as particularly burdensome to small businesses.

c. *Comment.* The section of the proposed rule that states that a purchaser of a concession does not have to buy the related personal property of an existing concessioner could cause losses to the small business concessioner.

NPS notes that the 1998 Act makes no mention of a requirement that an existing concessioner is entitled to have a new concessioner purchase its personal property. It is the position of NPS that concession contracts should not require an existing concessioner to sell its personal property to a new concessioner or to require a new concessioner to purchase the personal property of a previous concessioner. Both businesses are treated equally. NPS fails to understand why a contract that permits the contractor to sell its personal property on the open market upon contract expiration is burdensome to the contractor or in any way contrary to usual business practices in the United States. In fact, requiring a new concessioner to purchase the personal property of a prior concessioner may well be considered burdensome to small businesses.

d. *Comment.* The requirement in the proposed regulations that the purchaser of a concession operation has a year to pay a prior concessioner for its leasehold surrender interest is burdensome to small businesses.

NPS has discussed the need for this provision in the section-by-section analysis. However, NPS also notes that the final rule is changed in this connection, requiring the payment of interest and only permitting payment after the expiration of a contract in extraordinary circumstances beyond the control of NPS. NPS considers that these changes address any valid concerns of the commenter.

e. *Comment.* One hundred and forty two small businesses constitute a significant number of small businesses within the meaning of the Regulatory Flexibility Act.

The commenter made this assertion without explanation. NPS does not consider that there is any valid basis upon which to conclude that 142 businesses out of all the hotel, restaurant, outfitter and guide,

sightseeing, etc. businesses in the United States are a ''significant'' number of small businesses within the meaning of the Regulatory Flexibility Act.

f. *Comment.* The lottery system and the lack of regulations regarding rates to the public unduly affect small businesses.

Reference to a lottery system has been eliminated in the final rule. In addition, a section on rate approvals has been added. In any event, NPS rate approvals are accomplished under administrative guidelines, not regulations.

(3) A description of and an estimate of the number of small entities to which the rule will apply.

NPS notes that the vast majority of NPS concessioners (approximately 600 out of 630) are ''small businesses'' under applicable Small Business Administration guidelines (gross receipts of less than $5 million) and has developed the proposed regulations and final rule to accommodate to the extent possible the concerns of concessioners and prospective concessioners, almost all of which are small businesses.

There are some 630 existing NPS concessioners. Of these, approximately 75% will be provided a preference in renewal because of the 1998 Act. In addition, there are an unquantifiable number of businesses which may in the future seek to obtain a concession contract and thereby benefit from the 1998 Act's repeal of the preference in renewal as they will have a greater chance of successfully competing for a concession contract. The types of businesses that are generally NPS concessioners are hotel, restaurant, transportation, marina, sightseeing, outfitting, souvenir sales, etc., *i.e.,* businesses that provide necessary and appropriate visitor services in areas of the national park system.

(4) A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirements and the type of professional skills necessary for preparation of the report or record.

All concessioners are subject to these requirements.

Sections 51.98 and 51.99 describe the records and recordkeeping requirements of the final rule. All concessioners are subject to these requirements under the 1998 Act and this part. The type of skills necessary include business, accounting, and, in limited circumstances, legal skills.

(5) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy and legal reasons for selecting the alternatives adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

The previous discussion under the section-by-section analysis provides this information in detail, including a discussion as to why suggestions from concessioners were not adopted by NPS in the final rule. In general terms, the requirements of the final rule are necessary in order for NPS to properly carry out its responsibilities under the 1998 Act. However, NPS notes that it has made a number of incremental changes in the final rule that ameliorate impacts on smaller entities. For example, it has made the environmental management program elements of the proposed regulations discretionary with respect to businesses grossing less than $100,000 and has provided for lower information requirements for smaller concession contract solicitations. In addition, a number of changes have been made in the final rule that ameliorate impacts on all concessioners, *e.g.,* arbitration of construction cost, payment of interest on leasehold surrender interest not paid for as of contract expiration, inclusion of additional administrative appeal rights, and more limited, non-mandatory information requirements for assignments and encumbrances of concession contracts.

Unfunded Mandates Reform Act

The National Park Service has determined (for the reasons discussed above) and certifies pursuant to the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, State, tribal governments or private entities. A statement containing the information required by the Unfunded Mandates Reform Act is not required.

Takings (E.O. 12630)

In accordance with Executive Order 12360, the rule does not have significant takings implications. The rule has no effect on private property. Existing concessioners are entitled to payment for any real property improvements they may have upon expiration or termination of existing concession contracts in accordance with their terms. Other persons are not affected by the terms of concession contracts issued under the authority of this part unless the person chooses to enter into a concession contract.

Federalism

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment. The rule imposes no direct requirements on any governmental entity other than the National Park Service.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and does not meet the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

The PRA provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The collections of information contained in this rule have been approved by the Office of Management and Budget as required by 44 U.S.C. 3501 *et. seq.* and assigned clearance numbers 1024–0125 (Submission of Offers in Response to Concession Prospectuses) and 1024–0126 (Sales of Concession Operations). Additional reporting and recordkeeping requirements were identified in subpart F regarding appeal of a preferred offeror determination, subpart G regarding leasehold surrender interest and in subpart K regarding recordkeeping that are not covered under OMB approvals. An emergency information collection request to cover these requirements has been prepared and submitted to OMB for approval. These additional information collection requirements will not be implemented until OMB approves the emergency request. NPS will publish a **Federal Register** notice when OMB has approved these requirements.

National Environmental Policy Act

This rule does not constitute a major federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act is not required. The rule will not increase public use of park areas, introduce noncompatible uses into park areas, conflict with adjacent land ownerships or land uses, or cause a nuisance to property owners or occupants adjacent to park areas. Accordingly, this rule is categorically excluded from the procedural requirements of the National Environmental Policy Act by 516 DM 6, App. 7.4A(10).

Clarity of This Rule

Executive Order 12866 requires federal agencies to write regulations that are easy to understand. Comment is invited on how to make this rule easier to understand, including answers to the following questions: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain undefined technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid in or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more but shorter sections? (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? What else could be done to make the rule easier to understand?

Please send a copy of any comments that concern how this rule could be made easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW, Washington, DC 20240.

NPS notes that comments stated that the rule contains technical language and should be shorter. However, the 1998 Act itself is replete with technical language that must be defined in the rule. NPS also considers that the requirements of the rule are stated as clearly as possible.

List of Subjects in 36 CFR Part 51

Concessions, Government contracts, National parks, Reporting and recordkeeping requirements.

In consideration of the foregoing, 36 CFR Part 51 is hereby revised to read as follows:

PART 51—CONCESSION CONTRACTS

Subpart A—Authority and Purpose

Sec.

Subpart B—General Definitions

Subpart C—Solicitation, Selection and Award Procedures

Subpart D—Non-Competitive Award of Concession Contracts

Subpart E—Right of Preference to a New Concession Contract

Subpart F—Determining a Preferred Offeror

Subpart G—Leasehold Surrender Interest

Authority: The Act of August 25, 1916, as amended and supplemented, 16 U.S.C. 1 *et seq.*, particularly, 16 U.S.C. 3 and Title IV of the National Parks Omnibus Management Act of 1998 (Pub. L. 105–391).

Subpart A—Authority and Purpose

§ 51.1 What does this part cover?

This part covers the solicitation, award, and administration of concession contracts. The Director solicits, awards and administers concession contracts on behalf of the Secretary under the authority of the Act of August 25, 1916, as amended and supplemented, 16 U.S.C. 1 *et seq.* and Title IV of the National Parks Omnibus Management Act of 1998 (Public Law 105–391). The purpose of concession contracts is to authorize persons (concessioners) to provide visitor services in park areas. All concession contracts are to be consistent with the requirements of this part. In accordance with section 403 of the 1998 Act, the Director will utilize concession contracts to authorize the provision of visitor services in park areas, except as may otherwise be authorized by law. For example, the Director may enter into commercial use authorizations under section 418 of the 1998 Act and may enter into agreements with non-profit organizations for the sale of interpretive materials and conduct of interpretive programs for a fee or charge in park areas. In addition, the Director may, as part of an interpretive program agreement otherwise authorized by law, authorize a non-profit organization to provide incidental visitor services that are necessary for the conduct of the interpretive program. Nothing in this part amends, supersedes, or otherwise affects any provision of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 *et seq.*) relating to revenue-producing visitor services.

§ 51.2 What is the policy underlying concessions contracts?

It is the policy of the Congress and the Secretary that visitor services in park areas may be provided only under carefully controlled safeguards against unregulated and indiscriminate use so that visitation will not unduly impair park values and resources. Development of visitor services in park areas will be limited to locations that are consistent to the highest practicable degree with

the preservation and conservation of the resources and values of the park area. It is also the policy of the Congress and the Secretary of the Interior that development of visitor services in park areas must be limited to those as are necessary and appropriate for public use and enjoyment of the park area in which they are located.

Subpart B—General Definitions

§ 51.3 How are terms defined in this part?

To understand this part, you must refer to these definitions, applicable in the singular or the plural, whenever these terms are used in this part:

The *1965 Act* means Public Law 89–249, commonly known as the National Park Service Concession Policies Act of 1965.

A *1965 Act concession contract* is a concession contract or permit entered into under the authority of the 1965 Act.

The *1998 Act* means Title IV of Public Law 105–391.

The *award* of a concession contract is the establishment of a legally binding concession contract. It occurs only when the Director and a selected offeror both fully execute a concession contract.

A concession contract (or contract) means a binding written agreement between the Director and a concessioner entered under the authority of this part or the 1965 Act that authorizes the concessioner to provide certain visitor services within a park area under specified terms and conditions. Concession contracts are not contracts within the meaning of 41 U.S.C. 601 *et seq.* (the Contract Disputes Act) and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions. Concession contracts will contain such terms and conditions as are required by this part or law and as are otherwise appropriate in furtherance of the purposes of this part and the 1998 Act.

A *concessioner* is an individual, corporation, or other legally recognized entity that duly holds a concession contract.

Director means the Director of the National Park Service (acting on behalf of the Secretary), or an authorized representative of the Director, except where a particular official is specifically identified in this part. In circumstances where this part calls for an appeal to the Director, the appeal shall be considered by an official of higher authority than the official that made the disputed decision.

A *franchise fee* is the consideration paid to the Director by a concessioner for the privileges granted by a concession contract.

Offeror means an individual, corporation, or other legally recognized entity, including an existing concessioner, that submits a proposal for a concession contract. If the entity that is to be the concessioner is not formally in existence as of the time of submission of a proposal, a proposal must demonstrate that the individuals or organizations that intend to establish the entity that will become the concessioner have the ability and are legally obliged to cause the entity to be a qualified person as defined in this part. In addition, if the entity that will be the concessioner is not established at the time of submission of a proposal, the proposal must contain assurances satisfactory to the Director that the entity that will be the concessioner will be a qualified person as of the date of the award of the contract and otherwise have the ability to carry out the commitments made in the proposal.

Possessory interest means an interest in real property improvements as defined by the 1965 Act obtained by a concessioner under a possessory interest concession contract. Possessory interest, for the purposes of this part, does not include any interest in property in which no possessory interest, as defined by the 1965 Act, exists.

A *possessory interest concession contract* means a 1965 Act concession contract that provides the concessioner a possessory interest.

A *preferred offeror* is a concessioner that the Director determines is eligible to exercise a right of preference to the award of a qualified concession contract in accordance with this part.

A *qualified concession contract* is a new concession contract that the Director determines to be a qualified concession contract for right of preference purposes.

A *qualified person* is an individual, corporation or other legally recognized entity that the Director determines has the experience and financial ability to satisfactorily carry out the terms of a concession contract. This experience and financial ability includes, but is not limited to, the ability to protect and preserve the resources of the park area and the ability to provide satisfactory visitor services at reasonable rates to the public.

A *responsive proposal* means a timely submitted proposal that is determined by the Director as agreeing to all of the minimum requirements of the proposed concession contract and prospectus and as having provided the information required by the prospectus.

A *right of preference* is the preferential right of renewal set forth in Section 403(7)(C) of the 1998 Act which requires the Director to allow a preferred offeror the opportunity to match the terms and conditions of a competing responsive proposal that the Director has determined to be the best proposal for a qualified concession contract. A right of preference does not provide any rights of any nature to establish or negotiate the terms and conditions of a concession contract to which a right of preference may apply.

Visitor services means accommodations, facilities and services determined by the Director as necessary and appropriate for public use and enjoyment of a park area provided to park area visitors for a fee or charge by a person other than the Director. The fee or charge paid by the visitor may be direct or indirect as part of the provision of comprehensive visitor services (e.g., when a lodging concessioner may provide free transportation services to guests). Visitor services may include, but are not limited to, lodging, campgrounds, food service, merchandising, tours, recreational activities, guiding, transportation, and equipment rental. Visitor services also include the sale of interpretive materials or the conduct of interpretive programs for a fee or charge to visitors.

Subpart C—Solicitation, Selection and Award Procedures

§ 51.4 How will the Director invite the general public to apply for the award of a concession contract?

(a) The Director must award all concession contracts, except as otherwise expressly provided in this part, through a public solicitation process. The public solicitation process begins with the issuance of a prospectus. The prospectus will invite the general public to submit proposals for the contract. The prospectus will describe the terms and conditions of the concession contract to be awarded and the procedures to be followed in the selection of the best proposal.

(b) Except as provided under § 51.47 (which calls for a final administrative decision on preferred offeror appeals prior to the selection of the best proposal) the terms, conditions and determinations of the prospectus and the terms and conditions of the proposed concession contract as described in the prospectus, including, without limitation, its minimum franchise fee, are not final until the concession contract is awarded. The Director will not issue a prospectus for a concession contract earlier than

eighteen months prior to the expiration of a related existing concession contract.

§ 51.5 What information will the prospectus include?

The prospectus must include the following information:

(a) The minimum requirements of the concession contract. The minimum requirements of the concession contract, include, but are not limited to the following:

(1) The minimum acceptable franchise fee or other forms of consideration to the Government;

(2) The minimum visitor services that the concessioner is to be authorized to provide;

(3) The minimum capital investment, if any, that the concessioner must make;

(4) The minimum measures that the concessioner must take to ensure the protection, conservation, and preservation of the resources of the park area; and

(5) Any other minimum requirements that the new contract may specify, including, as appropriate and without limitation, measurable performance standards;

(b) The terms and conditions of a current concession contract, if any, relating to the visitor services to be provided, including all fees and other forms of compensation provided to the Director under such contract;

(c) A description of facilities and services, if any, that the Director may provide to the concessioner under the terms of the concession contract, including, but not limited to, public access, utilities and buildings;

(d) An estimate of the amount of any compensation due a current concessioner from a new concessioner under the terms of an existing or prior concession contract;

(e) A statement identifying each principal selection factor for proposals, including subfactors, if any, and secondary factors, if any, and the weight and relative importance of the principal and any secondary factors in the selection decision;

(f) Such other information related to the proposed concession contract as is provided to the Director pursuant to a concession contract or is otherwise available to the Director, as the Director determines is necessary to allow for the submission of competitive proposals. Among other such necessary information a prospectus will contain (when applicable) are the gross receipts of the current concession contract broken out by department for the three most recent years; franchise fees charged under the current concession contract for the three most recent years; merchandise inventories of the current concessioner for the three most recent years; and the depreciable fixed assets and net depreciable fixed assets of the current concessioner; and

(g) Identification of a preferred offeror for a qualified concession contract, if any, and, if a preferred offeror exists, a description of a right of preference to the award of the concession contract.

§ 51.6 Will a concession contract be developed for a particular potential offeror?

The terms and conditions of a concession contract must represent the requirements of the Director in accordance with the purposes of this part and must not be developed to accommodate the capabilities or limitations of any potential offeror. The Director must not provide a current concessioner or other person any information as to the content of a proposed or issued prospectus that is not available to the general public.

§ 51.7 How will information be provided to a potential offeror after the prospectus is issued?

Material information directly related to the prospectus and the concession contract (except when otherwise publicly available) that the Director provides to any potential offeror prior to the submission of proposals must be made available to all persons who have requested a copy of the prospectus.

§ 51.8 Where will the Director publish the notice of availability of the prospectus?

The Director will publish notice of the availability of the prospectus at least once in the Commerce Business Daily or in a similar publication if the Commerce Business Daily ceases to be published. The Director may also publish notices, if determined appropriate by the Director, electronically or in local or national newspapers or trade magazines.

§ 51.9 How do I get a copy of the prospectus?

The Director will make the prospectus available upon request to all interested persons. The Director may charge a reasonable fee for a prospectus, not to exceed printing, binding and mailing costs.

§ 51.10 How long will I have to submit my proposal?

The Director will allow an appropriate period for submission of proposals that is not less than 60 days unless the Director determines that a shorter time is appropriate in the circumstances of a particular solicitation. Proposals that are not timely submitted will not be considered by the Director.

§ 51.11 May the Director amend, extend, or cancel a prospectus or solicitation?

The Director may amend a prospectus and/or extend the submission date prior to the proposal due date. The Director may cancel a solicitation at any time prior to award of the concession contract if the Director determines in his discretion that this action is appropriate in the public interest. No offeror or other person will obtain compensable or other legal rights as a result of an amended, extended, canceled or resolicited solicitation for a concession contract.

§ 51.12 Are there any other additional procedures that I must follow to apply for a concession contract?

The Director may specify in a prospectus additional solicitation and/or selection procedures consistent with the requirements of this part in the interest of enhancing competition. Such additional procedures may include, but are not limited to, issuance of a two-phased prospectus—a qualifications phase and a proposal phase. The Director will incorporate simplified administrative requirements and procedures in prospectuses for concession contracts that the Director considers are likely to be awarded to a sole proprietorship or are likely to have annual gross receipts of less than $100,000. Such simplified requirements and procedures may include, as appropriate and without limitation, a reduced application package, a shorter proposal submission period, and a reduction of proposal information requirements.

§ 51.13 When will the Director determine if proposals are responsive?

The Director will determine if proposals are responsive or non-responsive prior to or as of the date of selection of the best proposal.

§ 51.14 What happens if no responsive proposals are submitted?

If no responsive proposals are submitted, the Director may cancel the solicitation, or, after cancellation, establish new contract requirements and issue a new prospectus.

§ 51.15 May I clarify, amend or supplement my proposal after it is submitted?

(a) The Director may request from any offeror who has submitted a timely proposal a written clarification of its proposal. Clarification refers to making clear any ambiguities that may have been contained in a proposal but does not include amendment or supplementation of a proposal. An offeror may not amend or supplement a proposal after the submission date

unless requested by the Director to do so and the Director provides all offerors that submitted proposals a similar opportunity to amend or supplement their proposals. Permitted amendments must be limited to modifying particular aspects of proposals resulting from a general failure of offerors to understand particular requirements of a prospectus or a general failure of offerors to submit particular information required by a prospectus.

(b) A proposal may suggest changes to the terms and conditions of a proposed concession contract and still be considered as responsive so long as the suggested changes are not conditions to acceptance of the terms and conditions of the proposed concession contract. The fact that a proposal may suggest changes to the proposed concession contract does not mean that the Director may accept those changes without a resolicitation of the concession opportunity.

§ 51.16 How will the Director evaluate proposals and select the best one?

(a) The Director will apply the selection factors set forth in § 51.17 by assessing each timely proposal under each of the selection factors on the basis of a narrative explanation, discussing any subfactors when applicable. For each selection factor, the Director will assign a score that reflects the determined merits of the proposal under the applicable selection factor and in comparison to the other proposals received, if any. The first four principal selection factors will be scored from zero to five. The fifth selection factor will be scored from zero to four (with a score of one for agreeing to the minimum franchise fee contained in the prospectus). The secondary factor set forth in § 51.17(b)(1) will be scored from zero to three. Any additional secondary selection factors set forth in the prospectus will be scored as specified in the prospectus provided that the aggregate possible point score for all additional secondary selection factors may not exceed a total of three.

(b) The Director will then assign a cumulative point score to each proposal based on the assigned score for each selection factor.

(c) The responsive proposal with the highest cumulative point score will be selected by the Director as the best proposal. If two or more responsive proposals receive the same highest point score, the Director will select as the best proposal (from among the responsive proposals with the same highest point score), the responsive proposal that the Director determines on the basis of a narrative explanation will, on an overall basis, best achieve the purposes of this part. Consideration of revenue to the United States in this determination and in scoring proposals under principal selection factor five will be subordinate to the objectives of protecting, conserving, and preserving the resources of the park area and of providing necessary and appropriate visitor services to the public at reasonable rates.

§ 51.17 What are the selection factors?

(a) The five principal selection factors are:

(1) The responsiveness of the proposal to the objectives, as described in the prospectus, of protecting, conserving, and preserving resources of the park area;

(2) The responsiveness of the proposal to the objectives, as described in the prospectus, of providing necessary and appropriate visitor services at reasonable rates;

(3) The experience and related background of the offeror, including the past performance and expertise of the offeror in providing the same or similar visitor services as those to be provided under the concession contract;

(4) The financial capability of the offeror to carry out its proposal; and

(5) The amount of the proposed minimum franchise fee, if any, and/or other forms of financial consideration to the Director. However, consideration of revenue to the United States will be subordinate to the objectives of protecting, conserving, and preserving resources of the park area and of providing necessary and appropriate visitor services to the public at reasonable rates.

(b) The secondary selection factors are:

(1) The quality of the offeror's proposal to conduct its operations in a manner that furthers the protection, conservation and preservation of park area and other resources through environmental management programs and activities, including, without limitation, energy conservation, waste reduction, and recycling. A prospectus may exclude this secondary factor if the prospectus solicits proposals for a concession contract that is anticipated to have annual gross receipts of less than $100,000 and the activities that will be conducted under the contract are determined by the Director as likely to have only limited impacts on the resources of the park area; and

(2) Any other selection factors the Director may adopt in furtherance of the purposes of this part, including where appropriate and otherwise permitted by law, the extent to which a proposal calls for the employment of Indians (including Native Alaskans) and/or involvement of businesses owned by Indians, Indian tribes, Native Alaskans, or minority or women-owned businesses in operations under the proposed concession contract.

(c) A prospectus may include subfactors under each of the principal and secondary factors to describe specific elements of the selection factor.

§ 51.18 When must the Director reject a proposal?

The Director must reject any proposal received, regardless of the franchise fee offered, if the Director makes any of the following determinations: the offeror is not a qualified person as defined in this part; The offeror is not likely to provide satisfactory service; the proposal is not a responsive proposal as defined in this part; or, the proposal is not responsive to the objectives of protecting and preserving the resources of the park area and of providing necessary and appropriate services to the public at reasonable rates.

§ 51.19 Must the Director award the concession contract that is set forth in the prospectus?

Except for incorporating into the concession contract appropriate elements of the best proposal, the Director must not award a concession contract which materially amends or does not incorporate the terms and conditions of the concession contract as set forth in the prospectus.

§ 51.20 Does this part limit the authority of the Director?

Nothing in this part may be construed as limiting the authority of the Director at any time to determine whether to solicit or award a concession contract, to cancel a solicitation, or to terminate a concession contract in accordance with its terms.

§ 51.21 When must the selected offeror execute the concession contract?

The selected offeror must execute the concession contract promptly after selection of the best proposal and within the time established by the Director. If the selected offeror fails to execute the concession contract in this period, the Director may select another responsive proposal or may cancel the selection and resolicit the concession contract.

§ 51.22 When may the Director award the concession contract?

Before awarding a concession contract with anticipated annual gross receipts in excess of $5,000,000 or of more than 10 years in duration, or, pursuant to

§ 51.24(b), the Director must submit the concession contract to the Committee on Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate. The Director must not award any such concession contract until 60 days after the submission. Award of these contracts may not be made without the Director's written approval. The Director may not delegate this approval except to a Deputy Director or an Associate Director. The Director may award a concession contract that is not subject to these or other special award requirements at any time after selection of the best proposal and execution of the concession contract by the offeror.

Subpart D—Non-Competitive Award of Concession Contracts

§ 51.23 May the Director extend an existing concession contract without a public solicitation?

Notwithstanding the public solicitation requirements of this part, the Director may award non-competitively an extension or extensions of an existing concession contract to the current concessioner for additional terms not to exceed three years in the aggregate, *e.g.,* the Director may award one extension with a three year term, two consecutive extensions, one with a two year term and one with a one year term, or three consecutive extensions with a term of one year each. The Director may award such extensions only if the Director determines that the extension is necessary to avoid interruption of visitor services. Before determining to award such a contract extension, the Director must take all reasonable and appropriate steps to consider alternatives to avoid an interruption of visitor services. Further, the Director must publish notice in the **Federal Register** of the proposed extension at least 30 days in advance of the award of the extension (except in emergency situations).

§ 51.24 May the Director award a temporary concession contract without a public solicitation?

(a) Notwithstanding the public solicitation requirements of this part, the Director may award non-competitively a temporary concession contract or contracts for consecutive terms not to exceed three years in the aggregate, *e.g.,* the Director may award one temporary contract with a three year term, two consecutive temporary contracts, one with a two year term and one with a one year term, or three consecutive temporary contracts with a term of one year each, to any qualified person for the conduct of particular visitor services in a park area if the Director determines that the award is necessary to avoid interruption of visitor services. Before determining to award a temporary concession contract, the Director must take all reasonable and appropriate steps to consider alternatives to avoid an interruption of visitor services. Further, the Director must publish notice in the **Federal Register** of the proposed temporary concession contract at least 30 days in advance of its award (except in emergency situations). A temporary concession contract may not be extended. A temporary concession contract may not be awarded to continue visitor services provided under an extended concession contract except as permitted by paragraph (b) of this section.

(b) Notwithstanding the last sentence of paragraph (a) of this section, the Director may award a temporary concession contract for consecutive terms not to exceed three years in the aggregate to authorize the continuing conduct of visitor services that were conducted under a concession contract that was in effect as of November 13, 1998, and that either had been extended as of that date or was due to expire by December 31, 1998, and was subsequently extended. The Director must personally approve the award of a temporary concession contract in these circumstances and may do so only if the Director determines that the award is necessary to avoid interruption of visitor services and that all reasonable alternatives to the award of the temporary concession contract have been considered and found infeasible. The Director must publish a notice of his intention to award a temporary concession contract to a specified person under this paragraph and the reasons for the proposed award in the **Federal Register** at least 60 days before the temporary concession contract is awarded. In addition, the Director must notify the Committee on Energy and Natural Resources of the Senate and the Committee on Resources of the House of Representatives of the proposed award of a temporary concession contract under this paragraph at least 60 days before the temporary concession contract is awarded. A temporary concession contract awarded under the authority of this paragraph will be considered as a contract extension for purposes of determining the existence of a preferred offeror under § 51.44.

(c) A concessioner holding a temporary concession contract will not be eligible for a right of preference to a qualified concession contract which replaces a temporary contract unless the concessioner holding the temporary concession contract was determined or was eligible to be determined a preferred offeror under the extended concession contract that was replaced by the temporary concession contract under paragraph (b) of this section.

§ 51.25 Are there any other circumstances in which the Director may award a concession contract without public solicitation?

Notwithstanding the public solicitation requirements of this part, the Director may award a concession contract non-competitively to any qualified person if the Director determines both that such an award is otherwise consistent with the requirements of this part and that extraordinary circumstances exist under which compelling and equitable considerations require the award of the concession contract to a particular qualified person in the public interest. Indisputable equitable considerations must be the determinant of such circumstances. The Director must publish a notice of his intention to award a concession contract to a specified person under these circumstances and the reasons for the proposed award in the **Federal Register** at least 60 days before the concession contract is awarded. In addition, the Director also must notify the Committee on Energy and Natural Resources of the Senate and the Committee on Resources of the House of Representatives at least 60 days before the contract is awarded. The Director must personally approve any such award and may only do so with the prior written approval of the Secretary.

Subpart E—Right of Preference to a New Concession Contract

§ 51.26 What solicitation, selection and award procedures apply when a preferred offeror exists?

The solicitation, selection and award procedures described in this part will apply to the solicitation, selection and award of contracts for which a preferred offeror exists, except as modified by this subpart, subpart F and other sections of this part related to preferred offerors and/or a right of preference.

§ 51.27 Who is a preferred offeror and what are a preferred offeror's rights to the award of a new concession contract?

(a) A preferred offeror is a concessioner that the Director has determined is eligible to exercise a right of preference to the award of a qualified new concession contract in accordance with this part.

(b) A right of preference is the right of a preferred offeror, if it submits a responsive proposal for a qualified concession contract, to match in accordance with the requirements of this part the terms and conditions of a competing proposal that the Director has determined to be the best responsive proposal.

§ 51.28 When will the Director determine whether a concessioner is a preferred offeror?

Subject to §§ 51.46 and 51.47, the Director will determine whether a concessioner is a preferred offeror in accordance with this part no later than the date of issuance of a prospectus for the applicable new concession contract.

§ 51.29 How will I know when a preferred offeror exists?

If the Director has determined that a preferred offeror exists for a qualified concession contract under this part, the Director will identify the preferred offeror in the applicable prospectus and describe the preferred offeror's right of preference.

§ 51.30 What must a preferred offeror do before it may exercise a right of preference?

A preferred offeror must submit a responsive proposal pursuant to the terms of an applicable prospectus for a qualified concession contract if the preferred offeror wishes to exercise a right of preference.

§ 51.31 What happens if a preferred offeror does not submit a responsive proposal?

If a preferred offeror fails to submit a responsive proposal, the offeror may not exercise a right of preference. The concession contract will be awarded to the offeror submitting the best responsive proposal.

§ 51.32 What is the process if the Director determines that the best responsive proposal was not submitted by a preferred offeror?

If the Director determines that a proposal other than the responsive proposal submitted by a preferred offeror is the best proposal submitted for a qualified concession contract, then the Director must advise the preferred offeror of the better terms and conditions of the best proposal and permit the preferred offeror to amend its proposal to match them. An amended proposal must match the better terms and conditions of the best proposal as determined by the Director. If the preferred offeror duly amends its proposal within the time period allowed by the Director, and the Director determines that the amended proposal matches the better terms and conditions of the best proposal, then the Director must select the preferred offeror for award of the contract upon the amended terms and conditions, subject to other applicable requirements of this part.

§ 51.33 What if a preferred offeror does not timely amend its proposal to meet the terms and conditions of the best proposal?

If a preferred offeror does not amend its proposal to meet the terms and conditions of the best proposal within the time period allowed by the Director, the Director will select for award of the contract the offeror that submitted the best responsive proposal.

§ 51.34 What will the Director do if a selected preferred offeror does not timely execute the new concession contract?

If a selected preferred offeror fails to execute the concession contract in the time period specified by the Director, the Director either will select for award of the concession contract the offeror that submitted the best responsive proposal, or will cancel the solicitation and may resolicit the concession contract but only without recognition of a preferred offeror or right of preference.

§ 51.35 What happens to a right of preference if the Director receives no responsive proposals?

If the Director receives no responsive proposals, including a responsive proposal from a preferred offeror, in response to a prospectus for a qualified concession contract for which a preferred offeror exists, the Director must cancel the solicitation and may resolicit the concession contract or take other appropriate action in accordance with this part. No right of preference will apply to a concession contract resolicited under this section unless the contract is resolicited upon terms and conditions materially more favorable to offerors than those contained in the original contract.

Subpart F—Determining a Preferred Offeror

§ 51.36 What conditions must be met before the Director determines that a concessioner is a preferred offeror?

A concessioner is a preferred offeror if the Director determines that the following conditions are met:

(a) The concessioner was a satisfactory concessioner during the term of its concession contract as determined under this part;

(b) The applicable new contract is a qualified concession contract as determined under this part; and

(c) If applicable, the concessioner's previous concession contract was an outfitter and guide concession contract as determined under this part.

§ 51.37 How will the Director determine that a new concession contract is a qualified concession contract?

A new concession contract is a qualified concession contract if the Director determines that:

(a) The new concession contract provides for the continuation of the visitor services authorized under a previous concession contract. The visitor services to be continued under the new contract may be expanded or diminished in scope but, for purposes of a qualified concession contract, may not materially differ in nature and type from those authorized under the previous concession contract; and either

(b) The new concession contract that is to replace the previous concession contract is estimated to result in, as determined by the Director, annual gross receipts of less than $500,000 in the first 12 months of its term; or

(c) The new concession contract is an outfitter and guide concession contract as described in this part.

§ 51.38 How will the Director determine that a concession contract is an outfitter and guide concession contract?

The Director will determine that a concession contract is an outfitter and guide concession contract if the Director determines that:

(a) The concession contract solely authorizes or requires (except for park area access purposes) the conduct of specialized outdoor recreation guide services in the backcountry of a park area; and

(b) The conduct of operations under the concession contract requires employment of specially trained and experienced guides to accompany park visitors who otherwise may not have the skills and equipment to engage in the activity and to provide a safe and enjoyable experience for these visitors.

§ 51.39 What are some examples of outfitter and guide concession contracts?

Outfitter and guide concession contracts may include, but are not limited to, concession contracts which solely authorize or require the guided conduct of river running, hunting (where otherwise lawful in a park area), fishing, horseback, camping, and mountaineering activities in the backcountry of a park area.

§ 51.40 What are some factors to be considered in determining that outfitter and guide operations are conducted in the backcountry?

Determinations as to whether outfitter and guide operations are conducted in the backcountry of a park area will be made on a park-by-park basis, taking into account the park area's particular

geographic circumstances. Factors that generally may indicate that outfitter and guide operations are conducted in the backcountry of a park area include, without limitation, the fact that:

(a) The operations occur in areas remote from roads and developed areas;

(b) The operations are conducted within a designated natural area of a park area;

(c) The operations occur in areas that are inaccessible by motorized vehicle;

(d) The operations occur in areas where search and rescue support is not readily available; and

(e) All or a substantial portion of the operations occur in designated or proposed wilderness areas.

§ 51.41 If the concession contract grants a compensable interest in real property improvements, will the Director find that the concession contract is an outfitter and guide concession contract?

The Director will find that a concession contract is not an outfitter and guide contract if the contract grants any compensable interest in real property improvements on lands owned by the United States within a park area.

§ 51.42 Are there exceptions to this compensable interest prohibition?

Two exceptions to this compensable interest prohibition exist:

(a) The prohibition will not apply to real property improvements lawfully constructed by a concessioner with the written approval of the Director in accordance with the express terms of a 1965 Act concession contract; and

(b) The prohibition will not apply to real property improvements constructed and owned in fee simple by a concessioner or owned in fee simple by a concessioner's predecessor before the land on which they were constructed was included within the boundaries of the applicable park area.

§ 51.43 Who will make the determination that a concession contract is an outfitter and guide contract?

Only a Deputy Director or an Associate Director will make the determination that a concession contract is or is not an outfitter and guide contract.

§ 51.44 How will the Director determine if a concessioner was satisfactory for purposes of a right of preference?

To be a satisfactory concessioner for the purposes of a right of preference, the Director must determine that the concessioner operated satisfactorily on an overall basis during the term of its applicable concession contract, including extensions of the contract. The Director will base this determination in consideration of annual evaluations made by the Director of the concessioner's performance under the terms of the applicable concession contract and other relevant facts and circumstances. The Director must determine that a concessioner did not operate satisfactorily on an overall basis during the term of a concession contract if the annual evaluations of the concessioner made subsequent to May 17, 2000 are less than satisfactory for any two or more years of operation under the concession contract.

§ 51.45 Will a concessioner that has operated for less than the entire term of a concession contract be considered a satisfactory operator?

The Director will determine that a concessioner has operated satisfactorily on an overall basis during the term of a concession contract only if the concessioner (including a new concessioner resulting from an assignment as described in this part, including, without limit, an assignment of a controlling interest in a concessioner as defined in this part) has or will have operated for more than two years under a concession contract with a term of more than five years or for one year under a concession contract with a term of five years or less. For purposes of this section, a new concessioner's first day of operation under an assigned concession contract (or as a new concessioner after approval of an assignment of a controlling interest in a concessioner) will be the day the Director approves the assignment pursuant to this part. If the Director determines that an assignment was compelled by circumstances beyond the control of the assigning concessioner, the Director may make an exception to the requirements of this section.

§ 51.46 May the Director determine that a concessioner has not operated satisfactorily after a prospectus is issued?

The Director may determine that a concessioner has not operated satisfactorily on an overall basis during the term of a current concession contract, and therefore is not a preferred offeror, after a prospectus for a new contract has been issued and prior to the selection of the best proposal submitted in response to a prospectus. In circumstances where the usual time of an annual evaluation of a concessioner's performance may not occur until after the selection of the best proposal submitted in response to a prospectus, the Director will make an annual performance evaluation based on a shortened operations period prior to the selection of the best proposal. Such shorter operations period, however, must encompass at least 6 months of operations from the previous annual performance evaluation. In the event the concessioner receives a second less than satisfactory annual evaluation (including, without limitation, one based on a shortened operations period) May 17, 2000, the prospectus must be amended to delete a right of preference or canceled and reissued without recognition of a right of preference to the new concession contract.

§ 51.47 How does a person appeal a decision of the Director that a concessioner is or is not a preferred offeror?

(a) Except as stated in paragraph (b) of this section, any person may appeal to the Director a determination that a concessioner is or is not a preferred offeror for the purposes of a right of preference in renewal, including, without limitation, whether the applicable new concession contract is or is not a qualified concession contract as described in this part. This appeal must specify the grounds for the appeal and be received by the Director in writing no later than 30 days after the date of the determination. If applicable, the Director may extend the submission date for an appeal under this section upon request by the concessioner if the Director determines that good cause for an extension exists.

(b) The appeal provided by this section will not apply to determinations that a concessioner is not a preferred offeror as a consequence of two or more less than satisfactory annual evaluations as described in this part as the concessioner is given an opportunity to appeal those evaluations after they are made in accordance with applicable administrative guidelines.

(c) The Director must consider an appeal under this section personally or must authorize a Deputy Director or Associate Director to consider the appeal. The deciding official must prepare a written decision on the appeal, taking into account the content of the appeal, other written information available, and the requirements of this part. The written decision on the appeal must be issued by the date of selection of the best proposal submitted in response to a prospectus. If the appeal results in a concessioner being determined a preferred offeror, then the concessioner will have a right of preference to the qualified concession contract as described in and subject to the conditions of this part, including, but not limited to, the obligation to submit a responsive proposal pursuant to the terms of the related prospectus. If the appeal results in a determination

that a concessioner is not a preferred offeror, no right of preference will apply to the award of the related concession contract and the award will be made in accordance with the requirements of this part.

(d) No person will be considered as having exhausted administrative remedies with respect to a determination by the Director that a concessioner is or is not a preferred offeror until the Director issues a written decision in response to an appeal submitted pursuant to this section, or, where applicable, pursuant to an appeal provided by the administrative guidelines described in paragraph (b) of this section. The decision of the Director is final agency action.

§ 51.48 What happens to a right of preference in the event of termination of a concession contract for unsatisfactory performance or other breach?

Nothing in this part will limit the right of the Director to terminate a concession contract pursuant to its terms at any time for less than satisfactory performance or otherwise. If a concession contract is terminated for less than satisfactory performance or other breach, the terminated concessioner, even if otherwise qualified, will not be eligible to be a preferred offeror. The fact that the Director may not have terminated a concession contract for less than satisfactory performance or other breach will not limit the authority of the Director to determine that a concessioner did not operate satisfactorily on an overall basis during the term of a concession contract.

§ 51.49 May the Director grant a right of preference except in accordance with this part?

The Director may not grant a concessioner or any other person a right of preference or any other form of entitlement of any nature to a new concession contract, except in accordance with this part or in accordance with 36 CFR part 13.

§ 51.50 Does the existence of a preferred offeror limit the authority of the Director to establish the terms of a concession contract?

The existence of a preferred offeror does not limit the authority of the Director to establish, in accordance with this part, the terms and conditions of a new concession contract, including, but not limited to, terms and conditions that modify the terms and conditions of a prior concession contract.

Subpart G—Leasehold Surrender Interest

§ 51.51 What special terms must I know to understand leasehold surrender interest?

To understand leasehold surrender interest, you must refer to these definitions, applicable in the singular or the plural, whenever these terms are used in this part:

Arbitration means binding arbitration conducted by an arbitration panel. All arbitration proceedings conducted under the authority of this subpart or subpart H of this part will utilize the following procedures unless otherwise agreed by the concessioner and the Director. One member of the arbitration panel will be selected by the concessioner, one member will be selected by the Director, and the third (neutral) member will be selected by the two party-appointed members. The neutral arbiter must be a licensed real estate appraiser. The expenses of the neutral arbiter and other associated common costs of the arbitration will be borne equally by the concessioner and the Director. The arbitration panel will adopt procedures that treat each party equally, give each party the opportunity to be heard, and give each party a fair opportunity to present its case. Adjudicative procedures are not encouraged but may be adopted by the panel if determined necessary in the circumstances of the dispute. Determinations must be made by a majority of the members of the panel and will be binding on the concessioner and the Director.

A capital improvement is a structure, fixture, or non-removable equipment provided by a concessioner pursuant to the terms of a concession contract and located on lands of the United States within a park area. A capital improvement does not include any interest in land. Additionally, a capital improvement does not include any interest in personal property of any kind including, but not limited to, vehicles, boats, barges, trailers, or other objects, regardless of size, unless an item of personal property becomes a fixture as defined in this part. Concession contracts may further describe, consistent with the limitations of this part and the 1998 Act, the nature and type of specific capital improvements in which a concessioner may obtain a leasehold surrender interest.

Construction cost of a capital improvement means the total of the incurred eligible direct and indirect costs necessary for constructing or installing the capital improvement that are capitalized by the concessioner in accordance with Generally Accepted Accounting Principals (GAAP). The term ''construct'' or ''construction'' as used in this part also means ''install'' or ''installation'' of fixtures where applicable.

Consumer Price Index means the national ''Consumer Price Index—All Urban Consumers'' published by the Department of Labor. If this index ceases to be published, the Director will designate another regularly published cost-of-living index approximating the national Consumer Price Index.

Depreciation means the loss of value in a capital improvement as evidenced by the condition and prospective serviceability of the capital improvement in comparison with a new unit of like kind.

Eligible direct costs means the sum of all incurred capitalized costs (in amounts no higher than those prevailing in the locality of the project), that are necessary both for the construction of a capital improvement and are typically elements of a construction contract. Eligible direct costs may include, without limitation, the costs of (if capitalized in accordance with GAAP and in amounts no higher than those prevailing in the locality of the project): building permits; materials, products and equipment used in construction; labor used in construction; security during construction; contractor's shack and temporary fencing; material storage facilities; power line installation and utility costs during construction; performance bonds; and contractor's (and subcontractor's) profit and overhead (including job supervision, worker's compensation insurance and fire, liability, and unemployment insurance).

Eligible indirect costs means, except as provided in the last sentence of this definition, the sum of all other incurred capitalized costs (in amounts no higher than those prevailing in the locality of the project) necessary for the construction of a capital improvement. Eligible indirect costs may include, without limitation, the costs of (if capitalized in accordance with GAAP and in amounts no higher than those prevailing in the locality of the project): architectural and engineering fees for plans, plan checks; surveys to establish building lines and grades; environmental studies; if the project is financed, the points, fees or service charges and interest on construction loans; all risk insurance expenses and ad valorem taxes during construction. The actual capitalized administrative expenses (in amounts no higher than those prevailing in the locality of the project) of the concessioner for direct, on-site construction inspection are

eligible indirect costs. Other administrative expenses of the concessioner are not eligible indirect costs.

Fixtures and non-removable equipment are manufactured items of personal property of independent form and utility necessary for the basic functioning of a structure that are affixed to and considered to be part of the structure such that title is with the Director as real property once installed. Fixtures and non-removable equipment do not include building materials (e.g., wallboard, flooring, concrete, cinder blocks, steel beams, studs, window frames, windows, rafters, roofing, framing, siding, lumber, insulation, wallpaper, paint, etc.). Because of their special circumstances, floating docks (but not other types of floating property) constructed by a concessioner pursuant to the terms of a leasehold surrender interest concession contract are considered to be non-removable equipment for leasehold surrender interest purposes only. Except as otherwise indicated in this part, the term ''fixture'' as used in this part includes the term ''non-removable equipment.''

Leasehold surrender interest solely means a right to payment in accordance with this part for related capital improvements that a concessioner makes or provides within a park area on lands owned by the United States pursuant to this part and under the terms and conditions of an applicable concession contract. The existence of a leasehold surrender interest does not give the concessioner, or any other person, any right to conduct business in a park area, to utilize the related capital improvements, or to prevent the Director or another person from utilizing the related capital improvements. The existence of a leasehold surrender interest does not include any interest in the land on which the related capital improvements are located.

Leasehold surrender interest concession contract means a concession contract that provides for leasehold surrender interest in capital improvements.

Leasehold surrender interest value means the amount of compensation a concessioner is entitled to be paid for a leasehold surrender interest in capital improvements in accordance with this part. Unless otherwise provided by the terms of a leasehold surrender interest concession contract under the authority of section 405(a)(4) of the 1998 Act, leasehold surrender interest value in existing capital improvements is an amount equal to:

(1) The initial construction cost of the related capital improvement;

(2) Adjusted by (increased or decreased) the same percentage increase or decrease as the percentage increase or decrease in the Consumer Price Index from the date the Director approves the substantial completion of the construction of the related capital improvement to the date of payment of the leasehold surrender interest value;

(3) Less depreciation of the related capital improvement on the basis of its condition as of the date of termination or expiration of the applicable leasehold surrender interest concession contract, or, if applicable, the date on which a concessioner ceases to utilize a related capital improvement (*e.g.,* where the related capital improvement is taken out of service by the Director pursuant to the terms of a concession contract).

Major rehabilitation means a planned, comprehensive rehabilitation of an existing structure that:

(1) The Director approves in advance and determines is completed within 18 months from start of the rehabilitation work (unless a longer period of time is approved by the Director in special circumstances); and

(2) The construction cost of which exceeds fifty percent of the pre-rehabilitation value of the structure.

Pre-rehabilitation value of an existing structure means the replacement cost of the structure less depreciation.

Real property improvements means real property other than land, including, but not limited to, capital improvements.

Related capital improvement or *related fixture* means a capital improvement in which a concessioner has a leasehold surrender interest.

Replacement cost means the estimated cost to reconstruct, at current prices, an existing structure with utility equivalent to the existing structure, using modern materials and current standards, design and layout.

Structure means a building, dock, or similar edifice affixed to the land so as to be part of the real estate. A structure may include both constructed infrastructure (*e.g.,* water, power and sewer lines) and constructed site improvements (*e.g.,* paved roads, retaining walls, sidewalks, paved driveways, paved parking areas) that are permanently affixed to the land so as to be part of the real estate and that are in direct support of the use of a building, dock, or similar edifice. Landscaping that is integral to the construction of a structure is considered as part of a structure. Interior furnishings that are not fixtures are not part of a structure.

Substantial completion of a capital improvement means the condition of a capital improvement construction project when the project is substantially complete and ready for use and/or occupancy.

§ 51.52 How do I obtain a leasehold surrender interest?

Leasehold surrender interest concession contracts will contain appropriate leasehold surrender interest terms and conditions consistent with this part. A concessioner will obtain leasehold surrender interest in capital improvements constructed in accordance with this part and the leasehold surrender interest terms and conditions of an applicable leasehold surrender interest concession contract.

§ 51.53 When may the Director authorize the construction of a capital improvement?

The Director may only authorize or require a concessioner to construct capital improvements on park lands in accordance with this part and under the terms and conditions of a leasehold surrender interest concession contract for the conduct by the concessioner of visitor services, including, without limitation, the construction of capital improvements necessary for the conduct of visitor services.

§ 51.54 What must a concessioner do before beginning to construct a capital improvement?

Before beginning to construct any capital improvement, the concessioner must obtain written approval from the Director in accordance with the terms of its leasehold surrender interest concession contract. The request for approval must include appropriate plans and specifications for the capital improvement and any other information that the Director may specify. The request must also include an estimate of the total construction cost of the capital improvement. The estimate of the total construction cost must specify all elements of the cost in such detail as is necessary to permit the Director to determine that they are elements of construction cost as defined in this part. (The approval requirements of this and other sections of this part also apply to any change orders to a capital improvement project and to any additions to a structure or replacement of fixtures as described in this part.)

§ 51.55 What must a concessioner do after substantial completion of the capital improvement?

Upon substantial completion of the construction of a capital improvement in which the concessioner is to obtain a leasehold surrender interest, the

concessioner must provide the Director a detailed construction report. The construction report must be supported by actual invoices of the capital improvement's construction cost together with, if requested by the Director, a written certification from a certified public accountant. The construction report must document, and any requested certification by the certified public accountant must certify, that all components of the construction cost were incurred and capitalized by the concessioner in accordance with GAAP, and that all components are eligible direct or indirect construction costs as defined in this part. Invoices for additional construction costs of elements of the project that were not completed as of the date of substantial completion may subsequently be submitted to the Director for inclusion in the project's construction cost.

§ 51.56 How will the construction cost for purposes of leasehold surrender interest value be determined?

After receiving the detailed construction report (and certification, if requested), from the concessioner, the Director will review the report, certification and other information as appropriate to determine that the reported construction cost is consistent with the construction cost approved by the Director in advance of the construction and that all costs included in the construction cost are eligible direct or indirect costs as defined in this part. The construction cost determined by the Director will be the construction cost for purposes of the leasehold surrender interest value in the related capital improvement unless the Concessioner requests arbitration of the construction cost under § 51.57. The Director may at any time amend a construction cost determination (subject to arbitration under § 51.57) if the Director determines that it was based on false, misleading or incomplete information.

§ 51.57 How does a concessioner request arbitration of the construction cost of a capital improvement?

If a concessioner requests arbitration of the construction cost of a capital improvement determined by the Director, the request must be made in writing to the Director within 3 months of the date of the Director's determination of construction cost under § 51.56. If a timely request is not made, the Director's determination of construction cost under § 51.56 shall be the final determination of the construction cost. The arbitration procedures are described in § 51.51. The decision of the arbitration panel as to the construction cost of the capital improvement will be binding on the concessioner and the Director.

§ 51.58 What actions may or must the concessioner take with respect to a leasehold surrender interest?

The concessioner:

(a) May encumber a leasehold surrender interest in accordance with this part, but only for the purposes specified in this part;

(b) Where applicable, must transfer in accordance with this part its leasehold surrender interest in connection with any assignment, termination or expiration of the concession contract; and

(c) May relinquish or waive a leasehold surrender interest.

§ 51.59 Will a leasehold surrender interest be extinguished by expiration or termination of a leasehold surrender interest concession contract or may it be taken for public use?

A leasehold surrender interest may not be extinguished by the expiration or termination of a concession contract and a leasehold surrender interest may not be taken for public use except on payment of just compensation. Payment of leasehold surrender interest value pursuant to this part will constitute the payment of just compensation for leasehold surrender interest within the meaning of this part and for all other purposes.

§ 51.60 How will a new concession contract awarded to an existing concessioner treat a leasehold surrender interest obtained under a prior concession contract?

When a concessioner under a leasehold surrender interest concession contract is awarded a new concession contract by the Director, and the new concession contract continues a leasehold surrender interest in related capital improvements, then the concessioner's leasehold surrender interest value (established as of the date of expiration or termination of its prior concession contract) in the related capital improvements will be continued as the initial value (instead of initial construction cost) of the concessioner's leasehold surrender interest under the terms of the new concession contract. No compensation will be due the concessioner for its leasehold surrender interest or otherwise in these circumstances except as provided by this part.

§ 51.61 How is an existing concessioner who is not awarded a new concession contract paid for a leasehold surrender interest?

(a) When a concessioner is not awarded a new concession contract after expiration or termination of a leasehold surrender interest concession contract, or, the concessioner, prior to such termination or expiration, ceases to utilize under the terms of a concession contract capital improvements in which the concessioner has a leasehold surrender interest, the concessioner will be entitled to be paid its leasehold surrender interest value in the related capital improvements. The leasehold surrender interest will not be transferred until payment of the leasehold surrender interest value. The date for payment of the leasehold surrender interest value, except in special circumstances beyond the Director's control, will be the date of expiration or termination of the leasehold surrender interest contract, or the date the concessioner ceases to utilize related capital improvements under the terms of a concession contract. Depreciation of the related capital improvements will be established as of the date of expiration or termination of the concession contract, or, if applicable, the date the concessioner ceases to utilize the capital improvements under the terms of a concession contract.

(b) In the event that extraordinary circumstances beyond the control of the Director prevent the Director from making the leasehold surrender interest value payment as of the date of expiration or termination of the leasehold surrender interest concession contract, or, as of the date a concessioner ceases to utilize related capital improvements under the terms of a concession contract, the payment when made will include interest on the amount that was due on the date of expiration or termination of the concession contract or cessation of use for the period after the payment was due until payment is made (in addition to the inclusion of a continuing Consumer Price Index adjustment until the date payment is made). The rate of interest will be the applicable rate of interest established by law for overdue obligations of the United States. The payment for a leasehold surrender interest value will be made within one year after the expiration or termination of the concession contract or the cessation of use of related capital improvements under the terms of a concession contract.

§ 51.62 What is the process to determine the leasehold surrender interest value when the concessioner does not seek or is not awarded a new concession contract?

Leasehold surrender interest concession contracts must contain provisions under which the Director and the concessioner will seek to agree in advance of the expiration or other termination of the concession contract as to what the concessioner's leasehold surrender interest value will be on a unit-by-unit basis as of the date of expiration or termination of the concession contract. In the event that agreement cannot be reached, the provisions of the leasehold surrender interest concession contract must provide for arbitration as to the leasehold surrender interest values upon request of the Director or the concessioner. The arbitration procedures are described in Section 51.51. A prior decision as to the construction cost of capital improvements made by the Director or by an arbitration panel in accordance with this part are final and not subject to further arbitration.

§ 51.63 When a new concessioner pays a prior concessioner for a leasehold surrender interest, what is the leasehold surrender interest in the related capital improvements for purposes of a new concession contract?

A new leasehold surrender interest concession contract awarded to a new concessioner will require the new concessioner to pay the prior concessioner its leasehold surrender interest value in existing capital improvements as determined under § 51.62. The new concessioner upon payment will have a leasehold surrender interest in the related capital improvements on a unit-by-unit basis under the terms of the new leasehold surrender interest contract. Instead of initial construction cost, the initial value of such leasehold surrender interest will be the leasehold surrender interest value that the new concessioner was required to pay the prior concessioner.

§ 51.64 May the concessioner gain additional leasehold surrender interest by undertaking a major rehabilitation or adding to a structure in which the concessioner has a leasehold surrender interest?

A concessioner that, with the written approval of the Director, undertakes a major rehabilitation or adds a new structure (*e.g.*, a new wing to an existing building or an extension of an existing sidewalk) to an existing structure in which the concessioner has a leasehold surrender interest, will increase its leasehold surrender interest in the related structure, effective as of the date of substantial completion of the major rehabilitation or new structure, by the construction cost of the major rehabilitation or new structure. The Consumer Price Index adjustment for leasehold surrender interest value purposes will apply to the construction cost as of the date of substantial completion of the major rehabilitation or new structure. Approvals for major rehabilitations and additions to structures are subject to the same requirements and conditions applicable to new construction as described in this part.

§ 51.65 May the concessioner gain additional leasehold surrender interest by replacing a fixture in which the concessioner has a leasehold surrender interest?

A concessioner that replaces an existing fixture in which the concessioner has a leasehold surrender interest with a new fixture will increase its leasehold surrender interest by the amount of the construction cost of the replacement fixture less the construction cost of the replaced fixture.

§ 51.66 Under what conditions will a concessioner obtain a leasehold surrender interest in existing real property improvements in which no leasehold surrender interest exists?

(a) A concession contract may require the concessioner to replace fixtures in real property improvements in which there is no leasehold surrender interest (e.g., fixtures attached to an existing government facility assigned by the Director to the concessioner). A leasehold surrender interest will be obtained by the concessioner in such fixtures subject to the approval and determination of construction cost and other conditions contained in this part.

(b) A concession contract may require the concessioner to undertake a major rehabilitation of a structure in which there is no leasehold surrender interest (*e.g.*, a government-constructed facility assigned to the concessioner). Upon substantial completion of the major rehabilitation, the concessioner will obtain a leasehold surrender interest in the structure. The initial construction cost of this leasehold surrender interest will be the construction cost of the major rehabilitation. Depreciation for purposes of leasehold surrender interest value will apply only to the rehabilitated components of the related structure.

§ 51.67 Will a concessioner obtain leasehold surrender interest as a result of repair and maintenance of real property improvements?

A concessioner will not obtain initial or increased leasehold surrender interest as a result of repair and maintenance of real property improvements unless a repair and maintenance project is a major rehabilitation.

Subpart H—Possessory Interest

§ 51.68 If a concessioner under a 1965 Act concession contract is not awarded a new concession contract, how will a concessioner that has a possessory interest receive compensation for its possessory interest?

A concessioner that has possessory interest in real property improvements pursuant to the terms of a 1965 Act concession contract, will, if the prior concessioner does not seek or is not awarded a new concession contract upon expiration or other termination of its 1965 Act concession contract, be entitled to receive compensation for its possessory interest in the amount and manner described by the possessory interest concession contract. The concessioner shall also be entitled to receive all other compensation, including any compensation for property in which there is no possessory interest, to the extent and in the manner that the possessory interest contract may provide.

§ 51.69 What happens if there is a dispute between the new concessioner and a prior concessioner as to the value of the prior concessioner's possessory interest?

In case of a dispute between a new concessioner and a prior concessioner as to the value of the prior concessioner's possessory interest, the dispute will be resolved under the procedures contained in the possessory interest concession contract. A new concessioner will not agree on the value of a prior concessioner's possessory interest without the prior written approval of the Director unless the value is determined through the binding determination process required by the possessory interest concession contract. The Director's written approval is to ensure that the value is consistent with the terms and conditions of the possessory interest concession contract. If a new concessioner and a prior concessioner engage in a binding process to resolve a dispute as to the value of the prior concessioner's possessory interest, the new concessioner must allow the Director to assist the new concessioner in the dispute process to the extent requested

by the Director. Nothing in this section may be construed as limiting the rights of the prior concessioner to be paid for its possessory interest or other property by a new concessioner in accordance with the terms of its concession contract.

§ 51.70 If a concessioner under a 1965 Act concession contract is awarded a new concession contract, what happens to the concessioner's possessory interest?

In the event a concessioner under a 1965 Act concession contract is awarded a new concession contract replacing a possessory interest concession contract, the concessioner will obtain a leasehold surrender interest in its existing possessory interest real property improvements under the terms of the new concession contract. The concessioner will carry over as the initial value of such leasehold surrender interest (instead of initial construction cost) an amount equal to the value of its possessory interest in real property improvements as of the expiration or other termination of its possessory interest contract. This leasehold surrender interest will apply to the concessioner's possessory interest in real property improvements even if the real property improvements are not capital improvements as defined in this part. In the event that the concessioner had a possessory interest in only a portion of a structure, depreciation for purposes of leasehold surrender interest value under the new concession contract will apply only to the portion of the structure to which the possessory interest applied. The concessioner and the Director will seek to agree on an allocation of the leasehold surrender interest value on a unit by unit basis.

§ 51.71 What is the process to be followed if there is a dispute between the prior concessioner and the Director as to the value of possessory interest?

Unless other procedures are agreed to by the concessioner and the Director, in the event that a concessioner under a possessory interest concession contract is awarded a new concession contract and there is a dispute between the concessioner and the Director as to the value of such possessory interest, or, a dispute as to the allocation of an established overall possessory interest value on a unit by unit basis, the value and/or allocation will be established by arbitration in accordance with the terms and conditions of this part. The arbitration procedures are described in § 51.51.

§ 51.72 If a new concessioner is awarded the contract, what is the relationship between leasehold surrender interest and possessory interest?

If a new concessioner is awarded a leasehold surrender interest concession contract and is required to pay a prior concessioner for possessory interest in real property improvements, the new concessioner will have a leasehold surrender interest in the real property improvements under the terms of its new concession contract. The initial value of the leasehold surrender interest (instead of initial construction cost) will be the value of the possessory interest as of the expiration or other termination of the 1965 Act possessory interest concession contract. This leasehold surrender interest will apply even if the related possessory interest real property improvements are not capital improvements as defined in this part. In the event a new concessioner obtains a leasehold surrender interest in only a portion of a structure as a result of the acquisition of a possessory interest from a prior concessioner, depreciation for purposes of leasehold surrender interest value will apply only to the portion of the structure to which the possessory interest applied.

Subpart I—Concession Contract Provisions

§ 51.73 What is the term of a concession contract?

A concession contract will generally be awarded for a term of 10 years or less unless the Director determines that the contract terms and conditions, including the required construction of capital improvements, warrant a longer term. It is the policy of the Director under these requirements that the term of concession contracts should be as short as is prudent, taking into account the financial requirements of the concession contract, resource protection and visitor needs, and other factors the Director may deem appropriate. In no event will a concession contract have a term of more than 20 years (unless extended in accordance with this part).

§ 51.74 When may a concession contract be terminated by the Director?

Concession contracts will contain appropriate provisions for suspension of operations under a concession contract and for termination of a concession contract by the Director for default, including, without limitation, unsatisfactory performance, or termination when necessary to achieve the purposes of the 1998 Act. The purposes of the 1998 Act include, but are not limited to, protecting, conserving, and preserving park area resources and providing necessary and appropriate visitor services in park areas.

§ 51.75 May the Director segment or split concession contracts?

The Director may not segment or otherwise split visitor services authorized or required under a single concession contract into separate concession contracts if the purpose of such action is to establish a concession contract with anticipated annual gross receipts of less than $500,000.

§ 51.76 May the Director include in a concession contract or otherwise grant a concessioner a preferential right to provide new or additional visitor services?

The Director may not include a provision in a concession contract or otherwise grant a concessioner a preferential right to provide new or additional visitor services under the terms of a concession contract or otherwise. For the purpose of this section, a ''preferential right to new or additional services'' means a right of a concessioner to a preference (in the nature of a right of first refusal or otherwise) to provide new or additional visitor services in a park area beyond those already provided by the concessioner under the terms of a concession contract. A concession contract may be amended to authorize the concessioner to provide minor additional visitor services that are a reasonable extension of the existing services. A concessioner that is allocated park area entrance, user days or similar resource use allocations for the purposes of a concession contract will not obtain any contractual or other rights to continuation of a particular allocation level pursuant to the terms of a concession contract or otherwise. Such allocations will be made, withdrawn and/or adjusted by the Director from time to time in furtherance of the purposes of this part.

§ 51.77 Will a concession contract provide a concessioner an exclusive right to provide visitor services?

Concession contracts will not provide in any manner an exclusive right to provide all or certain types of visitor services in a park area. The Director may limit the number of concession contracts to be awarded for the conduct of visitor services in a particular park area in furtherance of the purposes described in this part.

§ 51.78 Will a concession contract require a franchise fee and will the franchise fee be subject to adjustment?

(a) Concession contracts will provide for payment to the government of a

franchise fee or other monetary consideration as determined by the Director upon consideration of the probable value to the concessioner of the privileges granted by the contract involved. This probable value will be based upon a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving park areas and of providing necessary and appropriate visitor services at reasonable rates.

(b) The franchise fee contained in a concession contract with a term of 5 years or less may not be adjusted during the term of the contract. Concession contracts with a term of more than 5 years will contain a provision that provides for adjustment of the contract's established franchise fee at the request of the concessioner or the Director. An adjustment will occur if the concessioner and the Director mutually determine that extraordinary, unanticipated changes occurred after the effective date of the contract that have affected or will significantly affect the probable value of the privileges granted by the contract. The concession contract will provide for arbitration if the Director and a concessioner cannot agree upon an appropriate adjustment to the franchise fee that reflects the extraordinary, unanticipated changes determined by the concessioner and the Director.

§ 51.79 May the Director waive payment of a franchise fee or other payments?

The Director may not waive the concessioner's payment of a franchise fee or other payments or consideration required by a concession contract, except that a franchise fee may be waived in part by the Director pursuant to administrative guidelines that may allow for a partial franchise fee waiver in recognition of exceptional performance by a concessioner under the terms of a concession contract. A concessioner will have no right to require the partial waiver of a franchise fee under this authority or under any related administrative guidelines.

§ 51.80 How will the Director establish franchise fees for multiple outfitter and guide concession contracts in the same park area?

If the Director awards more than one outfitter and guide concession contract that authorizes or requires the concessioners to provide the same or similar visitor services at the same approximate location or utilizing the same resource within a single park area, the Director will establish franchise fees for those concession contracts that are comparable. In establishing these comparable franchise fees, the Director will take into account, as appropriate, variations in the nature and type of visitor services authorized by particular concession contracts, including, but not limited to, length of the visitor experience, type of equipment utilized, relative expense levels, and other relevant factors. The terms and conditions of an existing concession contract will not be subject to modification or open to renegotiation by the Director because of the award of a new concession contract at the same approximate location or utilizing the same resource.

§ 51.81 May the Director include ''special account'' provisions in concession contracts?

(a) The Director may not include in concession contracts ''special account'' provisions, that is, contract provisions which require or authorize a concessioner to undertake with a specified percentage of the concessioner's gross receipts the construction of real property improvements, including, without limitation, capital improvements on park lands. The construction of capital improvements will be undertaken only pursuant to the leasehold surrender interest provisions of this part and the applicable concession contract.

(b) Concession contracts may contain provisions that require the concessioner to set aside a percentage of its gross receipts or other funds in a repair and maintenance reserve to be used at the direction of the Director solely for maintenance and repair of real property improvements located in park areas and utilized by the concessioner in its operations. Repair and maintenance reserve funds may not be expended to construct real property improvements, including, without limitation, capital improvements. Repair and maintenance reserve provisions may not be included in concession contracts in lieu of a franchise fee, and funds from the reserves will be expended only for the repair and maintenance of real property improvements assigned to the concessioner by the Director for use in its operations.

(c) A concession contract must require the concessioner to maintain in good condition through a comprehensive repair and maintenance program all of the concessioner's personal property used in the performance of the concession contract and all real property improvements, including, without limitation, capital improvements, and, government personal property, assigned to the concessioner by a concession contract.

§ 51.82 Are a concessioner's rates required to be reasonable and subject to approval by the Director?

(a) Concession contracts will permit the concessioner to set reasonable and appropriate rates and charges for visitor services provided to the public, subject to approval by the Director.

(b) Unless otherwise provided in a concession contract, the reasonableness of a concessioner's rates and charges to the public will be determined primarily by comparison with those rates and charges for facilities and services of comparable character under similar conditions, with due consideration of the following factors and other factors deemed relevant by the Director: Length of season; peakloads; average percentage of occupancy; accessibility; availability and costs of labor and materials; and types of patronage. Such rates and charges may not exceed the market rates and charges for comparable facilities, goods, and services, after taking these factors into consideration.

§ 51.83 Handicrafts. [Reserved]

Subpart J—Assignment or Encumbrance of Concession Contracts

§ 51.84 What special terms must I know to understand this part?

To understand this subpart specifically and this part in general you must refer to these definitions, applicable in the singular or plural, whenever the terms are used in this part.

A *controlling interest in a concession contract* means an interest, beneficial or otherwise, that permits the exercise of managerial authority over a concessioner's performance under the terms of the concession contract and/or decisions regarding the rights and liabilities of the concessioner.

A *controlling interest in a concessioner* means, in the case of corporate concessioners, an interest, beneficial or otherwise, of sufficient outstanding voting securities or capital of the concessioner or related entities that permits the exercise of managerial authority over the actions and operations of the concessioner. A ''controlling interest'' in a concessioner also means, in the case of corporate concessioners, an interest, beneficial or otherwise, of sufficient outstanding voting securities or capital of the concessioner or related entities to permit the election of a majority of the Board of Directors of the concessioner.

The term ''controlling interest'' in a concessioner, in the instance of a partnership, limited partnership, joint venture, other business organization or individual entrepreneurship, means ownership or beneficial ownership of the assets of the concessioner that permits the exercise of managerial authority over the actions and operations of the concessioner.

Rights to operate and/or manage under a concession contract means any arrangement where the concessioner employs or contracts with a third party to operate and/or manage the performance of a concession contract (or any portion thereof). This does not apply to arrangements with an individual employee.

Subconcessioner means a third party that, with the approval of the Director, has been granted by a concessioner rights to operate under a concession contract (or any portion thereof), whether in consideration of a percentage of revenues or otherwise.

§ 51.85 What assignments require the approval of the Director?

The concessioner may not assign, sell, convey, grant, contract for, or otherwise transfer (such transactions collectively referred to as ''assignments'' for purposes of this part), without the prior written approval of the Director, any of the following:

(a) Any concession contract;

(b) Any rights to operate under or manage the performance of a concession contract as a subconcessioner or otherwise;

(c) Any controlling interest in a concessioner or concession contract; or

(d) Any leasehold surrender interest or possessory interest obtained under a concession contract.

§ 51.86 What encumbrances require the approval of the Director?

The concessioner may not encumber, pledge, mortgage or otherwise provide as a security interest for any purpose (such transactions collectively referred to as ''encumbrances'' for purposes of this part), without the prior written approval of the Director, any of the following:

(a) Any concession contract;

(b) Any rights to operate under or manage performance under a concession contract as a subconcessioner or otherwise;

(c) Any controlling interest in a concessioner or concession contract; or

(d) Any leasehold surrender interest or possessory interest obtained under a concession contract.

§ 51.87 Does the concessioner have an unconditional right to receive the Director's approval of an assignment or encumbrance?

No, approvals of assignments or encumbrances are subject to the following determinations by the Director:

(a) That the purpose of a leasehold surrender interest or possessory interest encumbrance is either to finance the construction of capital improvements under the applicable concession contract in the applicable park area or to finance the purchase of the applicable concession contract. An encumbrance of a leasehold surrender interest or possessory interest may not be made for any other purpose, including, but not limited to, providing collateral for other debt of a concessioner, the parent of a concessioner, or an entity related to a concessioner;

(b) That the encumbrance does not purport to provide the creditor or assignee any rights beyond those provided by the applicable concession contract, including, but not limited to, any rights to conduct business in a park area except in strict accordance with the terms and conditions of the applicable concession contract;

(c) That the encumbrance does not purport to permit a creditor or assignee of a creditor, in the event of default or otherwise, to begin operations under the applicable concession contract or through a designated operator unless and until the Director determines that the proposed operator is a qualified person as defined in this part;

(d) That an assignment or encumbrance does not purport to assign or encumber assets that are not owned by the concessioner, including, without limitation, park area entrance, user day, or similar use allocations made by the Director;

(e) That the assignment is to a qualified person as defined in this part;

(f) That the assignment or encumbrance would not have an adverse impact on the protection, conservation or preservation of park resources;

(g) That the assignment or encumbrance would not have an adverse impact on the provision of necessary and appropriate facilities and services to visitors at reasonable rates and charges; and

(h) That the terms of the assignment or encumbrance are not likely, directly or indirectly, to reduce an existing or new concessioner's opportunity to earn a reasonable profit over the remaining term of the applicable concession contract, to affect adversely the quality of facilities and services provided by the concessioner, or result in a need for increased rates and charges to the public to maintain the quality of concession facilities and services.

§ 51.88 What happens if an assignment or encumbrance is completed without the approval of the Director?

Assignments or encumbrances completed without the prior written approval of the Director will be considered as null and void and a material breach of the applicable concession contract which may result in termination of the contract for cause. No person will obtain any valid or enforceable rights in a concessioner, in a concession contract, or to operate or manage under a concession contract as a subconcessioner or otherwise, or to leasehold surrender interest or possessory interest, if acquired in violation of the requirements in this subpart.

§ 51.89 What happens if there is a default on an encumbrance approved by the Director?

In the event of default on an encumbrance approved by the Director in accordance with this part, the creditor, or an assignee of the creditor, may succeed to the interests of the concessioner only to the extent provided by the approved encumbrance, this part and the terms and conditions of the applicable concession contract.

§ 51.90 How does the concessioner get the Director's approval before making an assignment or encumbrance?

Before completing any assignment or encumbrance which may be considered to be the type of transaction described in this part, including, but not limited to, the assignment or encumbrance of what may be a controlling interest in a concessioner or a concession contract, the concessioner must apply in writing for approval of the transaction by the Director.

§ 51.91 What information may the Director require in the application?

An application for the Director's approval of an assignment or encumbrance will include, to the extent required by the Director in the circumstances of the transaction, the following information in such detail as the Director may specify in order to make the determinations required by this subpart:

(a) All instruments proposed to implement the transaction;

(b) An opinion of counsel to the effect that the proposed transaction is lawful under all applicable federal and state laws;

(c) A narrative description of the proposed transaction;

(d) A statement as to the existence and nature of any litigation relating to the proposed transaction;

(e) A description of the management qualifications, financial background, and financing and operational plans of any proposed transferee;

(f) A detailed description of all financial aspects of the proposed transaction;

(g) Prospective financial statements (proformas);

(h) A schedule that allocates in detail the purchase price (or, in the case of a transaction other than an asset purchase, the valuation) of all assets assigned or encumbered. In addition, the applicant must provide a description of the basis for all allocations and ownership of all assets; and

(i) Such other information as the Director may require to make the determinations required by this subpart.

§ 51.92 What are standard proformas?

Concessioners are encouraged to submit standard prospective financial statements (proformas) pursuant to this part. A ''standard proforma'' is one that:

(a) Provides projections, including revenues and expenses that are consistent with the concessioner's past operating history unless the proforma is accompanied by a narrative that describes why differing expectations are achievable and realistic;

(b) Assumes that any loan related to an assignment or encumbrance will be paid in full by the expiration of the concession contract unless the proforma contains a narrative description as to why an extended loan period is consistent with an opportunity for reasonable profit over the remaining term of the concession contract. The narrative description must include, but is not limited to, identification of the loan's collateral after expiration of the concession contract; and

(c) Assumes amortization of any intangible assets assigned or encumbered as a result of the transaction over the remaining term of the concession contract unless the proforma contains a narrative description as to why such extended amortization period is consistent with an opportunity for reasonable profit over the remaining term of the concession contract.

§ 51.93 If the transaction includes more that one concession contract, how must required information be provided?

In circumstances of an assignment or encumbrance that includes more than one concession contract, the concessioner must provide the information described in this subpart on a contract by contract basis.

§ 51.94 What information will the Director consider when deciding to approve a transaction?

In deciding whether to approve an assignment or encumbrance, the Director will consider the proformas, all other information submitted by the concessioner, and other information available to the Director.

§ 51.95 Does the Director's approval of an assignment or encumbrance include any representations of any nature?

In approving an assignment or encumbrance, the Director has no duty to inform any person of any information the Director may have relating to the concession contract, the park area, or other matters relevant to the concession contract or the assignment or encumbrance. In addition, in approving an assignment or encumbrance, the Director makes no representations of any nature to any person about any matter, including, but not limited to, the value, allocation, or potential profitability of any concession contract or assets of a concessioner. No approval of an assignment or encumbrance may be construed as altering the terms and conditions of the applicable concession contract unless expressly so stated by the Director in writing.

§ 51.96 May the Director amend or extend a concession contract for the purpose of facilitating a transaction?

The Director may not amend or extend a concession contract for the purpose of facilitating an assignment or encumbrance. The Director may not make commitments regarding rates to the public, contract extensions, concession contract terms and conditions, or any other matter, for the purpose of facilitating an assignment or encumbrance.

§ 51.97 May the Director open to renegotiation or modify the terms of a concession contract as a condition to the approval of a transaction?

The Director may not open to renegotiation or modify the terms and conditions of a concession contract as a condition to the approval of an assignment or encumbrance. The exception is if the Director determines that renegotiation or modification is required to avoid an adverse impact on the protection, conservation or preservation of the resources of a park area or an adverse impact on the provision of necessary and appropriate visitor services at reasonable rates and charges.

Subpart K—Information and Access to Information

§ 51.98 What records must the concessioner keep and what access does the Director have to records?

A concessioner (and any subconcessioner) must keep any records that the Director may require for the term of the concession contract and for five calendar years after the termination or expiration of the concession contract to enable the Director to determine that all terms of the concession contract are or were faithfully performed. The Director and any duly authorized representative of the Director must, for the purpose of audit and examination, have access to all pertinent records, books, documents, and papers of the concessioner, subconcessioner and any parent or affiliate of the concessioner (but with respect to parents and affiliates, only to the extent necessary to confirm the validity and performance of any representations or commitments made to the Director by a parent or affiliate of the concessioner).

§ 51.99 What access to concessioner records will the Comptroller General have?

The Comptroller General or any duly authorized representative of the Comptroller General must, until the expiration of five calendar years after the close of the business year of each concessioner (or subconcessioner), have access to and the right to examine all pertinent books, papers, documents and records of the concessioner, subconcessioner and any parent or affiliate of the concessioner (but with respect to parents and affiliates only to the extent necessary to confirm the validity and performance of any representations or commitments made to the Director by the parent or affiliate of the concessioner).

§ 51.100 When will the Director make proposals and evaluation documents publicly available?

In the interest of enhancing competition for concession contracts, the Director will not make publicly available proposals submitted in response to a prospectus or documents generated by the Director in evaluating such proposals, until the date that the new concession contract solicited by the prospectus is awarded. At that time, the Director may or will make the proposals and documents publicly available in accordance with applicable law.

Subpart L—The Effect of the 1998 Act's Repeal of the 1965 Act

§ 51.101 Did the 1998 Act repeal the 1965 Act?

Section 415 of the 1998 Act repealed the 1965 Act and related laws as of November 13, 1998. This repeal did not affect the validity of any 1965 Act concession contract. The provisions of this part apply to all 1965 Act concession contracts except to the extent that such provisions are inconsistent with terms and conditions of a 1965 Act concession contract.

§ 51.102 What is the effect of the 1998 Act's repeal of the 1965 Act's preference in renewal?

(a) Section 5 of the 1965 Act required the Secretary to give existing satisfactory concessioners a preference in the renewal (termed a ''renewal preference'' in the rest of this section) of its concession contract or permit. Section 415 of the 1998 Act repealed this statutory renewal preference as of November 13, 1998. It is the final decision of the Director, subject to the right of appeal set forth in paragraph (b) of this section, that holders of 1965 Act concession contracts are not entitled to be given a renewal preference with respect to such contracts (although they may otherwise qualify for a right of preference regarding such contracts under Sections 403(7) and (8) of the 1998 Act as implemented in this part). However, if a concessioner holds an existing 1965 Act concession contract and the contract makes express reference to a renewal preference, the concessioner may appeal to the Director for recognition of a renewal preference.

(b) Such appeal must be in writing and be received by the Director no later than thirty days after the issuance of a prospectus for a concession contract under this part for which the concessioner asserts a renewal preference. The Director must make a decision on the appeal prior to the proposal submission date specified in the prospectus. Where applicable, the Director will give notice of this appeal to all potential offerors that requested a prospectus. The Director may delegate consideration of such appeals only to a Deputy or Associate Director. The deciding official must prepare a written decision on the appeal, taking into account the content of the appeal and other available information.

(c) If the appeal results in a determination by the Director that the 1965 Act concession contract in question makes express reference to a renewal preference under section 5 of the 1965 Act, the 1998 Act's repeal of section 5 of the 1965 Act was inconsistent with the terms and conditions of the concession contract, and that the holder of the concession contract in these circumstances is entitled to a renewal preference by operation of law, the Director will permit the concessioner to exercise a renewal preference for the contract subject to and in accordance with the otherwise applicable right of preference terms and conditions of this part, including, without limitation, the requirement for submission of a responsive proposal pursuant to the terms of an applicable prospectus. The Director, similarly, will permit any holder of a 1965 Act concession contract that a court of competent jurisdiction determines in a final order is entitled to a renewal preference, for any reason, to exercise a right of preference in accordance with the otherwise applicable requirements of this part, including, without limitation, the requirement for submission of a responsive proposal pursuant to the terms of an applicable prospectus.

§ 51.103 Severability.

A determination that any provision of this part is unlawful will not affect the validity of the remaining provisions.

Subpart M—Information Collection

§ 51.104 Have information collection procedures been followed?

(a) The Paperwork Reduction Act provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The information collection for submission of proposals in response to concession prospectuses contained in this part have been approved by the Office of Management and Budget as required by 44 U.S.C. 3501 *et seq.* and assigned clearance number 1024–0125, extended through May 30, 2000. An information collection for proposed transfers of concession operations is covered by OMB Approval No. 1024–0126 effective through August 31, 2002.

(b) The public reporting burden for the collection of information for the purpose of preparing a proposal in response to a contract solicitation is estimated to average 480 hours per proposal for large authorizations and 240 hours per proposal for small authorizations. The public reporting burden for the collection of information for the purpose of requesting approval of a sale or transfer of a concession operation is estimated to be 80 hours. Please send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Officer, National Park Service, 1849 C Street, Washington, DC 20240; and to the Attention: Desk Officer for the Interior Department, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

(c) Additional reporting and recordkeeping requirements were identified in subpart F regarding appeal of a preferred offeror determination, subpart G regarding leasehold surrender interest and in subpart K regarding recordkeeping that are not covered under OMB approval. An emergency information collection request to cover these requirements has been prepared and submitted to OMB for approvals. These additional information collection requirements will not be implemented until OMB approves the emergency request. The Director will publish a **Federal Register** notice when OMB has approved these requirements.

Dated: April 10, 2000.

Stephen C. Saunders,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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