UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

'84 JUL 5 P3:00

In the Matter of	)	
	)	
Weed Heights Development Co.;	)	
Mesaba Service and Supply Co.;	)	
and Martin Electric Co.,	)	Docket No. TSCA-09-84-0010
	)	
Respondents	)	

1. Toxic Substances Control Act. The forum for determining the ownership of transformers from among three different named Respondents is in the investigational stage and not in a formal hearing.

2. Toxic Substances Control Act. Transformers located on premises of one party, with ownership residing in another, does not place liability upon that party where facts show an effort was made to have them removed.

3. Toxic Substances Control Act. A Motion To Dismiss should be granted upon a showing of Respondent by substantial evidence, unrefuted by Complainant, therefore, a failure to present a prima facie case.

4. Toxic Substances Control Act. Complaint against a named Respondent will be dismissed upon a failure to file a certificate of service. 40 CFR 22.05(a)(2).

5. Toxic Substances Control Act. Failure to file response to Motion To Dismiss within ten (10) days after service of motion is ground for granting Motion To Dismiss. (Sec. 22.16(b)).

Appearances

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ORDER GRANTING MOTIONS TO DISMISS FILED BY WEED HEIGHTS DEVELOPMENT COMPANY AND MESABA SERVICE AND SUPPLY COMPANY AND DISMISSING COMPLAINT AGAINST MARTIN ELECTRIC COMPANY*

Complaint in this proceeding was issued January 30, 1984, naming as Respondent only Weed Heights Development Company (Weed Heights). Answer was filed by said Respondent stating that the six transformers referenced in the investigative report and Complaint are not owned by Respondent, nor does it have any interest therein.

And further, that based upon information and belief, Respondent alleges that sometime prior to the sale of its property to Respondent, Anaconda, the then owners of the six (6) transformers, sold or transferred said transformers to Mesaba Service and Supply Co. ("Mesaba"), 330 Primrose Road, Burlingame, California.

* Sec. 22.20(b) provides that this decision constitutes an Initial Decision of the Presiding Officer and shall be filed with the Regional Hearing Clerk.

Mesaba, in turn, in August of 1979, sold the said six (6) transformers to Martin Electric Co., P. O. Box 588, Lake Oswego, Oregon.

Thereafter, on June 6, 1984, Complainant filed Motion For Leave To File First Amended Complaint, said Complaint being attached to said motion. This motion was granted on May 2, 1984. The First Amended Complaint added two additional Respondents, Mesaba and Martin Electric Company.

Respondents Mesaba and Weed Heights filed Answers to First Amended Complaint, both denying any ownership or interest in the six transformers which are the subject of the Complaint and providing documentation in support thereof.

Subsequently, both Mesaba and Weed Heights filed Motion To Dismiss And/or For Accelerated Decision citing lack of ownership or interest in the transformers and referencing documentary proof thereof.

The Motion To Dismiss filed by Weed Heights was mailed to all parties on May 17, 1984. The Motion To Dismiss filed by Mesaba was personally delivered to the Regional Hearing Clerk on June 1, 1984. Complainant's Response to said Motions To Dismiss was dated June 22, 1984. Rule 22.16(b) of the Consolidated Rules of Practice require that a party's response to any written motion must be filed within ten (10) days after service of motion. Failure of Complainant to comply with this Rule is one of the bases upon which the Motions To Dismiss are granted.

Sec. 22.20 of the Rules of Practice provides that:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

Respondents Weed Heights and Mesaba have provided documentary proof that neither Respondent owns nor has any interest in the transformers which are the subject of this Complaint.

Complainant's response to said motions states that "the inspection report filed by the EPA field investigators records no disclaimer of title to the transformers or responsibility for same by Mr. Johnson on behalf of his employer or principal, Weed Heights Development Company." And that this, among other things, leads to the assumption that title was still in Weed Heights. The documentary evidence submitted by Respondents nullifies this assumption.

Complainant states that the purpose of the First Amended Complaint was to determine "just who is the owner of this personalty and where does the responsibility for compliance with TSCA repose." The forum for that determination is by means of a more thorough investigation and not in a formal hearing.

Also, the fact that the transformers were located on the premises of Weed Heights does not place liability upon Weed Heights, especially in view of the arrangements made between Mesaba and Martin Electric Company to remove them from that location.

As to Respondent Martin Electric Company, the record before me is void of any evidence indicating that said Respondent was ever served a copy of the Complaint. The Order Granting Motion For Leave To File First Amended Complaint stated: "Upon receipt by this Office of a Certificate of Service of Complaint upon the newly named Respondents and Answers thereto, further action will be taken." No such evidence is before me.

It is ordered that the Motions To Dismiss filed by Weed Heights Development Company and Mesaba Service and Supply Company are hereby granted, with prejudice.

The Complaint against Martin Electric Company is dismissed without prejudice.

Edward B. Finch
Chief Administrative Law Judge

Dated: July 5, 1984
Washington, D. C.

* Both Weed Heights and Mesaba have moved that each be awarded attorneys' fees. 40 CFR 17, copy attached, sets forth Information Required From Applicants and Content of Application.

CERTIFICATION

I hereby certify that the original of this Order Granting Motions To Dismiss Filed By Weed Heights Development Company And Mesaba Service And Supply Company And Dismissing Complaint Against Martin Electric Company was mailed to the Regional Hearing Clerk, U. S. EPA, Region IX, and a copy was sent by certified mail, return receipt requested, to Complainant and Respondents in this proceeding.

Leanne B. Boisvert
Legal Staff Assistant

Dated: July 5, 1984

(1) Alco-Analyzer Gas Chromatograph (Luckey Laboratories, Inc).
(2) Alco-Tector (Decatur Electronics, Inc).
(3) Breathalyzer (Stephenson Corporation).
(4) Gas Chromatograph Intoximeter (Intoximeter, Inc).
(5) Photo-Electric Intoximeter (Intoximeter, Inc).

c. Course materials are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402:

Publication	Stock No.	Cost
Course Guide	5003-0046	$0.60
Student Study Guide	5003-0045	1.00
Instructor's Lesson Plans [1]	5003-0044	3.00

[1] When ordering Instructor Lesson Plans, requestors should indicate the type equipment being used by the installation/command.

D-4. Recertification. Refresher training consisting of classroom instruction and laboratory practical work is required every 18 months to assure that operators maintain skills and are brought up to date on the newest information relative to alcohol and chemical testing. Satisfactory completion of a written and practical examination administered as a part of the refresher training are required for recertification.

[FR Doc. 83-24101 Filed 9-1-83; 8:45 am]
BILLING CODE 3710-08-M

DEPARTMENT OF TRANSPORTATION

Saint Lawrence Seaway Development Corporation

33 CFR Part 401

Seaway Regulations, Navigation Closing Procedures

AGENCY: Saint Lawrence Seaway Development Corporation, DOT.

ACTION: Final rule.

SUMMARY: The Saint Lawrence Seaway Development Corporation and its counterpart agency, the St. Lawrence Seaway Authority of Canada, publish joint Seaway Regulations. As a result of discussions with the St. Lawrence Seaway Authority and St. Lawrence Seaway users concerning navigation closing procedures, it was determined that paragraph (b)(2) of § 401.97 needed to be revised in order to allow the flexibility in imposing operational surcharges as provided for by the St. Lawrence Seaway Tariff of Tolls. The Tariff of Tolls provides that operational surcharges may be imposed while § 401.97(b)(2) as previously written, without consideration of operation conditions, mandated the imposition of surcharges. Therefore, the Seaway Corporation has amended 33 CFR Part 401—Subpart A.

EFFECTIVE DATE: September 2, 1983.

FOR FURTHER INFORMATION CONTACT: Frederick A. Bush, General Counsel, (315) 764-3245.

SUPPLEMENTARY INFORMATION:

Background

On July 5, 1983, the Seaway Corporation published in the Federal Register (48 FR 30685) a proposed amendment to § 401.97(b)(2) of the Seaway Regulations. This amendment had been developed jointly with the St. Lawrence Seaway Authority.

No comments were submitted in response to the notice of proposed rulemaking.

List of Subjects in 33 CFR Part 401

Hazardous materials transportation, Navigation (water), Penalties, Radio, Reporting and recordkeeping requirements, Vessels, Waterways.

As a result of a number of discussions with the users of the Seaway, it became readily apparent that favorable operating conditions might eliminate the need for the imposition of operational surcharges and that such imposition would have a negative impact on the level of traffic, which in turn would reduce the amount of revenues accruing to both the St. Lawrence Seaway Authority of Canada and the Corporation. Therefore, in order to encourage the use of the St. Lawrence Seaway, paragraph (b)(2) of § 401.97 has been revised in order to allow the needed flexibility in determining the imposition of operational surcharges. This has been done by requiring, as a part of the closing procedures, that a vessel must comply with the provisions of the St. Lawrence Seaway Tariff of Tolls, which provides that the imposition of the operational surcharges is permissive as opposed to the mandatory imposition required by the aforementioned paragraph (b)(2) of § 401.97 of the Seaway Regulations.

This final rule involves a foreign affairs function of the United States; therefore Executive Order 12291 does not apply to this rulemaking. The Saint Lawrence Seaway Development Corporation certifies that, for the purposes of the Regulatory Flexibility Act (Pub. L. 96-354), this final rule will not have a significant impact on a substantial number of small entities. The Seaway Regulations relate to the activities of commercial users of the Seaway, the vast majority of whom are foreign vessel operators, and therefore any resulting costs will be borne primarily by foreign vessels. On the other hand, the economic benefits derived from a safe and efficiently operated St. Lawrence Seaway are considerable. Finally, the Corporation has determined that this rulemaking is not a major Federal action affecting the quality of the human environment under the National Environmental Policy Act, and therefore an environmental impact statement is not required.

PART 401—[AMENDED]

For the stated reasons, the Seaway Regulations have been amended as follows:

1. In § 401.97, paragraph (b)(2) has been revised to read as follows:

§ 401.97 Closing procedures.

* * * * *

(b) * * *

(2) It reports at the applicable calling in point referred to in paragraph (c) of this section within a period of 96 hours after the clearance date in that navigation season, it complies with the provisions of the agreement between Canada and the United States, known as the St. Lawrence Seaway Tariff of Tolls and the transit is authorized by the Corporation and the Authority.

* * * * *

(68 Stat. 93-96, 33 U.S.C. 981-990, as amended and sections 4, 5, 6, 7, 8, 12 and 13 of Sec. 2 of Pub. L. 85-474, 92 Stat. 1471)

Issued at Massena, New York on August 23, 1983.

Saint Lawrence Seaway Development Corporation.

William H. Kennedy,

Associate Administrator.

[FR Doc. 83-24102 Filed 9-1-83; 8:45 am]
BILLING CODE 4910-61-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 17

[OLCE-FRL 2330-7]

Implementation of Equal Access to Justice Act in Environmental Protection Agency Administrative Proceedings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is issuing its final rules governing the implementation of the Equal Access to Justice Act in EPA proceedings. These rules establish procedures for the submission and consideration of applications for awards of attorneys' fees and other expenses in adversary adjudications conducted by EPA under Section 5 of the Administrative Procedure Act.

DATE: This order is effective on October 3, 1983. The interim regulations will remain in effect until the effective date of this order.

FOR FURTHER INFORMATION CONTACT: James Clark, Environmental Protection Agency, Office of General Counsel (LE-132A), 401 M Street, SW., Washington, D.C. 20460, telephone (202) 382-7633.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2000-0430.

EPA received one comment from the National Audubon Society in response to the April 20, 1982 publication of its interim rules, 47 FR 16780. The Audubon Society made several suggestions, which are discussed below.

Prevailing Parties

First, the Audubon Society was concerned because the interim rule limited recovery of attorneys' fees to "prevailing parties" only, without defining the term. The comment correctly observed that other statutes have been interpreted to allow awards to parties that have not prevailed, citing *Sierra Club* v. *Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982) and *Environmental Defense Fund* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982). These two cases, however, arise from statutes that do not limit recovery of attorneys' fees to prevailing parties. The *Sierra Club* case, *supra*, awarded attorneys' fees to a nonprevailing party under Section 307(f) of the Clean Air Act, which authorizes a court to award fees "whenever it determines that such an award is appropriate." 42 U.S.C. 7606(f). Similarly, the *EDF* case, *supra*, permitted recovery of attorneys' fees by a nonprevailing party under Section 19(d) of the Toxic Substances Control Act, which authorizes award of fees "if the court determines such an award is appropriate." 15 U.S.C. 2618(d).

Section 504(a)(1) of the Equal Access to Justice Act, 5 U.S.C. 504(a)(1), on the other hand, explicitly directs agencies to award fees only to a "prevailing party." When Congress limits attorneys' fee awards to prevailing parties, as it did under the Act, courts have carried out that policy. See, *e.g.*, the cases arising under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. 1988, such as *Hanrahan* v. *Hampton*, (1980), 100 S. Ct. 1987, 446 U.S. 754, 64 L. Ed. 2d 670, rehearing denied 101 S. Ct. 33, 448 U.S. 913, 65 L. Ed. 1176, 1177 on remand 499 F. Supp. 640.

Neither these regulations nor the Act further defines "prevailing party." EPA decided not to attempt to rigorously define "prevailing party" in the rule so that the presiding officers, who are most familiar with the facts of the cases, can define the phrase on a case-by-case basis.

Substantial Justification

Second, the Audubon Society asked that these rules define "not substantially justified" and criticized the interim rule for creating "a nonparallel situation" by stating that just because EPA did not prevail does not demonstrate that the Agency's position was not substantially justified.

The rules do give some guidance about the meaning of "substantial justification," stating that no presumption arises that the agency's position was not substantially justified because the agency did not prevail. This phrase was suggested by the legislative history. The House Judiciary Committee report stated:

> The standard, however, should not be read to raise a presumption that the government position was not substantially justified, simply because it lost the case. (Report of the Committee on the Judiciary on S. 265, 96th Cong., 2nd Sess. 11 (1980) H.R. Rep. No. 1418 at 11.)

This statement does not, as the Audubon Society maintains, create a "nonparallel" situation or a "double standard." It simply calls for a two-step test, eliminating any presumption that just because a party prevails over EPA, the Agency's position was not substantially justified. To take the position that any prevailing party is automatically entitled to fees would render the statutory language requiring a finding that the Agency's position was not substantially justified mere surplusage.

EPA has decided not to define further what constitutes "substantial justification" so that the presiding officers, who are most familiar with the facts of the cases, can define it on a case-by-case basis.

The Fee Ceiling

Third, the Audubon Society commented that the $75 an hour attorney's fees limitation would be inadequate in light of prevailing rates. The Act, however, explicitly places that ceiling on hourly fees charged, 5 U.S.C. 504(b)(1)(A). EPA has received no information demonstrating that small entities cannot obtain competent representation at the $75 per hour ceiling set by Congress.

Interim Awards

Fourth, the Audubon Society urged that EPA should make awards under the Act after the final administrative determination, even when judicial review is sought of the underlying EPA determination. Such interim awards would be inappropriate for two reasons. First, the term "prevailing party" would seem to mean the party who, at the conclusion of the case, wins on the main issues. Accordingly, before the time for appeal has run, the case has not concluded and attorneys' fees should not be paid. Second, under 5 U.S.C. 504(c)(1), if a court reviews the underlying decision under 28 U.S.C. 2412(d)(3), the *court* must make the award of fees and expenses incurred in pursuing the administrative adjudication as well as the expenses incurred on the appeal. Because the final fee determination of the Agency could be reversed on appeal, EPA would be ill-advised to pay an award before the applicant has exhausted its appeals. Otherwise, if the Court reversed the EPA fee determination, the Agency could not be forced to attempt to recover awards already paid out.

Allowable Fees and Expenses

Finally, the Audubon Society suggested that EPA broaden the kinds of fees and expenses that could be recovered under the rule. Specifically, the comment urged: (1) That EPA should pay interest to a prevailing party for the period between the agency determination to award fees and completion of judicial review and (2) that EPA should pay fees and expenses incurred in pursuing the attorneys' fee claim, *i.e.*, for the time spent making the application and any time spent litigating before the agency or the courts over whether the Agency should pay fees.

Under 5 U.S.C. 504(c)(1), if a court reviews the underlying decision, the *court* is directed to make an award of fees pursuant to 28 U.S.C. 2412(d)(3) for both the adjudication on appeal and the agency proceeding. Therefore, it is up to the court and not to EPA whether to add interest to any EPA award. Similarly, the extent of any award for expenses and fees incurred while appealing the fee decision of the agency to a court would be determined by the court and not by EPA.

Finally, because nothing in the Act directs agencies to pay awards for applicants' fees and expenses incurred in applying for fees in administrative cases, these rules make no provision for awarding such fees.

Technical Changes

Because "proceeding" is defined in § 17.2(d) as an adversary adjudication, actions on applications for awards should be described so as to avoid the implication that the processing of an application is itself an independent Section 554 adjudication. Accordingly,

where "proceeding" was used in the interim rules to describe actions on the application, it has been deleted in the final rule.

Miscellaneous

This announcement does not constitute a "major" rule, as defined by Executive Order 12291, because it will not result in: (a) An effect on the economy of $100 million or more, (b) a major increase in any cost or prices, (c) adverse effects on competition, employment, investment, productivity, or innovation among American enterprises.

This regulation has been submitted to the Office of Management and Budget for review under Executive Order 12291.

Information collection requirements contained in §§ 17.11 through 17.13 of this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980, 48 U.S.C. 3501 *et seq.*, and have been assigned OMB control number 2000–0430.

This regulation is specifically designed to help small entities by allowing them to recover attorneys' fees and expenses in certain circumstances when they prevail over EPA in administrative litigation. However, this rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* or as defined in EPA's guidelines. Accordingly, EPA has not prepared a Regulatory Flexibility Analysis.

List of Subjects in 40 CFR Part 17

Equal access to justice, Claims, Lawyers.

The Environmental Protection Agency amends Title 40 of the Code of Federal Regulations by adopting as final Part 17, which was published as an interim rule at 47 FR 16780, April 20, 1982, and is to read as set forth below.

Dated: August 4, 1983.

William D. Ruckelshaus,

Administrator.

PART 17—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN EPA ADMINISTRATIVE PROCEEDINGS

Subpart A—General Provisions

Sec.
17.1 Purpose of these rules.
17.2 Definitions.
17.3 Proceedings covered.
17.4 Applicability to EPA proceedings.
17.5 Eligibility of applicants.
17.6 Standards for awards.
17.7 Allowable fees and other expenses.
17.8 Delegation of authority.

Subpart B—Information Required From Applicants

Sec.
17.11 Contents of application.
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17.13 Documentation of fees and expenses.
17.14 Time for submission of application.

Subpart C—Procedures for Considering Applications

17.21 Filing and service of documents.
17.22 Answer to application.
17.23 Comments by other parties.
17.24 Settlement.
17.25 Extensions of time and further proceedings.
17.26 Decision on application.
17.27 Agency review.
17.28 Judicial review.
17.29 Payment of award.

Authority: Section 504, Title 5, U.S.C., as amended by sec. 203(a)(1), Equal Access to Justice Act (Title 2 of Pub. L. 96–481, 94 Stat. 2323).

Subpart A—General Provisions

§ 17.1 Purpose of these rules.

These rules are adopted by EPA pursuant to section 504 of title 5 United States Code, as added by section 203(a)(1) of the Equal Access to Justice Act, Pub. L. No. 96–481. Under the Act, an eligible party may receive an award for attorney's fees and other expenses when it prevails over EPA in an adversary adjudication before EPA unless EPA's position as a party to the proceeding was substantially justified or special circumstances make an award unjust. The purpose of these rules is to establish procedures for the submission and consideration of applications for awards against EPA when the underlying decision is not reviewed by a court.

§ 17.2 Definitions.

As used in this part:

(a) "The Act" means section 504 of title 5, United States Code, as amended by section 203(a)(1) of the Equal Access to Justice Act, Pub. L. No. 96–481.

(b) "Administrator" means the Administrator of the Environmental Protection Agency.

(c) "Adversary adjudication" means an adjudication required by statute to be held pursuant to 5 U.S.C. 554 in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of granting or renewing a license.

(d) "EPA" means the Environmental Protection Agency, an Agency of the United States.

(e) "Presiding officer" means the official, without regard to whether he is designated as an administrative law judge or a hearing officer or examiner, who presides at the adversary adjudication.

(f) "Proceeding" means an adversary adjudication as defined in § 17.2(b).

§ 17.3 Proceedings covered.

(a) These rules apply to adversary adjudications required by statute to be conducted by EPA under 5 U.S.C. 554. To the extent that they are adversary adjudications, the proceedings conducted by EPA to which these rules apply include:

(1) A hearing to consider the assessment of a noncompliance penalty under section 120 of the Clean Air Act as amended (42 U.S.C. 7420);

(2) A hearing to consider the termination of an individual National Pollution Discharge Elimination System permit under Section 402 of the Clean Water Act as amended (33 U.S.C. 1342);

(3) A hearing to consider the assessment of any civil penalty under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a));

(4) A hearing to consider ordering a manufacturer of hazardous chemical substances or mixtures to take actions under section 6(b) of the Toxic Substances Control Act (15 U.S.C. 2605(b)), to decrease the unreasonable risk posed by a chemical substance or mixture;

(5) A hearing to consider the assessment of any civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1361);

(6) A hearing to consider suspension of a registrant for failure to take appropriate steps in the development of registration data under Section 3(c)(2)(B) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 136a);

(7) A hearing to consider the suspension or cancellation of a registration under Section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136d);

(8) A hearing to consider the assessment of any civil penalty or the revocation or suspension of any permit under section 105(a) or 105(f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a), 33 U.S.C. 1415(f));

(9) A hearing to consider the issuance of a compliance order or the assessment of any civil penalty conducted under Section 3008 of the Resource Conservation and Recovery Act as amended (42 U.S.C. 6928);

(10) A hearing to consider the issuance of a compliance order under Section 11(d) of the Noise Control Act as amended (42 U.S.C. 4910(d)).

(b) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 17.4 Applicability to EPA proceedings.

The Act applies to an adversary adjudication pending before EPA at any time between October 1, 1981 and September 30, 1984. This includes proceedings begun before October 1, 1981 if final EPA action has not been taken before that date, and proceedings pending on September 30, 1984.

§ 17.5 Eligibility of applicants.

(a) To be eligible for an award of attorney's fees and other expenses under the Act, the applicant must be a prevailing party in the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in Subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $1 million;

(2) The sole owner of an unincorporated business which has a net worth of not more than $5 million and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 114j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than $5 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date of adversary adjudication was initiated.

(d) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interest.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant under the applicant's direction and control. Part-time employees shall be included.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. An individual or group of individuals, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares of another business board of directors, trustees, or other persons exercising similar functions, shall be considered an affiliate of that business for purposes of this Part. In addition, the Presiding Officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant is not eligible if it has participated in the proceeding on behalf of other persons or entities that are ineligible.

§ 17.6 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding unless the position of the EPA as a party to the proceeding was substantially justified or unless special circumstances make the award sought unjust. No presumption arises that the agency's position was not substantially justified simply because the agency did not prevail.

(b) An award shall be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding.

§ 17.7 Allowable fees and other expenses.

(a) The following fees and other expenses are allowable under the Act:

(1) Reasonable expenses of expert witnesses;

(2) The reasonable cost of any study, analysis, engineering report, test, or project which EPA finds necessary for the preparation of the party's case;

(3) Reasonable attorney or agent fees;

(b) The amount of fees awarded will be based upon the prevailing market rates for the kind and quality of services furnished, except that:

(1) Compensation for an expert witness will not exceed $24.09 per hour; and

(2) Attorney or agent fees will not be in excess of $75 per hour.

(c) In determining the reasonableness of the fee sought, the Presiding Officer shall consider the following:

(1) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;

(2) The time actually spent in the representation of the applicant;

(3) The difficulty or complexity of the issues raised by the application;

(4) Any necessary and reasonable expenses incurred;

(5) Such other factors as may bear on the value of the services performed.

§ 17.8 Delegation of authority.

The Administrator delegates to his Judicial Officer authority to take final action relating to the Equal Access to Justice Act. Nothing in this delegation shall preclude the Judicial Officer from referring any matter related to the Equal Access to Justice Act to the Administrator when the Judicial Officer determines the referral to be appropriate.

Subpart B—Information Required From Applicants

§ 17.11 Contents of application.

(a) An application for award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of EPA in the proceeding that the applicant alleges was not substantially justified.

(b) The application shall include a statement that the applicant's net worth as of the time the proceeding was initiated did not exceed $1 million if the applicant is an individual (other than a sole owner of an unincorporated business seeking an award in that capacity) or $5 million in the case of all other applicants. An applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) and is exempt from taxation under section 501(a) of the Code or, in the case of such an organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under section 501(c)(3) of the Code; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 114j(a)).

(c) If the applicant is a partnership, corporation, association, or organization, or a sole owner of an unincorporated business, the application shall state that the applicant did not have more than 500 employees at the time the proceeding was initiated, giving the number of its employees and describing briefly the type and purpose of its organization or business.

(d) The application shall itemize the amount of fees and expenses sought.

(e) The application may include any other matters that the applicant believes should be considered in determining whether and in what amount an award should be made.

(f) The application shall be signed by the applicant with respect to the eligibility of the applicant and by the attorney of the applicant with respect to fees and expenses sought. The application shall contain or be accompanied by a written verification under oath or affirmation or under penalty of perjury that the information provided in the application and all accompanying material is true and complete to the best of the signer's information and belief.

(OMB Control Number 2000-0403)

§ 17.12 Net worth exhibit.

(a) Each applicant except a qualified tax exempt organization or a qualified cooperative must submit with its application a detailed exhibit showing its net worth at the time the proceeding was initiated. If any individual, corporation, or other entity directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or if the applicant directly or indirectly owns or controls a majority of the voting shares or other interest of any corporation or other entity, the exhibit must include a showing of the net worth of all such affiliates or of the applicant including the affiliates. The exhibit may be in any form that provides full disclosure of assets and liabilities of the applicant and any affiliates and is sufficient to determine whether the applicant qualifies under the standards of 5 U.S.C. 504(b)(1)(B)(i). The Presiding Officer may require an applicant to file additional information to determine the applicant's eligibility for an award.

(b) The net worth exhibit shall describe any transfers of assets from, or obligations incurred by, the applicant or any affiliate occurring in the one-year period prior to the date on which the proceeding was initiated that reduced the net worth of the applicant and its affiliates below the applicable net worth ceiling. If there were no such transactions, the applicant shall so state.

(c) The net worth exhibit shall be included in the public record of the proceeding.

(OMB Control Number 2000-0430)

§ 17.13 Documentation of fees and expenses.

(a) The application shall be accompanied by full documentation of fees and expenses, including the cost of any study, engineering report, test, or project, for which an award is sought.

(b) The documentation shall include an affidavit from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.

(1) The affidavit shall itemize in detail the services performed by the date, number of hours per date, and the services performed during those hours. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.

(2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide affidavits from two attorneys or agents with similar experience, who perform similar work, stating the hourly rate which they bill and are paid by the majority of their clients during a comparable time period.

(c) The documentation shall also include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

(d) The Presiding Officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

(OMB Control Number 2000-0430)

§ 17.14 Time for submission of application.

(a) An application must be filed no later than 30 days after final disposition of the proceeding. If agency review or reconsideration is sought or taken of a decision in which an applicant believes it has prevailed, action on the award of fees shall be stayed pending final agency disposition of the underlying controversy.

(b) Final disposition means the later of: (1) The date on which the agency decision becomes final, either through disposition by the Administrator or Judicial Officer of a pending appeal or through an initial decision becoming final due to lack of an appeal or (2) the date of final resolution of the proceeding, such as settlement or voluntary dismissal, which is not subject to a petition for rehearing or reconsideration.

(c) If judicial review is sought or taken of the final agency disposition of the underlying controversy, then agency proceedings for the award of fees will be stayed pending completion of judicial review. If, upon completion of review, the court decides what fees to award, if any, then EPA shall have no authority to award fees.

Subpart C—Procedures for Considering Applications.

§ 17.21 Filing and service of documents.

An application for an award and any other pleading or document related to the application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding.

§ 17.22 Answer to application.

(a) Within 30 calendar days after service of the application, EPA counsel shall file an answer.

(b) If EPA counsel and the applicant believe that they can reach a settlement concerning the award, EPA counsel may file a statement of intent to negotiate. The filing of such a statement shall extend the time for filing an answer an additional 30 days.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on to support the objection. If the answer is based on any alleged facts not already reflected in the record of the proceeding, EPA counsel shall include with the answer either a supporting affidavit or affidavits or request for further proceedings under § 17.25.

§ 17.23 Comments by other parties.

Any party to a proceeding other than the applicant and EPA counsel may file comments on an application within 30 calendar days after it is served or on an answer within 15 calendar days after it is served.

§ 17.24 Settlement.

A prevailing party and EPA counsel may agree on a proposed settlement of an award before final action on the application, either in connection with a settlement of the underlying proceeding or after the underlying proceeding has been concluded. If the party and EPA counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 17.25 Extensions of time and further proceedings.

(a) The Presiding Officer may, on motion and for good cause shown, grant extensions of time, other than for filing an application for fees and expenses,

after final disposition in the adversary adjudication.

(b) Ordinarily, the determination of an award will be made on the basis of the written record of the underlying proceeding and the filings required or permitted by the foregoing sections of these rules. However, the adjudicative officer may *sua sponte* or on motion of any party to the proceedings require or permit further filings or other action, such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further action shall be allowed only when necessary for full and fair resolution of the issues arising from the application and shall take place as promptly as possible. A motion for further filings or other action shall specifically identify the information sought on the disputed issues and shall explain why the further filings or other action is necessary to resolve the issues.

(c) In the event that an evidentiary hearing is required or permitted by the adjudicative officer, such hearing and any related filings or other action required or permitted shall be conducted pursuant to the procedural rules governing the underlying adversary adjudication.

§ 17.26 Decision on application.

The Presiding Officer shall issue a recommended decision on the application which shall include proposed written findings and conclusions on such of the following as are relevant to the decision: (a) The applicant's status as a prevailing party; (b) the applicant's qualification as a "party" under 5 U.S.C. 504(b)(1)(B); (c) whether EPA's position as a party to the proceeding was substantially justified; (d) whether the special circumstances make an award unjust; (e) whether the applicant during the course of the proceedings engaged in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy; and (f) the amounts, if any, awarded for fees and other expenses, explaining any difference between the amount requested and the amount awarded.

§ 17.27 Agency review.

The recommended decision of the Presiding Officer will be reviewed by EPA in accordance with EPA's procedures for the type of substantive proceeding involved.

§ 17.28 Judicial review.

Judicial review of final EPA decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 17.29 Payment of award.

An applicant seeking payment of an award shall submit a copy of the final decision granting the award to the Office of Financial Management for Processing. A statement that review of the underlying decision is not being sought in the United States courts or that the process for seeking review of the award has been completed must also be included.

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DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Public Land Order 6457

[OR 1294 (Wash)]

Washington; Withdrawal of Lands for the Billy Goat Recreation Area

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order withdraws, for 20 years, 5.8 acres of land within the Okanogan National Forest for protection of the Billy Goat Recreation Area. The land will be closed to mining, but remain open to surface entry and mineral leasing.

EFFECTIVE DATE: September 2, 1983.

FOR FURTHER INFORMATION CONTACT: Champ C. Vaughan, Jr., Oregon State Office, 503-231-6905.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. Subject to valid existing rights, the following described national forest land, which is under the jurisdiction of the Secretary of Agriculture, is hereby withdrawn from location and entry under the mining laws, (30 U.S.C. Ch. 2), and reserved for the Billy Goat Recreation Area:

Willamette Meridian

Okanogan National Forest

Billy Goat Recreation Area

T. 38 N., R. 20 E., unsurveyed,
Sec. 23, two tracts of land within said sec. 23 which are more particularly described as follows:

Parcel No. 1

Beginning at land monument identified as "U.S. Forest Service, Department of Agriculture, LM 1980"; thence N. 57°20'30" E., 392.20 feet; thence N. 33°34'40" E., 496.98 feet, to Corner No. 1 of Parcel No. 1 which is the true point of beginning; thence S. 32°22'41" E., 748.22 feet to Corner No. 2; thence N. 89°03'13" W., 202.28 feet to Corner No. 3; thence N. 64°57'07" W., 522.43 feet to Corner No. 4; thence N. 33°34'40" E., 496.98 feet to Corner No.1, containing approximately 4.4 acres.

Parcel No.2

Beginning at land monument identified as "U.S. Forest Service, Department of Agriculture, LM 1980"; thence S. 62°03'51" E., 2223.40 feet, to Corner No. 1 of Parcel No. 2 which is the true point of beginning; thence S. 51°58'13" E., 425.37 feet to Corner No. 2; thence N. 03°09'47" E., 347.81 feet to Corner No. 3; thence S. 76°27'54" W., 364.17 feet to Corner No. 1, containing approximately 1.4 acres

The areas described aggregate approximately 5.8 acres in Okanogan County.

2. The withdrawal made by this order does not alter the applicability of the public land laws governing the use of the national forest lands under lease, license, or permit, or governing the disposal of their mineral or vegetative resources other than under the mining laws.

3. This withdrawal shall remain in effect for a period of 20 years from the effective date of this order.

Inquiries concerning the land should be addressed to the State Director, Bureau of Land Management, P.O. Box 2965, Portland, Oregon 97208.

August 24, 1983.

Garrey E. Carruthers,
Assistant Secretary of the Interior.

[FR Doc. 83-24106 Filed 9-1-83; 8:45 am]
BILLING CODE 4310-84-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 70-27, Notice 28]

Hydraulic Brake Systems

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Final rule.

SUMMARY: This notice amends Standard No. 105, *Hydraulic Brake Systems*, to provide an optional test procedure for trucks, buses other than school buses, and multipurpose passenger vehicles (MPV's) with a gross vehicle weight rating (GVWR) of greater than 10,000 pounds. The standard becomes applicable to these vehicles on September 1, 1983. The amendment permits manufacturers to meet the partial failure requirements after conducting the standard's full test