

SUPPLEMENTARY INFORMATION:**I. Background**

OSHA has decided to use the negotiated rulemaking (Neg/Reg) process to develop a proposed standard for fire protection covering all shipyard employment. The shipyard stakeholders from all sectors strongly support consensual rulemaking efforts like negotiated rulemaking. OSHA believes this process will result in a proposed standard whose provisions will effectively protect employees working throughout the shipyard. (See OSHA's Notice of Intent to Form a Negotiated Rulemaking Committee to Develop a Proposed Rule on Fire Protection in Shipyard Employment, 61 FR 28824, June 6, 1996, for a detailed explanation of why OSHA is using negotiated rulemaking to develop its proposed standard and for general information on the negotiated rulemaking process). The goal of this negotiated rulemaking is a proposed rule and supporting documentation that all members will support.

The initial meeting of this Advisory Committee was held in Portland, Oregon on October 16 and 17, 1996. The members were introduced and the negotiated rulemaking process and the legal requirements for OSHA rulemaking were explained to them. Ground rules for this Committee were adopted. In addition, the Committee set forth substantive issues that needed to be resolved, established work groups and began discussing scope and application, fire prevention and fire fighting.

The last meeting of this Advisory Committee took place in Jacksonville, Florida, February 4 through February 6, 1997. The Committee continued with the issues as developed into work groups during the first meeting: fire watches, fire response, safe work practices, and fire protection.

II. The Key Issues in This Rulemaking

OSHA expects that key issues to be addressed as part of these negotiations will include: scope and application; controls and work practices; fire brigades; written fire plans; technological advances; costs of fire protection; and appendices.

III. Agenda for the April 8-10, 1997, Meeting

1. The meeting will be opened and the roll taken.

2. The minutes from the February 1997, Jacksonville, Florida, meeting will be presented for acceptance by the Committee.

3. The tentative agenda for this meeting will be reviewed and changes made, if necessary.

4. The "Fire Watches" work group draft will be presented to the Committee.

5. The "Scope and Application" section of the preamble will be presented to the Committee for acceptance.

6. The Work group chairpersons will report on the status of their assignments.

7. The Committee will break into work group sessions as needed throughout the meeting.

8. The Committee will establish the time and date for the next meeting.

The Advisory Committee's Facilitator, relying on the information presented to him by OSHA as well as the considerable input from the various interests during convening efforts, will identify and present other substantive issues to be resolved by this Committee, as time permits. OSHA requests that all interested parties bring their calendars to facilitate the development of a tentative schedule of committee meetings, site visits and work group meetings.

IV. Public Participation

All interested parties are invited to attend this public meeting at the time and place indicated above. No advance registration is required. Seating will be available to the public on a first-come, first-served basis. Individuals with disabilities wishing to attend should contact Ms. Theda Kenney at (202) 219-8061 to obtain appropriate accommodations no later than March 21, 1997.

The Facilitator of the Committee will decide to what extent oral presentations by members of the public may be permitted at the meeting. Oral presentations may include statements of fact and opinions, but shall not include any questioning of the Committee Members or other participants unless these questions have been specifically approved by the Facilitator.

Part 1912 of Title 29 of the Code of Federal Regulations will apply generally. The reporting requirements of § 1912.33 have been changed pursuant to § 1912.42 to help meet the special needs of this Committee. Specifically, § 1912.33 requires that verbatim transcripts be kept of all advisory committee meetings. Producing a coherent transcript requires a certain degree of formality. The Assistant Secretary therefore has determined pursuant to § 1912.42 that such formality might interfere with the free exchange of information and ideas during the negotiations, and that the

OSH Act would be better served by simply requiring detailed minutes of the proceedings without a formal transcript.

Minutes of the meetings and materials prepared for the Committee will be available for public inspection at the OSHA Docket Office, N-2625, 200 Constitution Ave., NW., Washington, DC 20210; Telephone: 202-219-7894.

Any written comments should be directed to Docket No. S-051, and sent in quadruplicate to the following address: U.S. Department of Labor, Occupational Safety and Health Administration, Docket Office, Room N-2625, 200 Constitution Ave., NW., Washington, DC 20210; Telephone 202-219-7894.

Authority: This document was prepared under the direction of Greg Watchman, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, pursuant to section 3 of the Negotiated Rulemaking Act of 1990, 104 Stat. 4969, Title 5 U.S.C. 561 *et seq.*; and Section 7(b) of the Occupational Safety and Health Act of 1970, 84 Stat. 1597, Title 29 U.S.C. 656.

Signed at Washington, DC, this 10th day of March 1997.

Greg Watchman,

Acting Assistant Secretary.

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
29 CFR Parts 2200, 2203, and 2204
Revisions to Procedural Rules Governing Practice Before the Occupational Safety and Health Review Commission

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes several revisions to the procedural rules governing practice before the Occupational Safety and Health Review Commission. Although most of the revisions are technical and clarifying in nature, this proposal also contains several significant changes to Commission practice and procedure.

DATES: Comments must be received by April 14, 1997.

FOR FURTHER INFORMATION CONTACT: Earl R. Ohman, Jr., General Counsel, (202) 606-5410, Occupational Safety and Health Review Commission, 1120 20th St., N.W., Ninth Floor, Washington, DC 20036-3419.

SUPPLEMENTARY INFORMATION: This document proposes substantial

revisions to the procedural rules governing practice before the Occupational Safety and Health Review Commission. Generally, revisions to the Commission's rules of procedure are not subject to the provisions of the Administrative Procedure Act requiring notice and opportunity for comment (5 U.S.C. 553(b)(3)(A)). However, because these revisions will have some effect upon the nature of practice before the Commission and because the Commission values the views of those who appear before it, the Commission invites public comment, especially from those employers and attorneys who will be most effected by these amendments.

1. Service and Notice

The Commission proposes to amend Rule 7(g) by revising the language in the form at the end of the rule to read "All pleadings relevant to this matter may be inspected at:" This change conforms the form to the language in the first paragraph of the rule and should have no significant impact on Commission practice.

2. Facsimile Transmission

The Commission would amend Rule 8(f) to require that a document can be filed with the Commission by facsimile transmission only when all of the parties are also served by fax. This would prevent confusion regarding the time of filing and, therefore, the applicability of the 3-day mail box rule.

3. Claims of Privilege

Currently, Rule 11(c) allows a party fifteen days to respond to another party's claim of privilege. The Commission finds no reason to conclude that more time is required to respond to a claim of privilege than to respond to any other motion. Accordingly, the Commission proposes to amend its rule to require that the time for responding to such claims be ten days, the same as any other motion. Of course, where good cause is shown, the Commission and its Judges always have the discretion to extend the time for the filing of such responses.

4. Opposition to Motions

As currently written, Rule 40(a) requires only that the moving party state whether it is aware of any opposition to a motion. This requirement is not useful, however, unless the moving party is required to consult with the opposing party regarding the motion prior to filing. Therefore, the Commission proposes to amend the rule to require that the moving party contact the other parties to determine whether there is any opposition to a motion.

5. Subpoenas

The Commission would add a new Rule 57(b), to explicitly allow subpoenas to be served by certified mail with return receipt, or by leaving a copy of the subpoena at the named person's principal place of business or residence. Currently, the Commission applies Federal Rule of Civil Procedure 45(b)(1) which provides only for personal service. It is the opinion of the Commission that any benefit obtained by requiring personal service does not justify the additional expense to the parties. The Commission notes that the methods of service specified on the reverse of its current subpoena forms do not comport with Federal Rule of Civil Procedure 45. The Commission's subpoena forms would be revised to coincide with new Rule 57(b).

6. Notification of Hearing

In accord with its desire to shorten, insofar as practicable, the time needed to process cases, the Commission proposes to amend Rule 60 to reduce the minimum time for a notice of hearing from thirty to twenty days. This change is proposed to give the Commission's Judges more flexibility to resolve simpler cases. The Commission does not expect that this change will affect a large number of cases.

7. Elimination of 20-day Transmittal Period for Judges' Decisions

The Commission proposes to amend Rule 90(b)(2) to eliminate the twenty day transmittal period for Judges' decisions. This twenty day period was instituted at a time when the Commission's case load was substantially heavier and the Commission was burdened by last-minute petitions for discretionary review.

With the reduction in its case load, the Commission finds that this interim twenty day period is no longer necessary. The Commission has found that petitions filed within twenty days of docketing of the Judge's decision, as required by Rule 91(b), receive the full attention necessary to determine if Commission review is warranted. While this twenty day interim period between transmittal of the decision to the party and its official docketing by the Commission gave the parties an opportunity to call to the Judge's attention typographical and other technical or clerical errors, the Commission believes that such corrective action is already authorized by Rule 90(b)(3). In sum, the Commission finds that, under current case load conditions, the twenty day

interim period serves more to delay than to facilitate the processing of Commission cases. Rule 91(b) would be amended to conform with the elimination of the twenty day interim period.

8. Number of Copies Submitted to the Commission

The Commission would amend Rules 8(d)(2), 91(h) and 93(h) to require that when a case is before the Commission the original plus eight copies of a petition for review, brief or other document be filed. The Commission has found that the four copies required under the current rule are inadequate. As a result, the Commission spends considerable time and incurs substantial expense to make the necessary copies. This amendment would rectify the situation.

9. Amendments to the Commission's Rules Implementing the Equal Access to Justice Act

To conform to recent amendments to the EAJA, the Commission would amend its EAJA Rule 107 to change the hourly rate from \$75 per hour to \$125 per hour.

The Commission would also amend EAJA Rule 301 to conform to the Commission decision in *Asbestos Abatement Consultation and Engineering*, 15 BNA OSHC 1252, 1254-56, 1991-93 CCH OSHD ¶ 29,464, pp. 39,731-32 (No. 87-1522, 1991), in which it held that applications for EAJA awards must be received by the Commission within thirty days of the final order date. The current rule requires that the application be filed in accordance with Commission Rules 7 and 8, §§ 2200.7 and 2200.8, and Rule 8(e) states that filing is effective upon mailing.

The holding in *Asbestos Abatement* relied in large part on federal appellate decisions interpreting the filing time limits of EAJA as requiring that the applications be actually received by the agency within the thirty day deadline. These federal courts based their interpretation on both the actual language of the EAJA and the doctrine that statutes waiving sovereign immunity be strictly construed. *E.g.* *Sonicraft, Inc. v. NLRB*, 814 F.2d 385 (7th Cir. 1987); *Monark Boat Co. v. NLRB*, 708 F.2d 1322, 1328-9 (8th Cir. 1983).

The Commission notes that in *Tri-State Steel Constr. Co.*, 17 BNA OSHC 1769, 1996 CCH OSHD ¶ 31,145 (No. 93-0512, 1996) (consolidated), the Commission, relying on the Supreme Court decision in *Irwin v. Veterans Admin.*, 498 U.S. 89 (1990), held that

the filing deadline in the EAJA was not jurisdictional and was subject to equitable tolling because the employer there relied, to its detriment, on Commission Rule 301 which had not been changed to conform to the filing requirements as set forth in *Asbestos Abatement*. However, *Asbestos Abatement* remains good law and, with this proposed change, the rules will be consistent with it.

List of Subjects

29 CFR Part 2200

Hearing and appeal procedures, Administrative practice and procedure.

29 CFR Part 2203

Sunshine Act, Information, Public meetings.

29 CFR Part 2204

Administrative practice and procedure, Equal access to justice.

Text of Amendment

For the reasons set forth in the preamble, the Occupational Safety and Health Review Commission proposes to amend Title 29, Chapter XX, Parts 2200, 2203 and 2204 of the Code of Federal Regulations as follows:

PART 2200—[AMENDED]

1. The authority citation continues to read as follows:

Authority: 29 U.S.C. 661(g), unless otherwise noted.

2. Section 2200.7 is amended by revising paragraph (g) to read as follows:

§ 2200.7 Service and notice.

In § 2200.7(g) remove the words "All papers relevant to this matter may be inspected;" and add in their place the words "All pleadings relevant to this matter may be inspected at:"

3. Section 2200.8 is amended by revising paragraph (d)(2) and the first sentence of paragraph (f)(1) to read as follows:

§ 2200.8 Filing.

(d) *Number of copies.*

(2) *Number of copies.* If a case is before the Commission for review, the original and eight copies of a document shall be filed.

(f) *Facsimile transmissions.* (1) Any document may be filed with the Commission or its Judges by facsimile transmission only if the parties are also served by facsimile transmission.

4. Section 2200.11 is amended by revising the first sentence of paragraph (c) to read as follows:

§ 2200.11 Protection of claims of privilege.

(c) *Opposition to the claim.* A party opposing a claim of privilege, or asserting a substantial need for disclosure in the event a qualified privilege exists, must do so within the time for responding to motions set forth in § 2200.40(c) but, if the motion is made during a hearing, the Judge may prescribe a shorter time for a response or require that the response be made during the hearing.

5. Section 2200.40 is amended by revising the last sentence of paragraph (a) to read as follows:

§ 2200.40 Motions and requests.

(a) *How to make.* Prior to filing a motion, the moving party shall contact the other parties to the action to determine whether they intend to oppose the motion and shall state in the motion any opposition of which the moving party is aware.

6. In § 2200.57 paragraphs (b)–(d) are redesignated (c)–(e) and a new paragraph (b) is added to read as follows:

§ 2200.57 Issuance of subpoenas; petitions to revoke or modify subpoenas; right to inspect or copy data.

(b) *Service of subpoenas.* A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein may be made by service on the person named, by certified mail return receipt requested, or by leaving a copy at the person's principal place of business or at the person's residence with some person of suitable age and discretion residing therein.

7. Section 2200.60 is amended by revising the first sentence to read as follows:

§ 2200.60 Notice of hearing; location.

Except by agreement of the parties, or in an expedited proceeding under § 2200.103, notice of the time, place, and nature of the first setting of a hearing shall be given to the parties and intervenors at least 20 days in advance of the hearing.

8. Section 2200.90 is amended by revising the first sentence of paragraph (b)(2) to read as follows:

§ 2200.90 Decisions of judges.

(2) *Docketing of Judge's report by Executive Secretary.* When the Judge transmits the decision to the parties, the Judge shall file a report with the Executive Secretary for docketing.

9. Section 2200.91 is amended by revising paragraphs (b) and (h) to read as follows:

§ 2200.91 Discretionary review; petitions for discretionary review; statements in opposition to petitions.

(b) *Petitions for discretionary review.* A party adversely affected or aggrieved by the decision of the Judge may seek review by the Commission by filing a petition for discretionary review directly with the Executive Secretary. A petition shall be filed within 20 days after the date of docketing of the Judge's report.

(h) *Number of copies.* An original and eight copies of a petition or a statement in opposition to a petition shall be filed.

10. Section 2200.93 is amended by revising paragraph (h) to read as follows:

§ 2200.93 Briefs before the Commission.

(h) *Number of copies.* The original and eight copies of a brief shall be filed. See § 2200.8(d)(2).

§ 2200.11; 2200.57; 2200.67; 2200.101 [Amended]

11. All references to "subpena" are revised to read "subpoena" and all references to "subpenas" are revised to read "subpoenas" in the following places:

- (a) Section 2200.11(e);
- (b) Section 2200.57;
- (c) Section 2200.67 (b) and (c);
- (d) Section 2200.101(c)(2)

PART 2203—[AMENDED]

1. The authority for Part 2203 continues to read as follows:

Authority: 29 U.S.C. 661(g); 5 U.S.C. 552b(d)(4); 5 U.S.C. 552b(g)

2. Part 2203 is amended as follows:

§ 2203.3 [Amended]

Section 2203.3(b)(10) is revised by changing the reference to "subpena" to read "subpoena."

PART 2204—[AMENDED]

1. The authority for Part 2204 continues to read as follows:

Authority: Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 (5 U.S.C. 504(c)(1)); Pub. L. 99-80, 99 Stat. 183

2. Section 2204.107 is amended by revising the first sentence of paragraph (b) to read:

§ 2204.107 Allowable fees and expenses.

* * * * *

(b) An award for the fee of an attorney or agent under these rules shall not exceed \$125 per hour, unless the Commission determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for Commission proceedings, justifies a higher fee. * * *

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3. Section 2204.301 is revised to read as follows:

§ 2204.301 Filing and service of documents.

An EAJA application is deemed to be filed only when received by the Commission. In all other respects, an application for an award and any other pleading or document related to an application shall be filed and served on all parties to the proceeding in accordance with §§ 2200.7 and 2200.8, except as provided in § 2204.202(b) for confidential financial information.

Dated: March 6, 1997.

Stuart E. Weisberg,
Chairman.

Dated: March 6, 1997.

Velma Montoya,
Commissioner.

Dated: March 6, 1997.

Daniel Guttman,
Commissioner.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[IN77-1; FRL-5709-2]

Approval and Promulgation of Air Quality Implementation Plans, and Designation of Areas for Air Quality Planning Purposes; Indiana

AGENCY: United States Environmental Protection Agency (USEPA).

ACTION: Proposed rule.

SUMMARY: The USEPA is proposing to approve the ozone maintenance plan submitted as a State Implementation Plan (SIP) revision request and the redesignation request submitted by the

State of Indiana for the purpose of redesignating Vanderburgh County (Evansville) from marginal nonattainment to attainment for ozone. Ground-level ozone, commonly known as smog, is an air pollutant which forms on hot summer days and which harmfully affects lung tissue and breathing passages. The redesignation to attainment of the health-based ozone air quality standard is based on a request from the State of Indiana to redesignate this area and approve its maintenance plan, and on the supporting data the State has submitted in support of the requests. Under the Clean Air Act, a designation can be changed if sufficient data are available to warrant such a change, and a maintenance plan is put in place which is designed to ensure the area maintains the ozone air quality standard for the next ten years.

DATES: Comments must be received by May 13, 1997.

ADDRESSES: Copies of the revision request and USEPA's analysis (Technical Support Documents) are available for inspection at the following address:

U.S. Environmental Protection Agency,
Region 5, Air and Radiation Division,
77 West Jackson Boulevard, Chicago,
Illinois 60604. (It is recommended that you telephone Edward Doty at (312) 886-6057 before visiting the Region 5 Office.)

Written comments should be sent to:
J. Elmer Bortzer, Chief, Regulation
Development Section, Air Programs
Branch (AR-18J), U.S. Environmental
Protection Agency, 77 West Jackson
Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT:
Edward Doty at (312) 886-6057.

SUPPLEMENTARY INFORMATION: On November 15, 1990, the Clean Air Act Amendments of 1990 were enacted. Pub. L. 101-549, codified at 42 U.S.C. 7401-7671q. Pursuant to section 107(d)(4)(A) of the Clean Air Act (CAA or the Act), Vanderburgh County (Evansville) was designated as nonattainment for ozone and was classified as marginal (see 56 FR 56694 (November 6, 1991)).

I. Background

The Indiana Department of Environmental Management (IDEM) submitted an ozone redesignation request and maintenance plan for Vanderburgh County (Evansville) on November 4, 1993. On July 8, 1994 (59 FR 35044), the United States Environmental Protection Agency (USEPA) published a direct final rulemaking approving the redesignation

of Vanderburgh County to attainment of the National Ambient Air Quality Standard (NAAQS) for ozone. On the same day, a proposed rulemaking was also published in the Federal Register which established a 30-day public comment period for the redesignation approval and noted that, if adverse comments were received regarding the direct final rulemaking, the USEPA would withdraw the direct final rulemaking and would address the adverse comments through a revised final rulemaking. The USEPA received adverse comments, and published a withdrawal of the direct final rulemaking on August 26, 1994 (59 FR 44040).

Subsequent to the July 8, 1994 direct final rulemaking, the USEPA was informed by the IDEM that a possible violation of the ozone NAAQS had been monitored at a privately-operated industrial site owned by the Aluminum Corporation of America (Alcoa) in Warrick County. (At the time IDEM contacted the USEPA concerning the possible violation, the State had not yet completed quality assurance of the data. The violation, as noted below, was subsequently quality-assured.) Warrick County (designated as attainment for ozone) adjoins Vanderburgh County to the east. Because Warrick County can be considered to be a nearby area downwind of Vanderburgh County on certain days, the USEPA questioned whether the monitored violation in Warrick County should be considered in any subsequent rulemaking on the redesignation of Vanderburgh County. The IDEM indicated its intent to investigate the high ozone values, and requested that the USEPA not act on the redesignation petition pending the outcome of that technical investigation. IDEM completed its investigation and submitted the results to the USEPA on June 5, 1995. IDEM's investigation concluded that the Alcoa data are unusual, are biased high (relative to peak ozone concentrations at other monitors in the area during the May through June, 1994 time period), and are not representative of the Vanderburgh County nonattainment area. IDEM recommended that the USEPA should proceed with the redesignation of Vanderburgh County to attainment so that the maintenance plan could become federally enforceable.

The USEPA Technical Support Document (TSD) for this proposed rulemaking: (1) summarizes and evaluates the redesignation request; (2) analyzes recent State data for monitors inside and outside of the Evansville nonattainment area; (3) responds to public comments on the July 8, 1994