in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: September 27, 2005.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. 05–19998 Filed 10–4–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R05–OAR–2005–IN–0006; FRL–7981–7]

Determination of Attainment, Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Indiana; Redesignation of the Evansville Area to Attainment of the 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of public comment period.

SUMMARY: EPA is extending the comment period for a proposed rule published September 9, 2005 (70 FR 53605). On September 9, 2005, EPA proposed to approve the State of Indiana's request to redesignate the Evansville area (Vanderburgh and Warrick Counties) to attainment of the 8-hour ozone National Ambient Air Quality Standard. In conjunction with the proposed approval of the redesignation request for the Evansville area, EPA proposed to approve the State's ozone maintenance plan for the 8-hour ozone NAAQS through 2015 in this area as a revision to the Indiana State Implementation Plan. EPA also proposed to approve 2015 Volatile Organic Compounds and Oxides of Nitrogen Motor Vehicle Emissions Budgets, which are supported by and consistent with the 10-year maintenance plan for this area, for purposes of transportation conformity. In response to a September 9, 2005, request from Valley Watch, Inc., EPA is extending the comment period for 7 days.

DATES: The comment period is extended to October 18, 2005.

ADDRESSES: Submit comments, identified by Regional Material in EDocket (RME) ID No. R05–OAR–2005–IN–0006, to: John M. Mooney, Chief, Criteria Pollutant Section, (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604. E-mail: *mooney.john@epa.gov.* Additional instructions to comment can be found in the notice of proposed rulemaking published September 9, 2005 (70 FR 53605).

FOR FURTHER INFORMATION CONTACT: Edward Doty, Environmental Scientist, Criteria Pollutant Section, Air Programs Branch (AR–18J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6057, *Doty.Edward@epa.gov.*

Dated: September 29, 2005.

Bharat Mathur,

Acting Regional Administrator, Region 5.

[FR Doc. 05–20094 Filed 10–4–05; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 4

RIN 1094–AA49

Implementation of the Equal Access to Justice Act in Agency Proceedings

AGENCY: Office of the Secretary, Interior.

ACTION: Proposed rule.

SUMMARY: The Office of Hearings and Appeals (OHA) is proposing to amend its existing regulations that implement the Equal Access to Justice Act to bring them up to date with amendments to the statute that have been enacted since OHA adopted the existing regulations in 1983.

DATES: You should submit your comments by December 5, 2005.

ADDRESSES: You may submit comments, identified by the number 1094–AA49, by any of the following methods:

—Federal rulemaking portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

—E-mail: *John_Strylowski@ios.doi.gov*. Include ''RIN 1094–AA49'' in the subject line of the message.

—Fax: 703–235–9014.

—Mail: Director, Office of Hearings and Appeals, Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203.

—Hand delivery: Director, Office of Hearings and Appeals, Department of the Interior, 801 N. Quincy Street, Suite 400, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203, Phone 703–235–3750. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Public Comments

If you wish to comment on this proposed rule, you may submit your comments by any of the methods listed in the **ADDRESSES** section.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record. We will honor the request to the extent allowable by law.

In some circumstances we may withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials or organizations or businesses, available for public inspection in their entirety.

II. Background

Originally enacted in 1980, the Equal Access to Justice Act (the Act or EAJA) provides that ''[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.'' 5 U.S.C. 504(a)(1) (2000). The Act has been amended several times since 1980, most recently in 1996, when the maximum amount of fees that may normally be awarded to an attorney or agent was increased from $75 per hour to $125 per hour. 5 U.S.C. 504(b)(1)(A)(ii).

OHA issued final regulations implementing the Act in 1983. 43 CFR 4.601–4.629, 48 FR 17595 (April 25, 1983). Those regulations were based on model rules published in 1981 by the Administrative Conference of the United States (ACUS). 46 FR 32900 (June 25, 1981). ACUS published revised model rules in 1986 that reflected the amendments Congress made when it re-authorized the Act in 1985. 1 CFR part 315 (1995), 51 FR 16659 (May 6, 1986); *see* Administrative Conference of the U.S., *Federal Administrative Procedure Sourcebook* at 419 (2d ed. 1992). ACUS did not publish model rules reflecting amendments to the Act made since 1985 before ACUS was terminated in 1996.

In preparing these revised regulations implementing the Act, OHA has used the 1986 ACUS model rules as a point of departure, modifying them to put them in plain language, to reflect more recent amendments to the Act, and to make certain changes we believe are warranted for reasons explained in the following section-by-section analysis. We do not discuss changes that are simply editorial. Readers may find it helpful to have a copy of the 1986 model rules available as they review this proposed rule.

III. Section-by-Section Analysis

Section 4.601 What is the purpose of this subpart?

This regulation is based on the ''purpose'' section of the 1986 model rules, 1 CFR 315.101. We propose using the phrase ''the Department or other agency'' rather than ''this agency'' because OHA conducts proceedings for some agencies outside the Department, *e.g.*, the Indian Health Service. *See* the proposed definition of ''other agency'' in section 4.602.

The regulations in this subpart apply only to administrative proceedings under 5 U.S.C. 504, not to judicial proceedings under EAJA, 28 U.S.C. 2412 (2000), or to the attorney fee provisions of any other statute.

Section 4.602 What definitions apply to this subpart?

We propose revising most of the definitions in our previous regulations and have added some definitions.

We propose adding ''deciding'' before ''official(s) who presided'' in the definition of ''adjudicative officer'' because it is in the Act, 5 U.S.C. 504(b)(1)(D). ACUS suggested that the adjudicative officer should normally be the person who made the decision on the merits, but stated its belief that ''agencies can properly assign EAJA petitions to new board members or panels where illness, retirement, or other specific circumstances would prevent assignment to the original member.'' 51 FR 16663–64 (May 6, 1986).*See United States* v. *Willsie*, 155 IBLA 296, 297–98 (2001). We are proposing language to cover such circumstances.

Within OHA, the adjudicative officer will often be an administrative law judge, but in some cases, it may be a panel of two or more appeals board judges. The term ''adjudicative officer'' is therefore used to include both a single deciding official and a panel of deciding officials issuing a joint decision.

Paragraphs (1) and (2) of the proposed definition of ''Adversary adjudication'' are based on the second sentence of the ''proceedings covered'' section of the model rules, 1 CFR 315.103(a). Paragraphs (3) and (4) are based on 1986 and 1993 amendments to the Act, Pub. L. 99–509 and Pub. L. 103–141.

The proposed definition of ''affiliate'' is based on the second sentence of paragraph (f) of the ''eligibility'' section of the model rules, 1 CFR 315.104(f).

The proposed definition of ''demand'' is based on a 1996 amendment to the Act, Pub. L. 104–121;*see* 5 U.S.C. 504(b)(1)(F).

The proposed definition of ''final disposition'' is based on paragraph (b) of the ''when an application may be filed'' section of the model rules, 1 CFR 315.204. Under the definition, a settlement or voluntary dismissal of the proceeding may serve as the final disposition, in which case any application for fees and expenses would be due within 30 days from that event, under section 4.613(a). But a settlement or voluntary dismissal may not be a sufficient basis for an award.

For example, if the settlement or voluntary dismissal occurs at the hearings level because the Department or other agency has voluntarily changed its position in response to the filing of the proceeding and before there has been any ruling on the merits, the applicant will be unable to show it is a prevailing party entitled to fees. *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001); *Brickwood Contractors, Inc.* v. *United States*, 288 F.3d 1371 (Fed. Cir. 2002);*Perez-Arellano* v. *Smith*, 279 F.3d 791 (9th Cir. 2002). On the other hand, if the settlement or voluntary dismissal occurs at the appeals board level because the Department or other agency has changed its position in response to an adverse ruling on the merits at the hearings level, the applicant will likely be able to show that it is a prevailing party potentially entitled to fees.

We propose adding a definition of ''other agency,'' as discussed above in connection with section 4.601.

The proposed definition of ''party'' is drawn from 1 CFR 315.104(a) of the model rules and a 1996 amendment of the Act, Pub. L. 104–121.

The proposed definition of ''position of the Department or other agency'' is based on the Act, 5 U.S.C. 504(b)(1)(E), but the exception provided in the Act has been transferred to section 4.605(b), as suggested in the ''standards for awards'' section of the model rules, 1 CFR 315.105(b).

Section 4.603 What proceedings are covered by this subpart?

Paragraphs (a), (b)(1), and (b)(2) are based on the ''proceedings covered'' section of the model rules, 1 CFR 315.103(a), except that the second sentence of section 315.103(a) has been moved to the definition of ''adversary adjudication'' in section 4.602, as stated above. Under that definition, an ''adjudication under 5 U.S.C. 554'' includes those proceedings required by a statute to be conducted under section 554, *e.g.*, section 9 of the Taylor Grazing Act, 43 U.S.C. 315h (2000), *see Bureau of Land Management* v. *Ericsson*, 98 IBLA 258 (1987), and the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450f(b)(3) (2000).

Paragraph (a) also covers appeals of decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978, 41 U.S.C. 605, before the Interior Board of Contract Appeals under section 8 of that Act, 41 U.S.C. 607.

Paragraph (b)(1) would clarify that the Act does not cover other hearings or appeals that are not governed by 5 U.S.C. 554, even if the Department has elected to conduct such hearings or appeals using procedures comparable to those under section 554. Examples include cases referred by an appeals board for a fact-finding hearing under 43 CFR 4.337(a) or 4.415, and personnel grievance hearings for Departmental employees under 370 Departmental Manual 771, Subchapter 3.

In *Collord* v. *U.S. Department of the Interior*, 154 F.3rd 933 (9th Cir. 1998), the U.S. Court of Appeals for the Ninth Circuit held that, because a mining claim is a property interest that may not be extinguished without due process, section 554 governs mining claim contests, and therefore those proceedings are adversary adjudications under the Act. The Interior Board of Land Appeals (IBLA) has followed the *Collord* decision with respect to mining claim contests, *United States* v. *Willsie*, 155 IBLA 296, 297 (2001), and has extended its applicability to Alaska Native Allotment Act claim contests, *Heirs of David F. Berry*, 156 IBLA 341, 343–44 (2002).

However, the Ninth Circuit's reliance in *Collord* on *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50–51 (1950), is open to question.*See A Guide to Federal Agency Adjudication* ¶¶ 3.02, 11.03 (Michael Asimow, ed., American Bar Association, 2003); 1 Richard J. Pierce, Jr., *Administrative Law Treatise*, § 8.2 (4th ed. 2002).

Under existing court precedent, therefore, mining claim contests and Native allotment contests in the Ninth Circuit are deemed to fall within the proceedings covered by section 4.603(a), while mining claim contests in other judicial circuits may not be. *See Kaycee Bentonite Corp.*, 79 IBLA 182 (1984) (pre-*Collord* analysis of the applicability of the Act to mining claim contest proceedings).

Paragraph (c) is based on 1 CFR 315.103(c) of the model rules.

Section 4.604 When am I eligible for an award?

We propose to omit section 4.604 of our previous regulations, or any revision of that section based on the ''when the Act applies'' section of the model rules, 1 CFR 315.102, because it is no longer needed. Section 4.605 of our previous regulations would become section 4.604.

Paragraph (a) is based on the ''eligibility of applicants'' section of the model rules, 1 CFR 315.104(a), except that we have moved the definition of ''party'' to section 4.602, as stated above.

Paragraph (b) is based on 1 CFR 315.104(b). We propose adding paragraph (6) based on a 1996 amendment to 5 U.S.C. 504(b)(1)(B), Pub. L. 104–121.

Paragraphs (c) through (g) are based on 1 CFR 315.104(c) through (g), except that the second sentence of paragraph 315.104(f) was moved to section 4.602 as the definition of ''affiliate.''

Section 4.605 Under what circumstances may I receive an award?

Paragraph (a) is based on the ''standards for awards'' section of the model rules, 1 CFR 315.105(a), except that the second sentence of the model rule, which is based on 5 U.S.C. 504(b)(1)(E), has been moved to the definition of ''position of the Department or other agency'' in section 4.602, as stated above.

Consistent with the model rules, section 4.605(a) provides that an award may be granted to a party who has prevailed in ''the proceeding'' or in ''a significant and discrete substantive portion of a proceeding.'' The latter phrase could include, in an appropriate case, an interlocutory appeal on a significant, separable issue, or an appeal that results in a remand to an ALJ for further proceedings. It would not include a ruling on a purely procedural issue during the course of a proceeding. *See* 46 FR 32900, 32907–08 (June 25, 1981); *Van Hoomissen* v. *Xerox Corp.*, 503 F.2d 1131, 1133 (9th Cir. 1974); *Bohn* v. *Heckler*, 613 F. Supp. 232, 234–35 (N.D. Ill. 1965).

Paragraph (b) is based on 1 CFR 315.105(b) and 5 U.S.C. 504(b)(1)(E).

Paragraph (c) is based on 5 U.S.C. 504(a)(4), as added by a 1996 amendment, Pub. L. 104–121.

Section 4.606 What fees and expenses may be allowed?

Paragraph (a) is based on the ''allowable fees and expenses'' section of the model rules, 1 CFR 315.106(a)–(b), except that the maximum hourly fee has been increased from $75 per hour to $125 per hour, in accordance with a 1996 amendment, Pub. L. 104–121. Instead of supplying a fixed dollar amount for the rate of an expert witness, we propose substituting a standard of not more than the highest rate at which the Department or other agency pays expert witnesses with similar expertise.

Paragraphs (b) and (c) are based on the corresponding paragraphs of the model rule, 1 CFR 315.106(c) and (d).

We have omitted from section 4.606 any reference to fees for agents, who are included in the Act at section 504(a)(2), (b)(1)(A) and in section 315.105 of the model rules. As used in the Act, the term ''agent'' does not mean any person who acts on behalf of a party; rather, it means a specialized non-attorney practitioner who is authorized to represent clients with special permission of the tribunal. *Fanning, Phillips and Molnar* v. *West*, 160 F.3d 717 (Fed. Cir. 1998); *Cook* v. *Brown*, 68 F.3d 447 (Fed. Cir. 1995).

The Department does not authorize specialized non-attorney practitioners to represent clients before it, *see* 43 CFR 1.3 (2004). Under section 1.3(b)(3), an individual who is not an attorney can represent himself, a member of his family, a partnership of which he is a member, a corporation of which he is an officer or full-time employee, etc.; but that does not make the individual an ''agent'' within the meaning of the Act. Consequently, a party could not seek fees for an agent in a proceeding before OHA, and there is no need for these regulations to include a reference to agents.

Section 4.610 What information must my application for an award contain?

This section is based on the ''contents of application'' section of the model rules, 1 CFR 315.201. We propose adding paragraph (b)(4) to cross-reference the new language in section 4.605(c).

Section 4.611 What information must I include in my net worth exhibit?

This section is based on the ''net worth exhibit'' section of the model rules, 1 CFR 315.202, except we propose adding a reference to a small entity in the first sentence of paragraph (a). We have also broken the paragraphs of the model rule into shorter paragraphs and have added a cross reference in the last sentence to the Department's Freedom of Information Act regulations.

Section 4.612 What documentation of fees and expenses must I provide?

This section is based on the ''documentation of fees and expenses'' section of the model rules, 1 CFR 315.203.

Section 4.613 When may I file an application for an award?

This section is based on the ''when an application may be filed'' section of the model rules, 1 CFR 315.204, except that paragraph (b) of the model rules has been moved to the definitions in section 4.602.

Section 4.620 How must I file and serve documents?

This section is based on the ''filing and service of documents'' section of the model rules, 1 CFR 315.301.

Section 4.621 When may the Department or other agency file an answer?

This section is based on the ''answer to application'' section of the model rules, 1 CFR 315.302.

Section 4.622 When may I file a reply?

This section is based on the ''reply'' section of the model rules, 1 CFR 315.303.

Section 4.623 When may other parties file comments?

This section is based on the ''comments by other parties'' section of the model rules, 1 CFR 315.304.

Section 4.624 When may further proceedings be held?

This section is based on the ''further proceedings'' section of the model rules, 1 CFR 315.306.

Section 4.625 How will my application be decided?

This section is based on the ''decision'' section of the model rules, 1 CFR 315.307. We have omitted the final sentence about allocating awards among agencies because it is not expected to come up in cases that OHA handles.

Section 4.626 How will an appeal from a decision be handled?

In this section we have retained the concept of the ''agency review'' section of the model rules, 1 CFR 315.308, that review of adjudicative officer decisions on applications take place in accordance with the Department's regular review proceedings. For example:

- An appeal from a decision of an administrative law judge on an application for an award in a proceeding under the Taylor Grazing Act would be appealed to IBLA under 43 CFR 4.478(e), 4.410 *et seq.* IBLA would render a final decision for the Department.
- An appeal from a decision of an OHA administrative law judge on an application for an award in a proceeding under the Indian Self-Determination and Education Assistance Act involving the Indian Health Service would be appealed to the Departmental Appeals Board, Department of Health and Human Services. The Board would render a final decision for that agency.
- A decision by a panel of judges of the Interior Board of Contract Appeals on an application for an award in a proceeding under the Contract Disputes Act would be final for the Department.

Section 4.627 May I seek judicial review of a final Departmental or other agency decision?

This section is based on the ''judicial review'' section of the model rules, 1 CFR 315.309.

Section 4.628 How will I obtain payment of an award?

This section is based on the ''payment of award'' section of the model rules, 1 CFR 315.310.

IV. Review Under Procedural Statutes and Executive Orders

A. Regulatory Planning and Review (E.O. 12688)

In accordance with the criteria in Executive Order 12866, the Office of Management and Budget (OMB) has reviewed a summary of this rule and has determined that this is not a significant rule. OMB has not reviewed the rule itself under Executive Order 12866.

1. This rule would not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, competition, jobs, the environment, public health or safety, or other units of government. A cost-benefit and economic analysis is not required. These amended regulations would have virtually no effect on the economy because they merely implement amendments to EAJA that are already in effect.

2. This rule would not create inconsistencies with or interfere with other agencies' actions, since all agencies are subject to EAJA and its amendments.

3. This rule would not alter the budgetary effects of entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. These proposed regulations have to do only with the procedures implementing EAJA, not with entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

4. This rule does not raise novel legal or policy issues. The proposed regulations would merely implement amendments to EAJA that are already in effect.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this rule would not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The proposed regulations merely implement amendments to EAJA that are already in effect. A Small Entity Compliance Guide is not required.

C. 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:

1. Would not have an annual effect on the economy of $100 million or more. The proposed regulations merely implement amendments to EAJA that are already in effect. They should have no effect on the economy.

2. Would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Updating OHA's procedural regulations implementing EAJA, based on amendments to that Act, would not affect costs or prices for citizens, individual industries, or government agencies.

3. Would 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. Updating OHA's procedural regulations implementing EAJA, based on amendments to that Act, should have no effects, adverse or beneficial, on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*), we find that:

1. This rule would not have a significant or unique effect on State, local, or tribal governments or the private sector. Updating OHA's procedural regulations implementing EAJA, based on amendments to that Act, would neither uniquely nor significantly affect these governments. A statement containing the information required by the Unfunded Mandates Reform Act, 2 U.S.C. 1531 *et seq.*, is not required.

2. This rule would not produce an unfunded Federal mandate of $100 million or more on State, local, or tribal governments or the private sector in any year, *i.e.*, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

E. Takings (E.O. 12630)

In accordance with Executive Order 12630, we find that the rule would not have significant takings implications. A takings implication assessment is not required. Updating OHA's procedural regulations implementing EAJA, based on amendments to that Act, should have no effect on property rights.

F. Federalism (E.O. 13132)

In accordance with Executive Order 13132, we find that the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. There is no foreseeable effect on states from updating OHA's procedural regulations implementing EAJA, based on amendments to that Act. A Federalism Assessment is not required.

G. Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule would not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. Because these regulations would merely implement amendments to EAJA that are already in effect, they would not burden either administrative or judicial tribunals.

H. Paperwork Reduction Act

This proposed rule would not require an information collection from 10 or more parties, and a submission under the Paperwork Reduction Act is not required. An OMB form 83–I has not been prepared and has not been approved by the Office of Policy Analysis. The proposed rule is an administrative and procedural rule that simply updates existing procedural regulations implementing EAJA, based on amendments to that Act.

I. National Environmental Policy Act

The Department has analyzed this rule in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, Council on Environmental Quality (CEQ) regulations, 40 CFR part 1500, and the Department of the Interior Departmental Manual (DM). CEQ regulations, at 40 CFR 1508.4, define a ''categorical exclusion'' as a category of actions that the Department has determined ordinarily do not individually or cumulatively have a significant effect on the human environment. The regulations further direct each department to adopt NEPA procedures, including categorical exclusions. 40 CFR 1507.3. The Department has determined that this proposed rule is categorically excluded from further environmental analysis under NEPA in accordance with 516 DM 2, Appendix 1, which categorically excludes ''[p]olicies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature.'' In addition, the Department has determined that none of the extraordinary circumstances listed in 516 DM 2, Appendix 2, applies to the proposed rule. The proposed rule is an administrative and procedural rule that simply updates existing procedural regulations implementing EAJA, based on amendments to that Act. Therefore, neither an environmental assessment nor an environmental impact statement under NEPA is required.

J. Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and 512 DM 2, the Department of the Interior has evaluated potential effects of these rules on Federally recognized Indian tribes and has determined that there are no potential effects. These rules would not affect Indian trust resources; they would merely implement amendments to EAJA that are already in effect.

K. Effects on the Nation's Energy Supply

In accordance with Executive Order 13211, we find that this regulation does not have a significant effect on the nation's energy supply, distribution, or use. Updating OHA's procedural regulations implementing EAJA, based on amendments to that Act, would not affect energy supply or consumption.

L. Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain 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 or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A ''section'' appears in bold type and is preceded by the symbol ''§ '' and a numbered heading; for example, § 4.601 What is the purpose of these regulations?) (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (6) What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov*.

List of Subjects in 43 CFR Part 4

Administrative practice and procedure; Claims; Equal access to justice.

Dated: September 27, 2005.

P. Lynn Scarlett,

Assistant Secretary—Policy, Management and Budget.

For the reasons set forth in the preamble, the Office of Hearings and Appeals proposes to revise part 4, subpart F, of title 43 of the Code of Federal Regulations as set forth below:

PART 4—DEPARTMENT HEARINGS AND APPEALS PROCEDURES

* * * * *

Subpart F—Implementation of the Equal Access to Justice Act in Agency Proceedings

General Provisions

Sec.

4.601 What is the purpose of this subpart?
4.602 What definitions apply to this subpart?
4.603 What proceedings are covered by this subpart?
4.604 When am I eligible for an award?
4.605 Under what circumstances may I receive an award?
4.606 What fees and expenses may be allowed?

Information Required From Applicants

4.610 What information must my application for an award contain?
4.611 What information must I include in my net worth exhibit?
4.612 What documentation of fees and expenses must I provide?
4.613 When may I file an application for an award?

Procedures for Considering Applications

4.620 How must I file and serve documents?
4.621 When may the Department or other agency file an answer?
4.622 When may I file a reply?
4.623 When may other parties file comments?
4.624 When may further proceedings be held?
4.625 How will my application be decided?
4.626 How will an appeal from a decision be handled?
4.627 May I seek judicial review of a final decision?
4.628 How will I obtain payment of an award?

Authority: 5 U.S.C. 504(c)(1).

Subpart F—Implementation of the Equal Access to Justice Act in Agency Proceedings

General Provisions

§ 4.601 What is the purpose of this subpart?

The Equal Access to Justice Act provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called ''adversary adjudications'') before the Department of the Interior. Under the Act, an eligible party may receive an award when it prevails over the Department or other agency, unless the position of the Department or other agency was substantially justified or special circumstances make an award unjust. The rules in this subpart describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Office of Hearings and Appeals will use in ruling on those applications.

§ 4.602 What definitions apply to this subpart?

As used in this subpart:

Act means section 203(a)(1) of the Equal Access to Justice Act, Pub. L. 96–481, 5 U.S.C. 504, as amended.

Adjudicative officer means the deciding official(s) who presided at the adversary adjudication, or any successor official(s) assigned to decide the application.

Adversary adjudication means any of the following:

(1) An adjudication under 5 U.S.C. 554 in which the position of the Department or other agency is presented by an attorney or other representative who enters an appearance and participates in the proceeding;

(2) An appeal of a decision of a contracting officer made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before the Interior Board of Contract Appeals pursuant to section 8 of that Act (41 U.S.C. 607);

(3) Any hearing conducted under section 6103(a) of the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*); or

(4) Any hearing or appeal involving the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb *et seq.*).

Affiliate means:

(1) Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant; or

(2) Any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest.

Demand means the express demand of the Department or other agency that led to the adversary adjudication, but does not include a recitation by the Department or other agency of the maximum statutory penalty:

(1) In the administrative complaint; or

(2) Elsewhere when accompanied by an express demand for a lesser amount.

Department means the Department of the Interior or the component of the Department that is a party to the adversary adjudication (*e.g.*, Bureau of Land Management).

Final disposition means the date on which either of the following becomes final and unappealable, both within the Department and to the courts:

(1) A decision or order disposing of the merits of the proceeding; or

(2) Any other complete resolution of the proceeding, such as a settlement or voluntary dismissal.

Other agency means any agency of the United States or the component of the agency that is a party to the adversary adjudication before the Office of Hearings and Appeals, other than the Department of the Interior and its components.

Party means a party as defined in 5 U.S.C. 551(3) that meets the eligibility criteria set forth in § 4.604.

Position of the Department or other agency means:

(1) The position taken by the Department or other agency in the adversary adjudication; and

(2) The action or failure to act by the Department or other agency upon which the adversary adjudication is based.

Proceeding means an adversary adjudication as defined in this section.

You means a party to an adversary adjudication.

§ 4.603 What proceedings are covered by this subpart?

(a) The Act applies to adversary adjudications conducted by the Office of Hearings and Appeals, including proceedings to modify, suspend, or revoke licenses if they are otherwise adversary adjudications.

(b) The Act does not apply to:

(1) Other hearings and appeals conducted by the Office of Hearings and Appeals, even if the Department uses procedures comparable to those in 5 U.S.C. 554 in such cases;

(2) Any proceeding in which the Department or other agency may prescribe a lawful present or future rate; or

(3) Proceedings to grant or renew licenses.

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

§ 4.604 When am I eligible for an award?

(a) To be eligible for an award of attorney fees and other expenses under the Act, you must:

(1) Be a party to the adversary adjudication for which you seek an award; and

(2) Show that you meet all conditions of eligibility in this section.

(b) You are an eligible applicant if you are any of the following:

(1) An individual with a net worth of $2 million or less;

(2) The sole owner of an unincorporated business who has a net worth of $7 million or less, including both personal and business interests, and 500 or fewer 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 500 or fewer employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with 500 or fewer employees;

(5) Any other partnership, corporation, association, unit of local government, or organization with a new worth of $7 million or less and 500 or fewer employees; or

(6) For purposes of § 4.605(c), a small entity as defined in 5 U.S.C. 601(6).

(c) For the purpose of eligibility, your net worth and the number of your employees must be determined as of the date the proceeding was initiated.

(1) Your employees include all persons who regularly perform services for remuneration under your direction and control.

(2) Part-time employees must be included on a proportional basis.

(d) You are considered an ''individual'' rather than a ''sole owner of an unincorporated business'' if:

(1) You own an unincorporated business; and

(2) The issues on which you prevail are related primarily to personal interests rather than to business interests.

(e) To determine your eligibility, your net worth and the number of your employees must be aggregated with the net worth and the number of employees of all of your affiliates. However, this paragraph does not apply if the adjudicative officer determines that aggregation would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities.

(f) The adjudicative officer may determine that financial relationships other than those described in the definition of ''affiliate'' in § 4.602 constitute special circumstances that would make an award unjust.

(g) If you participate in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible, you are not eligible for an award.

§ 4.605 Under what circumstances may I receive an award?

(a) You may receive an award for your fees and expenses in connection with a proceeding if:

(1) You prevailed in the proceeding or in a significant and discrete substantive portion of a proceeding; and

(2) The position of the Department or other agency over which you prevailed was not substantially justified. The Department or other agency has the burden of proving that its position was substantially justified.

(b) An award will be reduced or denied if you have unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

(c) This paragraph applies to an adversary adjudication arising from an action by the Department or other agency to enforce compliance with a statutory or regulatory requirement:

(1) If the demand of the Department or other agency in the action is excessive and unreasonable compared with the adjudicative officer's decision, then the adjudicative officer must award you your fees and expenses related to defending against the excessive demand, unless:

(i) You have committed a willful violation of law;

(ii) You have acted in bad faith; or

(iii) Special circumstances make an award unjust.

(2) Fees and expenses awarded under this paragraph will be paid only if appropriations to cover the payment have been provided in advance.

§ 4.606 What fees and expenses may be allowed?

(a) The adjudicative officer must base awards under this subpart on rates customarily charged by persons engaged in the business of acting as attorneys and expert witnesses, even if the services were made available to you without charge or at a reduced rate.

(1) The maximum that can be awarded for the fee of an attorney is $125 per hour.

(2) The maximum that can be awarded to compensate an expert witness is the highest rate at which the Department or other agency pays expert witnesses with similar expertise.

(3) An award may also include the reasonable expenses of the attorney or witness as a separate item, if the attorney or witness ordinarily charges clients separately for those expenses.

(b) The adjudicative officer may award only reasonable fees and expenses under this subpart. In determining the reasonableness of the fee for an attorney or expert witness, the adjudicative officer must consider the following:

(1) If the attorney or expert witness is in private practice, his or her customary fee for similar services;

(2) If the attorney or expert witness is your employee, the fully allocated cost of the services;

(3) The prevailing rate for similar services in the community in which the attorney or expert witness ordinarily performs services;

(4) The time actually spent in representing you in the proceeding;

(5) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(6) Any other factors that bear on the value of the services provided.

(c) The adjudicative officer may award the reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on your behalf to the extent that:

(1) The charge for the service does not exceed the prevailing rate for similar services; and

(2) The study or other matter was necessary for preparation of your case.

Information Required From Applicants

§ 4.610 What information must my application for an award contain?

(a) Your application for an award of fees and expenses under the Act must:

(1) Identify you;

(2) Identify the proceeding for which an award is sought;

(3) Show that you have prevailed;

(4) Specify the position of the Department or other agency that you allege was not substantially justified;

(5) Unless you are an individual, state the number of your employees and those of all your affiliates, and describe the type and purpose of your organization or business;

(6) State the amount of fees and expenses for which you seek an award;

(7) Be signed by you or your authorized officer or attorney;

(8) Contain or be accompanied by a written verification under oath or under penalty of perjury that the information in the application is true and correct; and

(9) Unless one of the exceptions in paragraph (b) of this section applies, include a statement that:

(i) Your net worth does not exceed $2 million, if you are an individual; or

(ii) Your net worth and that of all your affiliates does not exceed $7 million in the aggregate, if you are not an individual.

(b) You do not have to submit the statement of net worth required by paragraph (a)(9) of this section if you do any of the following:

(1) Attach a copy of a ruling by the Internal Revenue Service that you qualify as a tax-exempt organization described in 26 U.S.C. 501(c)(3);

(2) Attach a statement describing the basis for your belief that you qualify under 26 U.S.C. 501(c)(3), if you are a tax-exempt organization that is not required to obtain a ruling from the Internal Revenue Service on your exempt status;

(3) State that you are a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)); or

(4) Seek fees and expenses under § 4.605(c) and provide information demonstrating that you qualify as a small entity under 5 U.S.C. 601, 15 U.S.C. 632, and 13 CFR part 121.

(c) You may also include in your application any other matters that you wish the adjudicative officer to consider in determining whether and in what amount an award should be made.

§ 4.611 What information must I include in my net worth exhibit?

(a) Unless you meet one of the criteria in § 4.610(b), you must file with your

application a net worth exhibit that meets the requirements of this section. The adjudicative officer may also require that you file additional information to determine your eligibility for an award.

(b) The exhibit must show your net worth and that of any affiliates when the proceeding was initiated. The exhibit may be in any form that:

(1) Provides full disclosure of your and your affiliates' assets and liabilities; and

(2) Is sufficient to determine whether you qualify under the standards in this subpart.

(c) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, if you object to public disclosure of information in any portion of the exhibit and believe there are legal grounds for withholding it from disclosure, you may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled ''Confidential Financial Information,'' accompanied by a motion to withhold the information from public disclosure.

(1) The motion must describe the information sought to be withheld and explain, in detail:

(i) Why it falls within one or more of the exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b);

(ii) Why public disclosure of the information would adversely affect you; and

(iii) Why disclosure is not required in the public interest.

(2) You must serve the net worth exhibit and motion on counsel representing the agency against which you seek an award, but you are not required to serve it on any other party to the proceeding.

(3) If the adjudicative officer finds that the information should not be withheld from disclosure, it must be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit will be disposed of in accordance with the Department's procedures under the Freedom of Information Act, 43 CFR 2.11 *et seq.*

§ 4.612 What documentation of fees and expenses must I provide?

(a) Your application must be accompanied by full documentation of the fees and expenses for which you seek an award, including the cost of any study, analysis, engineering report, test, project or similar matter.

(b) You must submit a separate itemized statement for each professional firm or individual whose services are covered by the application, showing:

(1) The hours spent in connection with the proceeding by each individual;

(2) A description of the specific services performed;

(3) The rates at which each fee has been computed;

(4) Any expenses for which reimbursement is sought;

(5) The total amount claimed; and

(6) The total amount paid or payable by you or by any other person or entity for the services provided.

(c) The adjudicative officer may require you to provide vouchers, receipts, logs, or other substantiation for any fees or expenses claimed, as required by § 4.624.

§ 4.613 When may I file an application for an award?

(a) You may file an application whenever you have prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding. You must file the application no later than 30 days after the final disposition of the proceeding.

(b) Consideration of an application for an award must be stayed if any party seeks review or reconsideration of a decision in a proceeding in which you believe you have prevailed, pending final disposition of the review or reconsideration of the decision.

(c) When the Department or other agency (or the United States on its behalf) appeals an adversary adjudication to a court, no decision on an application for fees and other expenses in connection with that adversary adjudication will be made until either:

(1) A final and unreviewable decision is rendered by the court on the appeal; or

(2) The underlying merits of the case have been finally determined.

Procedures for Considering Applications

§ 4.620 How must I file and serve documents?

You must file and serve all documents related to an application for an award under this subpart on all other parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 4.611(c) for confidential information. The Department or other agency and all other parties must likewise file and serve their pleadings and related documents on you and on each other, in the same manner as other pleadings in the proceeding.

§ 4.621 When may the Department or other agency file an answer?

(a) Within 30 days after service of an application, the Department or other agency against which an award is sought may file an answer to the application. However, if consideration of an application has been stayed under § 4.613(b), the answer is due within 30 days after the final disposition of the review or reconsideration of the decision.

(1) Except as provided in paragraph (a)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested. In such case, the adjudicative officer will issue a decision in accordance with § 4.625 based on the record before him or her.

(2) Failure to file an answer within the 30-day period will not be treated as a consent to the award requested if the Department or other agency either:

(i) Requests an extension of time for filing; or

(ii) Files a statement of intent to negotiate under paragraph (b) of this section.

(b) If the Department or other agency and you believe that the issues in the fee application can be settled, you may jointly file a statement of intent to negotiate a settlement. Filing this statement will extend for an additional 30 days the time for filing an answer, and the adjudicative officer may grant further extensions if you and the agency counsel so request.

(c) The answer must explain in detail any objections to the award requested and identify the facts relied on to support the Department's or other agency's position. If the answer is based on any alleged facts not already in the record of the proceeding, the Department or other agency must include with the answer either supporting affidavits or a request for further proceedings under § 4.624.

§ 4.622 When may I file a reply?

Within 15 days after service of an answer, you may file a reply. If your reply is based on any alleged facts not already in the record of the proceeding, you must include with the reply either supporting affidavits or a request for further proceedings under § 4.624.

§ 4.623 When may other parties file comments?

Any party to a proceeding other than the applicant and the Department or other agency may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in the proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full

exploration of matters raised in the comments.

§ 4.624 When may further proceedings be held?

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, the adjudicative officer may order further proceedings, which will be held only when necessary for full and fair resolution of the issues and will be conducted as promptly as possible.

(b) The adjudicative officer may order further proceedings on his or her own initiative or in response to a request by you or by the Department or other agency. A request for further proceedings under this section must:

(1) Identify the information sought or the disputed issues; and

(2) Explain why the additional proceedings are necessary to resolve the issues.

(c) As to issues other than substantial justification (such as your eligibility or substantiation of fees and expenses), further proceedings under this section may include an informal conference, oral argument, additional written submissions, pertinent discovery, or an evidentiary hearing.

(d) The adjudicative officer will determine whether the position of the Department or other agency was substantially justified based on the administrative record of the adversary adjudication as a whole.

§ 4.625 How will my application be decided?

The adjudicative officer must issue a decision on the application promptly after completion of proceedings on the application. The decision must include written findings and conclusions on all of the following that are relevant to the decision:

(a) Your eligibility and status as a prevailing party;

(b) The amount awarded, and an explanation of the reasons for any difference between the amount requested and the amount awarded;

(c) Whether the position of the Department or other agency was substantially justified;

(d) Whether you unduly protracted the proceedings; and

(e) Whether special circumstances make an award unjust.

§ 4.626 How will an appeal from a decision be handled?

(a) If the adjudicative officer is an administrative law judge, you or the Department or other agency may appeal his or her decision on the application to the appeals board that would have jurisdiction over an appeal involving the merits of the proceeding. The appeal will be subject to the same rules and procedures that would apply to an appeal involving the merits of the proceeding. The appeals board will issue the final Departmental or other agency decision on the application.

(b) If the adjudicative officer is a panel of appeals board judges, their decision on the application is final for the Department or other agency.

§ 4.627 May I seek judicial review of a final decision?

You may seek judicial review of a final Departmental or other agency decision on an award as provided in 5 U.S.C. 504(c)(2).

§ 4.628 How will I obtain payment of an award?

(a) To obtain payment of an award against the Department or other agency, you must submit:

(1) A copy of the final decision granting the award; and

(2) A certification that no party is seeking review of the underlying decision in the United States courts, or that the process for seeking review of the award has been completed.

(b) If the award is against the Department:

(1) You must submit the material required by paragraph (a) of this section to the following address: Director, Office of Financial Management, Policy, Management and Budget, U.S. Department of the Interior, Washington, DC 20240.

(2) Payment will be made by electronic funds transfer whenever possible. A representative of the Department will contact you for the information the Department needs to process the electronic funds transfer.

(c) If the award is against another agency, you must submit the material required by paragraph (a) of this section to the chief financial officer or other disbursing official of that agency. Agency counsel must promptly inform you of the title and address of the appropriate official.

(d) The Department or other agency will pay the amount awarded to you within 60 days of receiving the material required by this section.

[FR Doc. 05–19896 Filed 10–4–05; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 29

[Docket OST–2005–22602]

RIN 2105–AD46

Debarment and Suspension (Nonprocurement) Requirements

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: This proposal would amend Department of Transportation regulations implementing the governmentwide nonprocurement suspension and debarment requirements. Specifically, the DOT proposes to adopt the optional lower tier coverage prohibiting excluded parties from participating in subcontracts at tiers lower than the first tier below a covered nonprocurement transaction.

DATES: Comments must be received on or before November 4, 2005.

ADDRESSES: Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590, or submit electronically at *http://dms.dot.gov.* All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically.

FOR FURTHER INFORMATION CONTACT: Ladd Hakes, Office of the Senior Procurement Executive, Office of Administration (M–61), (202) 366–4268, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

You may submit or retrieve comments online through the Document Management System (DMS) at: *http://dmses.dot.gov.* Acceptable formats include: MS Word (versions 95 to 97), MS Word for Mac (versions 6 to 8), Rich Text File (RTF), American Standard