

and parallel to the Flagstaff VOR 043° radial extending clockwise to a point beginning at lat. 35°00'00"N, long. 111°36'00"W; to lat. 34°44'00"N, long. 111°50'00"W; to lat. 34°45'00"N, long. 112°01'00"W; to lat. 34°54'00"N, long. 112°05'00"W; to lat. 35°08'00"N, long. 111°52'00"W, thence eastbound along the Flagstaff VOR 263° radial to intercept the 3.6-mile radius of the Flagstaff Pulliam Airport, thence clockwise to the point of beginning. That airspace extending upward from 1,200 feet above the surface within 8.3 miles each side of the Flagstaff VOR 127° and 307° radials, extending from 7 miles northwest to 16.5 miles southeast of the Flagstaff VOR and that airspace bounded by a line beginning at lat. 35°13'32"N, long. 111°04'31"W; to lat. 35°17'17"N, long. 111°02'35"W; to lat. 35°22'00"N, long. 111°16'43"W; to lat. 35°24'00"N, long. 111°26'16"W; to lat. 35°18'00"N, long. 111°35'33"W, thence clockwise via a 10-mile radius of the Flagstaff VOR to lat. 35°16'34"N, long. 111°32'42"W; to lat. 35°19'58"N, long. 111°24'10"W; thence to the point of beginning and that airspace bounded by a line beginning at lat. 35°03'00"N, long. 111°21'00"W; to lat. 35°02'00"N, long. 111°15'00"W; to lat. 35°01'00"N, long. 111°22'00"W; thence to the point of beginning, excluding the Sedona, AZ, Class E airspace area.

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Issued in Los Angeles, California, on July 21, 1997.

Thomas L. Parks,

*Acting Manager, Air Traffic Division,
Western-Pacific Region.*

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2204

Amendment of the Commission's Equal Access to Justice Rules

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to add a new paragraph to the Commission's procedural rules on eligibility under the Equal Access to Justice Act in order to minimize extra unnecessary collateral litigation and to bring the Commission into conformity with the corresponding rule adopted by most other federal agencies.

DATES: Comments must be received by September 10, 1997.

ADDRESSES: All comments concerning this proposed rule should be addressed to Earl R. Ohman, Jr., General Counsel, Occupational Safety and Health Review Commission, 1120 20th Street, NW, 9th Floor, Washington, DC 20036-3419.

FOR FURTHER INFORMATION CONTACT:

Earl R. Ohman, Jr., General Counsel, (202) 606-5410.

SUPPLEMENTARY INFORMATION: This document proposes to add a paragraph to the procedural rules of the Occupational Safety and Health Review Commission governing applications for attorney's fees under the Equal Access to Justice Act ("EAJA"). Generally, changes 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 the Commission values the views of those who appear before it, the Commission invites public comment.

As announced in the Commission's decision in *BFW Construction Co.*, OSHRC Docket No. 91-1214, issued on August 6, 1997, the Commission would add a new paragraph (f) to 29 CFR 2204.105, its rule of procedure concerning eligibility under the EAJA. This new provision would state that the net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine the applicant's eligibility under the EAJA. 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 any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate under this part, unless such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

When the EAJA was enacted, it required each federal agency to adopt its own rules implementing the EAJA after consultation with the (former) Administrative Conference of the United States ("ACUS"). 5 U.S.C. 504(c)(1). ACUS suggested model rules for agencies, including model rule 0.104(f) on aggregation of net worth for eligibility purposes. 46 FR 32900, 32912 (1981). (The EAJA itself is silent on the issue of aggregation.) Most federal agencies adopted an aggregation rule that closely followed that model rule. See, e.g., 29 CFR 16.105(f) (Department of Labor), 29 CFR 102.143(g) (National Labor Relations Board), and 29 CFR 2704.104(f) (Federal Mine Safety and Health Review Commission). However, the Commission declined to adopt that rule, stating instead that it would decide

the aggregation issue "on a case-by-case basis." 46 FR 48078, 48079 (1981), reprinted in 1980-81 CCH ESHG New Developments ¶ 12,365, p. 15,458 (October 6, 1981). However, as discussed in *BFW Corp.*, deciding the issue on a case-by-case basis applying the "real party in interest" factors developed by federal courts has proven unwieldy and has resulted in extra unnecessary collateral litigation, contrary to the intent of the EAJA. Therefore, the Commission has taken a "second look" at the ACUS model rule and has decided to join many of our fellow agencies in adopting a rule that closely follows the ACUS model.

The Commission also proposes to change all references in Part 2204 to the "EAJ Act" to read "EAJA" to conform to the common shortened reference term for the Equal Access to Justice Act.

List of Subjects in 29 CFR Part 2204

Claims, Equal access to justice, Lawyers.

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

PART 2204—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN PROCEEDINGS BEFORE THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1. The authority citation 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. All references in Part 2204 to "EAJ Act" are revised to read "EAJA" wherever they appear.

3. A new paragraph (f) is added to § 2204.105 to read as follows:

§ 2204.105 Eligibility of applicants.

* * * * *

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. 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 any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities. In addition, financial

relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

Dated: August 6, 1997.

Stuart E. Weisburg,
Chairman.

Daniel Guttman,
Commissioner.

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POSTAL SERVICE

39 CFR Parts 775, 777 and 778

National Environmental Policy Act Implementing Procedures

AGENCY: Postal Service (USPS).

ACTION: Proposed rule.

SUMMARY: This proposal would revise existing procedures and categorical exclusions governing the Postal Service's compliance with the National Environmental Policy Act (NEPA). The proposed amendments are based upon experience with existing regulations and new policies and infrastructure that have been implemented since the restructuring of the Postal Service in 1992. The proposed changes are intended to comply with the requirements of NEPA while improving quality and reducing administrative processes and preparation.

DATE: Comments must be received by September 10, 1997.

ADDRESSES: Please submit written comments to Charles E. Bravo, Manager, Environmental Management Policy, U.S. Postal Service, 475 L'Enfant Plaza SW Room 1P830, Washington, DC 20260-2810, fax (202) 268-6016.

FOR FURTHER INFORMATION CONTACT: Charles A. Vidich, Environmental Coordinator, U.S. Postal Service, 8 Griffin Rd. N., Windsor, CT 06006-7030, phone (860) 285-7254, or Gary W. Bigelow, Senior Counsel, Environmental Law, 4200 Wake Forest Rd., Raleigh, NC 27668-1121, phone (919) 501-9439.

SUPPLEMENTARY INFORMATION: Historically, the U.S. Postal Service has implemented the provisions of the National Environmental Policy Act (NEPA) through policies and procedures established by the Postal Service's Facilities organization. Certainly, most of the "major federal actions" undertaken by the Postal Service have been associated with the construction or disposal of postal facilities. However, in recent years it has become increasingly evident that other postal organizations also have a role in implementing the

provisions of NEPA. The Postal Service is revising its regulations to clarify the scope of the applicability of NEPA.

The proposed changes revise procedures for implementing the requirements of NEPA. They require Postal Service officials to consider potential impacts of major federal actions to the human environment. To properly implement the provisions of the Act, responsible Postal Service officials must perform adequate environmental analyses to determine whether identified impacts are significant. An Environmental Impact Statement (EIS) is required if the impacts are determined to be significant; otherwise, an environmental assessment (EA) is prepared, unless the action is categorically excluded or there is no potential for significant impact.

Responsible officials will complete an environmental checklist to identify potential environmental concerns outside of the NEPA process, such as permitting requirements, and to determine the need for preparing an EA. Although NEPA does not require the preparation of an environmental checklist, it is Postal Service policy to use the environmental checklist as a planning tool to better identify the environmental consequences of proposed actions that have potential for impacts upon the environment.

The proposed changes respond to numerous suggestions for additional categorical exclusions (CATEXs), modifications to existing exclusions, and clarification of the scope of the NEPA requirements. The changes are connected with experience with the types of actions that generally do not require an EA or result in a finding of no significant impact (FONSI). In addition, the Postal Service reorganized in 1992 and its missions, programs, and policies have evolved to meet the requirements of the competitive market and to continue to provide a business-like public service to the American public. Accordingly, the Postal Service needs to make changes to its NEPA regulations consistent with its restructured operation.

In order to produce an update of the CATEXs, the Postal Service reviewed EAs and FONSI that it has issued. It also reviewed other federal agency CATEXs to ensure the appropriateness of the exclusions. The results form the basis for the proposed amendments. The proposed changes are consistent with guidance provided by the Council on Environmental Quality (CEQ), which encourages flexibility in the NEPA implementing procedures to reduce administrative burdens and promote efficiency. The Postal Service has

consulted the CEQ regarding these proposed amendments. The proposed CATEXs would not affect the Postal Service's responsibility for compliance with other applicable federal, state, or local environmental laws, including the Clean Air Act, Clean Water Act, and existing postal floodplain and wetland regulations.

The proposed changes are intended to adjust the Postal Service's normal levels of NEPA review and to add, modify, and clarify classes of actions based upon experience in applying NEPA. The listings do not constitute a conclusive determination regarding the appropriate level of review for a proposed action. The identified categories of CATEXs and actions that normally require an EA presume that the level of review is appropriate. The presumptions do not apply when unusual or extraordinary circumstances related to the action that may affect the significance of the proposed action. An example of an extraordinary circumstance could be the proposed construction of a small structure in the middle of wetlands that harbor protected endangered species.

Description of Proposed Amendments

This section describes the proposed amendments to the Postal Service NEPA regulations at 39 CFR part 775. Subchapter K is renamed Environmental Regulations to more accurately describe the subchapter that contains NEPA and wetland and floodplain regulations. Parts 777 and 778 are redesignated from Subchapter K to the formerly reserved Subchapter L, Special Regulations.

Part 775 is similarly renamed National Environmental Policy Act Procedures. Section 775.1, Purpose, is revised by deleting the language in the second sentence.

Section 775.3(a), Responsibilities, is revised to indicate that the Chief Environmental Officer of the Postal Service is the person responsible for overall development of policy regarding NEPA, and each 39 CFR part 4 officer with responsibility over the proposed program, project, action, or facility is responsible for compliance with NEPA as the responsible official. The officer who is in charge of the facilities organization is responsible for the development of NEPA policy as it affects real estate and construction or disposal of postal facilities. Paragraph (b) is revised to state that environmental coordinators are designated by postal management to assist in compliance with NEPA requirements because the Postal Service has reorganized and renamed many of the groups referenced in the original regulation.