

during development of the promulgated standards and requirements in this proposal, is available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Monday through Friday, at EPA's Air Docket Section at the above address. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT:

Kenon Smith, U.S. Environmental Protection Agency, Acid Rain Division (6204J), 401 M Street SW., Washington, DC 20460, (202) 233-9164, or call the Acid Rain Hotline at (202) 233-9620.

SUPPLEMENTARY INFORMATION: If no significant, adverse comments are timely received, no further activity is contemplated in relation to this proposed rule and the direct final rule in the Final Rules section of this Federal Register will automatically go into effect on the date specified in that rule. If significant, adverse comments are timely received on any portion of the direct final rule, that portion will be withdrawn and all public comment received on that portion will be addressed in a subsequent final rule based on the relevant portions of this proposed rule. Because the Agency will not institute a second comment period on this proposed rule, any parties interested in commenting should do so during this comment period.

For further supplemental information, the detailed rationale, and the rule revision, see the information provided in the direct final rule in the Final Rules section of this Federal Register.

List of Subjects in 40 CFR Part 73

Environmental protection, Acid rain, Air pollution control, Electric Utilities, Reporting and record keeping requirements, and Sulfur dioxide.

Dated: May 24, 1996.

Carol M. Browner,
Administrator.

[FR Doc. 96-14113 Filed 6-5-96; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 6

[Docket No. OST-96-1421 Notice 96-15]

RIN 2105-AB73

Implementation of Equal Access to Justice Act in Agency Proceedings

AGENCY: Office of the Secretary, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department is proposing to update its regulation providing for

the award of attorney fees and other expenses under the Equal Access to Justice Act to eligible individuals and entities who are parties to certain administrative proceedings before the Department and its various operating administrations. These revisions are necessitated by various statutory changes that have been made since the Department adopted its present rule in 1983. The Department is not, however, proposing any other substantive alterations to its regulation. All of the Department's proposed changes to its regulation either mirror the currently-applicable statutory requirements or are of a minor, non-technical nature. This action is a response to the President's Regulatory Reinvention Initiative and is designed to update the regulation to reflect currently applicable law.

DATES: Comments should be received by August 5, 1996. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Comments should be sent to Docket Clerk, Docket No. OST-96-1421, Room PL-401, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. For the convenience of persons who will be reviewing the docket, it is requested that commenters provide an original and three copies of their comments. Comments can be inspected from 9 a.m. to 5 p.m. Commenters who wish the receipt of their comments to be acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will date-stamp the postcard and mail it to the commenter. Comments should be on 8 by 11 inch white paper using dark ink and should be without tabs and unbound.

FOR FURTHER INFORMATION CONTACT:

Alexander J. Millard, Office of the General Counsel, U.S. Department of Transportation, 400 Seventh Street, SW., Room 4102, Washington, DC 20590, telephone (202) 366-9285, or S. Reid Alsop, Office of the Chief Counsel, Federal Highway Administration, U.S. Department of Transportation, 400 Seventh Street SW., Room 4230, Washington, DC 20590, telephone (202) 366-1371.

SUPPLEMENTARY INFORMATION: In his Regulatory Reinvention Initiative Memorandum of March 4, 1995, President Clinton directed that Federal agencies conduct a page-by-page review of all of their regulations and "eliminate or revise those that are outdated or otherwise in need of reform." In response to that directive, the Department has undertaken a review of its regulations including its rule

governing the award of attorney fees and other expenses in certain administrative proceedings under the Equal Access to Justice Act (EAJA) (Pub. L. 96-481, 94 Stat. 2325). The Department's regulation is codified at 49 CFR part 6.

In 1983, the Department of Transportation (DOT) published a final regulation implementing EAJA in the administrative adjudicatory context, 48 FR 1068 (January 10, 1983). EAJA, which took effect on October 1, 1981, provides for the award of attorney fees and other expenses to parties who prevail over the Federal Government in certain administrative and court proceedings under section 554 of the Administrative Procedure Act (APA). It requires that agencies conducting proceedings under section 554 establish uniform procedures for making awards.

DOT's final rule, 49 CFR part 6, therefore, established uniform procedures under the EAJA for any adversary adjudications conducted pursuant to section 554 by this Department or any of its operating administrations. As noted in the Department's regulation, currently three types of proceedings are specifically covered by the regulation; namely, Coast Guard license, certificate or document suspension and revocation proceedings, National Highway Traffic Safety Administration (NHTSA) fuel economy enforcement proceedings, and the Federal Highway Administration (FHWA) driver qualification and compliance order proceedings.

Since DOT adopted its final rule in 1983, Congress has amended EAJA on a number of occasions in several respects. After reviewing these statutory changes, DOT has determined that its regulation needs to be revised to ensure that it comports with the current statutory requirements. DOT accordingly is proposing to modify the following sections of its rule:

(a) § 6.1 Purpose of these rules.

The second sentence of this section presently provides:

An eligible party may receive an award when it prevails over the Department of Transportation or any of its operating administrations unless the agency's position in the proceeding was substantially justified or special circumstances make an award unjust.

The Department is proposing to delete this sentence. These standards do not completely reflect the currently-applicable requirements given various statutory changes that have been made to 5 U.S.C. 504 since 1983. In place of this sentence, as discussed below, the Department is proposing to revise section 6.9. This section, as revised, would set forth, in some detail, the

statutory standards that now govern the granting of awards and expenses.

(b) § 6.3 When the Act applies.

This section currently provides:

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

This limitation was included in the Department's final rule because the statute as it was originally enacted was only to be effective for the period October 1, 1981 to October 1, 1984, on which date it was to expire pursuant to a repealer under section 203(c) of Pub. L. 96-481. That repealer, however, was itself repealed pursuant to section 6 of Pub. L. 99-80. Additionally, as discussed below, new standards governing awards were enacted pursuant to Pub. L. 104-121 effective March 29, 1996. Consequently, the Department is proposing to delete the current version of § 6.3, and retitle and restate that section to read as follows:

§ 6.3 Applicability.

Section 6.9(a) applies to any adversary adjudication pending before the Department on or after October 1, 1981. In addition, applicants for awards must also meet the standards of § 6.9(b) for any adversary adjudication commenced on or after March 29, 1996.

(c) § 6.5 Proceedings covered.

This section identifies various proceedings that are, and are not, subject to the Department's regulation. Currently, three specific types of proceedings are specifically identified as being covered by the Department's regulation; namely, (a) U.S. Coast Guard suspension or revocation of licenses, certificates or document proceedings, (b) National Highway Traffic Safety Administration fuel economy enforcement proceedings, and (c) Federal Highway Administration driver qualification and compliance order proceedings. However, this list is not exclusive and additional Departmental proceedings that satisfy the criteria in this Part can also be covered.

The Department is proposing to add an several additional proceedings to this list. First, the Department is proposing to amend § 6.5 to make it clear that its regulation is intended to encompass its aviation economic enforcement proceedings conducted by its Office of Aviation Enforcement and Proceedings. The Department, hence, is proposing to add the following language to § 6.5:

and the Department's aviation economic enforcement proceedings conducted by its

Office of Aviation Enforcement and Proceedings, 49 U.S.C. Subtitle VII, 14 CFR Chapter II.

The Department is taking this action to add these aviation enforcement proceedings in view of its decision, in a separate rulemaking, to terminate a nearly duplicative rule, 14 CFR part 373, that until now has covered these aviation enforcement proceedings. The Department inherited part 373 from the now-defunct Civil Aeronautics Board in 1985 as a result of the shut down of that agency, and the transfer of that agency's remaining functions to DOT pursuant to the Civil Aeronautics Board Sunset Act of 1984, Public Law 98-443, 98 Stat. 1703. The Department has determined, also as a part of the President's Regulatory Reinvention Initiative, that it makes no sense to retain a totally separate EAJA regulation for its aviation enforcement proceedings.

The Department is also updating the citations for the Coast Guard suspension and revocation proceedings referenced in section 6.5(a). In this regard, the Department is proposing to change the reference to "46 U.S.C. 239" to "46 U.S.C. 7701 *et seq.*" In addition, the Department is proposing to add citations for the three additional Coast Guard proceedings, specifically:

(a) 33 U.S.C. 1321(b)(6)(B)(ii), 33 CFR part 20 (to include class II civil penalties under the Clean Water Act); (b) 42 U.S.C. 9609(b) (to include class II penalty provisions under the Comprehensive Environmental Response, Compensation and Liability Act; and (c) 46 CFR part 401 (to cover suspension and revocation of Certificates of Registry proceedings for Great Lakes Pilots.)

The Department is further proposing to amend § 6.5(a) to take note of the fact that since 1983 Congress has expanded the list of proceedings that are subject to the rule. Specifically, the Department is proposing to add the following language to this section:

Also covered are any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), any hearing conducted under Chapter 38 of title 31, and the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

The inclusion of these additional proceedings is necessitated by section 6 of Pub.L. 95-563, November 1, 1978, 92 Stat. 2385; Pub.L. 99-509, October 8, 1986, 100 Stat. 1948; and Pub.L. 103-141, November 16, 1993, 107 Stat. 1489.

(d) § 6.7 Eligibility of applications. This section sets forth various minimum financial threshold standards, and other criteria, that applicants must satisfy in order to be eligible for an

award. Various changes were made to these standards and criteria pursuant to Pub.L. 99-80, section 1(c)(1), August 5, 1985, 99 Stat. 183, 186. For example, some of the dollar limits have been increased. Accordingly the Department is proposing to amend this section as follows:

(a) Change the words "5 U.S.C.

551(3)" in the second sentence to "5 U.S.C. 504(b)(1)(B)."

(b)(1) Change the words "1 million" to "2 million."

(b)(2) Change the words "5 million" to "7 million."

(b)(5) Change the words "5 million" to "7 million."

In addition, the Department is proposing to add a new § (b)(6), which would state:

(b)(6) For the purposes of section 6.9(b) eligible applicants include small entities as defined in 5 U.S.C. 601.

This change is necessitated by Pub.L. 104-121, March 29, 1996, 104 Stat. 847.

(e) § 6.9 Standards for awards.

Since the Department's adoption of its present EAJA regulation in 1983, Congress has also altered the standards for granting awards. Section 6.9 sets forth the standards that were applicable when DOT adopted its rule. These standards need to be brought up to date. The Department, therefore, is proposing to delete the current version of § 6.9 of its regulation in its entirety and to replace that section with a new § 6.9, which would read as follows:

(a) An eligible applicant may receive an award for fees and expenses incurred by that party in connection with a decision in favor of the applicant in a proceeding covered by this Part, unless the position of the Department over which the applicant has prevailed was substantially justified or special circumstances make the award sought unjust. The burden of proof that an award should not be made to an eligible applicant is on the Department where it has initiated the proceeding. No presumption arises that the Department's position was not substantially justified simply because the Department did not prevail. Whether or not the position of the Department was substantially justified shall be determined on the basis of the administrative record, as a whole, in the adversary adjudication for which fees and other expenses are sought. The "position of the Department" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication may be based.

(b) In the context of a Departmental proceeding to enforce a party's compliance with a statutory or regulatory requirement, if the demand by the Department is substantially in excess of the amount awarded to the government pursuant to the decision of the adjudicative officer and is unreasonable when compared with such

decision, under the facts and circumstances of the case, the adjudicative officer shall award to an eligible applicant party the fees and expenses related to defending against the excessive demand, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance. As used in this section, "demand" means the express demand of the Department which led to the adversary adjudication, but does not include a recitation by the Department of the maximum statutory penalty (i) in the administrative complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(c) The decision of the Department on the application for fees and other expenses shall be the final administrative decision under this section.

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

These changes are necessitated by Pub.L. 99-80, August 5, 1985, 99 Stat. 183, 186; and Pub.L. 104-121, March 29, 1996, 104 Stat. 847.

(f) § 6.11 Allowable fees and expenses.

The Department is proposing to change the figure "\$75.00" in section 6.11(b) to "\$125.00". This is also being done in response to Pub.L. 104-121, March 29, 1996, 104 Stat. 847.

(g) § 6.25 Answer to application.

Finally, § 6.25(c) contains a minor typographical error. Specifically, the words "an identify" should read "and identify". The Department is proposing to correct this error.

Regulatory Analyses and Notices

This NPRM is considered to be a non-significant rulemaking under DOT's regulatory policies and procedures, 44 FR 11034. The NPRM was not subject to review by the Office of Information and Regulatory Affairs pursuant to Executive Order 12866.

The proposal would have minimal economic impact, and accordingly no regulatory evaluation has been prepared. Indeed, the changes that are being proposed here, for the most part, merely track various statutory changes that have been enacted since the Department's adoption of its original final rule in 1983.

The NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. I certify that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities.

This proposal is merely updating the regulation to reflect current statutory requirements.

List of Subjects in 49 CFR Part 6

Administrative practice and proceeding, Transportation.

For the reasons set out in the preamble, 49 CFR part 5 is proposed to be amended as follows:

PART 5—IMPLEMENTATION OF EQUAL ACCESS TO JUSTICE ACT IN AGENCY PROCEEDINGS.

1. The authority citation for part 6 is revised to read as follows:

Authority: 5 U.S.C. 504; 28 U.S.C. 2412.

2. Section 6.1 is amended by removing the second sentence.

3. Section 6.3 is revised to read as follows:

§ 6.3 Applicability.

Section 6.9(a) applies to any adversary adjudication pending before the Department on or after October 1, 1981. In addition, applicants for awards must also meet the standards of § 6.9(b) for any adversary adjudication commenced on or after March 29, 1996.

4. In § 6.5, paragraph (a) is revised to read as follows:

§ 6.5 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by the Department of Transportation. These are adjudications under 5 U.S.C. 554 in which the position of the Department is represented by an attorney or other representative who enters an appearance and participates in the proceeding. Coverage of the Act begins at designation of a proceeding or issuance of a charge sheet. Any proceeding in which the Department may prescribe or establish a lawful present or future rate is not covered by the Act. Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise "adversary adjudications." For the Department of Transportation, the types of proceedings covered include: Coast Guard suspension or revocation of licenses, certificates or documents under 46 U.S.C. 7701 *et seq.*; Coast Guard class II civil penalty proceedings under the Clean Water Act, 33 U.S.C. 1321(b)(6)(B)(ii), Coast Guard class II penalty proceedings under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9609(b); suspension and revocation of Certificates of Registry proceedings for Great Lakes Pilots pursuant to 46 CFR part 401; National

Highway Traffic Safety Administration (NHTSA) fuel economy enforcement under 15 U.S.C. 2001 (49 CFR Part 511); Federal Highway Administration (FHWA) enforcement of motor carrier safety and hazardous materials regulations under 49 U.S.C. 521 and 5123 (49 CFR part 386); the Department's aviation economic enforcement proceedings conducted by its Office of Aviation Enforcement and Proceedings pursuant to 49 U.S.C. Subtitle VII, 14 CFR Chapter II. Also covered are any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), any hearing conducted under Chapter 38 of title 31, and the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

* * * * *

5. In § 6.7, paragraph (a) is amended by replacing the citation "5 U.S.C. 551(3)" with the citation "5 U.S.C. 504(b)(1)(B)"; paragraph (b)(1) is amended by replacing the words "1 million" with the words "2 million"; paragraphs (b)(2) and (b)(5) are amended by replacing the words "5 million" with the words "7 million"; and paragraph (b)(6) is added to read as follows:

§ 6.7 Eligibility of applications.

* * * * *

(b) * * *

(6) For the purposes of section 6.9(b) eligible applicants include small entities as defined in 5 U.S.C. 601.

* * * * *

6. Section 6.9, is revised to read as follows:

§ 6.9 Standards for awards.

(a) An eligible applicant may receive an award for fees and expenses incurred by that party in connection with a decision in favor of the applicant in a proceeding covered by this part, unless the position of the Department over which the applicant has prevailed was substantially justified or special circumstances make the award sought unjust. The burden of proof that an award should not be made to an eligible applicant is on the Department where it has initiated the proceeding. No presumption arises that the Department's position was not substantially justified simply because the Department did not prevail. Whether or not the position of the Department was substantially justified shall be determined on the basis of the administrative record, as a whole, in the adversary adjudication for which fees and other expenses are sought. The "position of the Department" means, in

addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication may be based.

(b) In the context of a Departmental proceeding to enforce a party's compliance with a statutory or regulatory requirement, if the demand by the Department is substantially in excess of the amount awarded to the government pursuant to the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to an eligible applicant party the fees and expenses related to defending against the excessive demand, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance. As used in this section, "demand" means the express demand of the Department which led to the adversary adjudication, but does not include a recitation by the Department of the maximum statutory penalty (1) in the administrative complaint, or (2) elsewhere when accompanied by an express demand for a lesser amount.

(c) The decision of the Department on the application for fees and other expenses shall be the final administrative decision under this section.

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

§ 6.11 [Amended]

7. In § 6.11, paragraph (b) is amended by replacing the figure "\$75.00" with the figure "\$125.00".

§ 6.25 [Amended]

8. In § 6.25, paragraph (c) is amended by replacing the words "an identify" with the words "and identify".

Issued this 31st day of May, 1996 at Washington, D.C.

Federico Peña,

Secretary of Transportation.

[FR Doc. 96-14245 Filed 6-5-96; 8:45 am]

BILLING CODE 4910-62-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding for a Petition To List the Northern Goshawk in the Western United States

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and vacation of the June 25, 1992, finding.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces a 90-day finding for a petition to list the northern goshawk (*Accipiter gentilis*) in the Western United States under the Endangered Species Act, as amended. The Service has determined that the petition does not present substantial information that listing the northern goshawk in the Western United States may be warranted. The Service also vacates the previous June 25, 1992, finding for the same petitioned action.

DATES: The finding announced in this document was made on May 28, 1996.

ADDRESSES: Information, comments, or questions concerning this petition may be submitted to the Supervisor, Arizona Ecological Services Field Office, U.S. Fish and Wildlife Service, 2321 W. Royal Palm Rd., Suite 103, Phoenix, Arizona 85021. The petition, finding, and supporting data are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Sam Spiller, Supervisor (see **ADDRESSES** above) (telephone 602/640-2720).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and notice of the finding is to be published promptly in the Federal Register. If a finding is made that substantial information was presented, the Service also is required to promptly commence a review of the status of the species involved.

On September 26, 1991, a coalition of conservation organizations (Babbitt *et al.* 1991) submitted a letter to the

Service, requesting to amend a petition under consideration by the Service to list a population of northern goshawk (*Accipiter gentilis*) as endangered in Utah, Colorado, New Mexico, and Arizona (Silver *et al.* 1991). The coalition requested expanding the geographic region under consideration to include the "forested west." The petitioners subsequently refined their definition of the "forested west" to mean the forested United States, west of the 100th meridian. Because this letter requested consideration of a substantially different listing action than the previous petition, the Service informed the petitioners that their letter would be considered a separate petition.

On June 25, 1992, the Service published a 90-day finding that the petition had not presented substantial information to indicate that the petitioned action may be warranted. The petitioners subsequently filed a lawsuit to have the finding set aside as arbitrary and capricious under the Administrative Procedures Act. On February 22, 1996, U.S. District Judge Richard M. Bilby found the June 25, 1992 finding to be arbitrary and capricious and remanded the finding to the Service for a new 90-day determination and vacation of the previous finding. This notice serves to inform the public of the Service's new 90-day finding and vacates the Service's June 25, 1992 finding.

A species that is in danger of extinction throughout all or a significant portion of its range may be declared an endangered species under the Act. A species that is likely to become an endangered species in the foreseeable future (as defined above) throughout all or a significant portion of its range may be declared a threatened species under the Act. The term "species" is defined by the Act to include "* * * subspecies * * * and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature * * *" (16 U.S.C. 1532 (15)).

In reviewing a listing petition, the Service must determine whether the petitioned action includes an entity that is listable under the Act, and, if so, whether the petition presented substantial information that the petitioned action may be warranted. In this case, the Service must consider whether northern goshawks west of the 100th meridian constitute a distinct population segment under 16 U.S.C. 1532 (15). In making this determination, the Service relies upon the National Marine Fisheries Service and Fish and Wildlife Service final Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the