

# Proposed Rules

Federal Register

Vol. 75, No. 146

Friday, July 30, 2010

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### 7 CFR Part 1

RIN 0503-AA42

#### Office of the Secretary: Procedures Relating to Awards Under the Equal Access to Justice Act

AGENCY: Office of the Secretary, USDA.

ACTION: Proposed rule.

**SUMMARY:** The U.S. Department of Agriculture (USDA) proposes to amend its regulations implementing the Equal Access to Justice Act (EAJA), which provides to certain parties in adversary agency adjudications reimbursement for attorney fees and other expenses under limited circumstances. In this document, USDA is proposing to raise the hourly fee.

**DATES:** In order to be considered, comments should be submitted within September 28, 2010.

**ADDRESSES:** You may submit comments, identified by RIN 0503-AA42, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* [adam.hermann@ogc.usda.gov](mailto:adam.hermann@ogc.usda.gov). Include RIN 0503-AA42 in the subject line of the message.

- *Fax:* 202-720-5837.

- *Mail:* Paper, disk or CD-ROM submissions should be submitted to Adam J. Hermann, Esq., General Law Division, Office of the General Counsel, USDA, STOP 1415, 1400 Independence Avenue, SW., Washington, DC 20250.

- *Hand Delivery/Courier:* Adam J. Hermann, Esq., General Law Division, Office of the General Counsel, USDA, South Building Room 3311, 1400 Independence Ave., SW., Washington, DC 20250.

**Instructions:** All submissions received must include the agency name and the RIN for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

#### FOR FURTHER INFORMATION CONTACT:

Adam J. Hermann, Esq., Attorney Advisor, General Law Division, Office of the General Counsel, South Building Room 3311, USDA, 1400 Independence Ave., SW., Washington, DC 20250; Voice: (202) 720-9425; E-mail: [adam.hermann@ogc.usda.gov](mailto:adam.hermann@ogc.usda.gov).

**SUPPLEMENTARY INFORMATION:** The Equal Access to Justice Act (EAJA), 5 U.S.C. 504, provides to certain parties in adversary agency adjudications reimbursement for attorney fees and other expenses under limited circumstances. In the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104-121, Title II, § 231 (1996), Congress amended EAJA at 5 U.S.C. 504(b)(1)(A) by raising the hourly maximum attorney fees rate from \$75.00 per hour to \$125.00 per hour. EAJA also permits agencies to increase the maximum if “the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.” Departmental rules at 7 CFR 1.186 currently set the maximum EAJA attorney fees at \$125.00 per hour. Section 1.187 provides for informal rulemaking to adjust the maximum rates for attorney fees.

On September 29, 2008, USDA received a Petition for Rulemaking (PFR) filed by Public Citizen Litigation Group, Five Points Road Joint Venture, and Charles Brown, Esq., under the provisions of 7 CFR 1.187 and 1.28. The PFR seeks an increase in the maximum attorney fees payable based on the U.S. Department of Labor Consumer Price All-Items Index for All Urban Consumers. In brief, the petitioners seek an automatic escalator clause using 1996 as the base year and \$125.00 per hour as the base year maximum fee. The petitioners would have the escalated amount apply to all pending and future covered proceedings before USDA.

USDA has considered the petitioners’ request, its rationale, and the practice before other Federal agencies and the Federal courts. The PFR emphasizes that Federal courts uniformly apply an escalator clause based upon the cost of living index under the parallel provision for EAJA fee reimbursement in 28 U.S.C. 2412, the analogue to 5 U.S.C. 504 applicable in Federal judiciary proceedings. USDA does not

necessarily believe that the practice of the Federal courts in this regard should be controlling in light of the fact that the majority of Federal agencies have retained the statutory maximum of \$125.00 per hour in administrative proceedings.

However, USDA does recognize that inflation has eroded the value of the \$125.00 per hour fee set by Congress in 1996. Therefore, USDA is proposing to raise the hourly fee set forth in 7 CFR 1.186 from \$125.00 to \$150.00, to be applicable to covered proceedings initiated on and after the effective date of the publication of this regulation in final form.

This proposed rule has been reviewed under Executive Order No. 12866 and has been determined not to be a “significant regulatory action.” This proposed rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; nor will it materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; nor will it have an annual effect on the economy of \$100 million or more; nor will it adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way. Furthermore, it does not raise a novel legal or policy issue arising out of legal mandates, the President’s priorities or principles set forth in the Executive Order.

USDA certifies that this rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Public Law 96-534, as amended (5 U.S.C. 601 *et seq.*).

USDA has determined that the provisions of the Paperwork Reduction Act, as amended, (44 U.S.C. 3501 *et seq.*), do not apply to any collections of information contained in this rule because any such collections of information are made during the conduct of administrative action involving an agency against specific individuals or entities. 5 CFR 1320.4(a)(2).

#### List of Subjects in 7 CFR Part 1

Administrative practice and procedure.

Accordingly, USDA proposes to amend Title 7 of the Code of Federal Regulations as follows:

## PART 1—ADMINISTRATIVE REGULATIONS

1. The authority for part 1 continues to read as follows:

**Authority:** 5 U.S.C. 301, unless otherwise noted.

### Subpart J—Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department

2. Amend § 1.186 by revising paragraph (b) to read as follows:

#### § 1.186 Allowable fees and expenses.

\* \* \* \* \*

(b) In proceedings commenced on or after the effective date of this paragraph, no award for the fee of an attorney or agent under the rules in this subpart may exceed \$150 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at § 1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

\* \* \* \* \*

3. Amend § 1.187 by revising paragraph (a) to read as follows:

#### § 1.187 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Department may adopt regulations providing that attorney fees may be awarded at a rate higher than \$150 per hour in some or all of the types of proceedings covered by this part. The Department will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

\* \* \* \* \*

Done at Washington, DC, July 13, 2010.

**Thomas J. Vilsack,**

*Secretary of Agriculture.*

[FR Doc. 2010-18099 Filed 7-29-10; 8:45 am]

**BILLING CODE 3410-90-P**

## DEPARTMENT OF ENERGY

### 10 CFR Part 707

[Docket No. HS-RM-10-WSAP]

RIN 1992-AA41

### Request for Information Regarding Workplace Substance Abuse Programs for Department of Energy Contractors

**AGENCY:** Office of Health, Safety and Security, Department of Energy.

**ACTION:** Request for information.

**SUMMARY:** The Department of Energy (DOE or the Department) requests information and comments on issues related to workplace substance abuse programs for its contractor employees. Specifically, the Department solicits comment and information on the addition of anabolic steroids and other drugs to its randomized drug testing program; the availability of analytical testing methods for anabolic steroids; whether alcohol and certain prescription and over-the-counter medications and/or supplements should be added to the substance abuse program; whether medical review officers should obtain and maintain certification; and other pertinent subjects. The information received in response to this request will assist DOE in determining the appropriate course of action in developing an amendment to the current substance abuse program for its contractor and subcontractor employees.

**DATES:** All comments on this issue presented in this document must be received by the Department by October 28, 2010.

**ADDRESSES:** Comments in response to this document may be submitted by hardcopy or electronically through e-mail. Hardcopies (2 copies) sent by regular mailing should be addressed to: Jacqueline D. Rogers, Office of Health, Safety and Security, Office of Worker Safety and Health Policy, Docket No. HS-RM-10-WSAP, 1000 Independence Avenue, SW., Washington, DC 20585.

Electronic submissions may be sent to [jackie.rogers@hq.doe.gov](mailto:jackie.rogers@hq.doe.gov). If you have additional information, such as studies or journal articles, and cannot attach them to your electronic submission, please send 2 copies to the address above. The additional material must clearly identify your electronic comments by name, date, subject, and Docket No. HS-RM-10-WSAP.

**FOR FURTHER INFORMATION CONTACT:** Jacqueline D. Rogers, U.S. Department of Energy, Office of Health, Safety and Security, Office of Worker Safety and

Health Policy, 1000 Independence Avenue, SW., Washington, DC 20585, 202-586-4714, or [jackie.rogers@hq.doe.gov](mailto:jackie.rogers@hq.doe.gov).

Electronic copies of this **Federal Register** notice, as well as other relevant DOE documents concerning this issue, will be available on a Web page at: <http://www.hss.energy.gov/healthsafety/WSHP/rule851/rule707.html>.

## SUPPLEMENTARY INFORMATION:

### I. Background

Pursuant to DOE's statutory authorities, including the Atomic Energy Act of 1954, as amended, and the Drug-Free Workplace Act of 1988, DOE promulgated a rule on July 22, 1992, on DOE contractor workplace substance abuse programs (57 FR 32652). The rule established minimum requirements for DOE contractors and subcontractors performing work at DOE sites to use in developing and implementing programs that deal with the use of illegal drugs by their employees. The minimum requirements address: (1) Prohibition on the use, possession, sale, distribution, or manufacture of illegal drugs; (2) education and training; (3) testing of certain employees in sensitive positions; (4) employee assistance; (5) removal, discipline, treatment, and rehabilitation of employees; and (6) notification to DOE. The rule provides for drug testing of contractor employees in, and applicants for, testing designated positions (TDP) at sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended. The Department determined that possible risks of harm to the environment and to public health, safety, and national security justified the imposition of a uniform rule establishing a baseline workplace substance abuse program, including drug testing.

Currently, the Department is considering more stringent requirements in various areas of the workplace substance abuse programs for its contractor. The Department urges those individuals interested in this issue to provide responses to the questions provided in this document.

### II. Questions for Comment

The Department is especially interested in answers supported by evidence and rationale whenever possible to the questions below. When providing a response, please key your response to the number of the question.

1. Currently, DOE contractors and subcontractors performing work on DOE sites conduct randomized drug testing for the following drugs or classes of