List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Amend § 165.1181 by revising paragraphs(c)(1)(ii)(C)(3), (c)(5), (c)(6)(ii), (c)(7), (e)(1)(ii)(E), (e)(2)(i) and (ii) and (e)(3) to read as follows:

§ 165.1181 San Francisco Bay Region, California—regulated navigation area.

* * * * *

(c) * * *

(1) * * *

(ii) * * *

(C) * * *

(3) Deep Water (two-way) Traffic Lane: Bounded by the Central Bay precautionary area and the Golden Gate precautionary area, between the Deep Water Traffic Lane separation zone and a line connecting the following coordinates, beginning at:

* * * * *

(5) *Benicia-Martinez Railroad Drawbridge Regulated Navigation Area (RNA)*: The following is a regulated navigation area—The waters bounded by the following longitude lines:

(i) 122°13′31″ W (coinciding with the charted location of the Carquinez Bridge)

(ii) 121°53′17″ W (coinciding with the charted location of New York Point)

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(6) * * *

(ii) The waters bounded by a line connecting the following coordinates, beginning at:

37°54′28″ N, 122°23′36″ W; thence to 37°54′20″ N, 122°23′38″ W; thence to 37°54′23″ N, 122°24′02″ W; thence to 37°54′57″ N, 122°24′51″ W; thence to 37°55′05″ N, 122°25′02″ W; thence to 37°54′57″ N, 122°25′22″ W; thence to 37°53′26″ N, 122°25′03″ W; thence to 37°53′24″ N, 122°25′13″ W; thence to 37°55′30″ N, 122°25′35″ W; thence to 37°55′40″ N, 122°25′10″ W; thence to 37°54′54″ N, 122°24′30″ W; thence to 37°54′30″ N, 122°24′00″ W; thence returning to the point of beginning.

Datum: NAD 83

(7) *Oakland Harbor RNA*: The following is a regulated navigation area—The waters bounded by a line connecting the following coordinates, beginning at:

37°48′40″ N, 122°19′58″ W; thence to 37°48′50″ N, 122°20′02″ W; thence to 37°48′29″ N, 122°20′39″ W; thence to 37°48′13″ N, 122°21′26″ W; thence to 37°48′10″ N, 122°21′39″ W; thence to 37°48′20″ N, 122°22′12″ W; thence to 37°47′36″ N, 122°21′50″ W; thence to 37°47′52″ N, 122°21′40″ W; thence to 37°48′03″ N, 122°21′00″ W; thence to 37°47′48″ N, 122°19′46″ W; thence to 37°47′55″ N, 122°19′43″ W; thence returning along the shoreline to the point of the beginning.

Datum: NAD 83

* * * * *

(e) * * *

(1) * * *

(ii) * * *

(E) So far as practicable keep clear of the Central Bay Separation Zone and the Deep Water Traffic Lane Separation Zone;

* * * * *

(2) * * *

(i) A vessel less than 1600 gross tons or a tug with a tow of less than 1600 gross tons is not permitted within this RNA.

(ii) A power-driven vessel of 1600 or more gross tons or a tug with a tow of 1600 or more gross tons shall not enter Pinole Shoal Channel RNA when another power-driven vessel of 1600 or more gross tons or tug with a tow of 1600 or more gross tons is navigating therein if such entry would result in meeting, crossing, or overtaking the other vessel, when either vessel is:

(A) Carrying certain dangerous cargoes (as denoted in § 160.203 of this subchapter);

(B) Carrying bulk petroleum products; or

(C) A tank vessel in ballast.

* * * * *

(3) *Benicia-Martinez Railroad Drawbridge Regulated Navigation Area (RNA)*:

(i) Eastbound vessels:

(A) The master, pilot, or person directing the movement of a power-driven vessel of 1600 or more gross tons or a tug with a tow of 1600 or more gross tons traveling eastbound and intending to transit under the lift span (centered at coordinates 38°02′18″ N, 122°07′17″ W) of the railroad bridge across Carquinez Strait at mile 7.0 shall, immediately after entering the RNA, determine whether the visibility around the lift span is ½ nautical mile or greater.

(B) If the visibility is less than ½ nautical mile, or subsequently becomes less than ½ nautical mile, the vessel shall not transit under the lift span.

(ii) Westbound vessels:

(A) The master, pilot, or person directing the movement of a power-driven vessel of 1600 or more gross tons or a tug with a tow of 1600 or more gross tons traveling westbound and intending to transit under the lift span (centered at coordinates 38°02′18″ N, 122°07′17″ W) of the railroad bridge across Carquinez Strait at mile 7.0 shall, immediately after entering the RNA determine whether the visibility around the lift span is ½ nautical mile or greater.

(B) If the visibility is less than ½ nautical mile, the vessel shall not pass beyond longitude line 121°55′19″ W (coinciding with the charted position of the westernmost end of Mallard Island) until the visibility improves to greater than ½ nautical mile around the lift span.

(C) If after entering the RNA visibility around the lift span subsequently becomes less than ½ nautical mile, the master, pilot, or person directing the movement of the vessel either shall not transit under the lift span or shall request a deviation from the requirements of the RNA as prescribed in paragraph (b) of this section.

(D) Vessels that are moored or anchored within the RNA with the intent to transit under the lift span shall remain moored or anchored until visibility around the lift span becomes greater than ½ nautical mile.

Dated: December 17, 2003.

Kevin J. Eldridge,

Rear Admiral, U.S. Coast Guard, Commander, Eleventh Coast Guard District.

[FR Doc. 04–1266 Filed 1–20–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 13

Implementation of the Equal Access to Justice Act in Agency Proceedings

AGENCY: Office of the Secretary, HHS.

ACTION: Final rule.

SUMMARY: This final rule amends the Department's regulations under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, to conform with statutory amendments to the EAJA and reflect the separation of the Social Security Administration from HHS.

EFFECTIVE DATE: This final rule will be effective on February 20, 2004.

FOR FURTHER INFORMATION CONTACT: Katherine M. Drews, Associate General Counsel, 330 Independence Ave., SW., Cohen Building, Room 4760, Washington, DC 20201. Telephone: (202) 619–0150.

SUPPLEMENTARY INFORMATION:

Background

The Department published a Notice of Proposed Rulemaking on August 13, 2002 at 67 FR 52696, to amend its existing regulation implementing the EAJA. The Department solicited comments on the proposed rule, but did not receive any. Accordingly, the Department publishes the proposed rule as a final rule without changes.

The EAJA, enacted in 1980, requires the Government to pay attorney fees to parties prevailing against it in litigation where the Government's position is not substantially justified. The Act applies to certain types of adversary administrative proceedings and to certain court litigation where attorney fees are not otherwise available.

The EAJA requires each agency to issue rules implementing the Act as it applies to administrative proceedings. The current rule of the Department of Health and Human Services (HHS) was published on October 4, 1983, and is codified at 45 CFR part 13. (All citations below to section 13 are to sections of 45 CFR part 13.)

The original Act had a sunset provision, causing it to expire on September 30, 1984 (although it would continue to cover proceedings pending on that date). The HHS regulation presently in effect contains a similar sunset provision. A subsequent statutory change eliminated the sunset provision in the Act, revised the eligibility criteria for parties, and amended the Act in certain other respects. Pub. L. 99–80, 99 Stat. 183 (1985).

Since publication of the current regulation, the Social Security Administration has become an independent agency. Also, the EAJA was further amended by section 231 of the Contract with America Advancement Act of 1996, Pub. L. 104–121, 110 Stat. 847, 862–63 (1996).

This final rule amends the existing regulation in the following ways:

1. The Act provided for fee shifting only where the agency's position was not substantially justified. Pub. L. 104–121 added a provision for fee shifting where the agency's demand was substantially in excess of the ultimate decision and was unreasonable when compared with that decision. The final regulation amends section 13.1, and revises sections 13.5 and 13.10(a)(2), to incorporate this new basis for fee awards. Pub. L. 104–121 also added a new category of party that would be eligible for a fee award, though only for awards made based on this excessive and unreasonable demand criterion. The final rule amends sections 13.4; 13.10(a)(3), (5); and 13.11(a) to the same effect.

2. The Act included a sunset clause, section 203(c), providing that the Act would not apply to administrative adjudications initiated after September 30, 1984. HHS's existing regulation includes a similar provision, 45 CFR 13.2. Section 6(b)(1) of Pub. L. 99–80 repealed the sunset provision in the Act. The final rule similarly amends section 13.2.

3. Section 13.3 in the existing regulation generally provides that we have listed the covered proceedings in the Appendix to the rule. The final rule revises section 13.3 to cover proceedings not listed in the Appendix to the rule. The new rule automatically covers proceedings where the procedural rights are incorporated by reference from certain statutes that we have already determined invoke the Act. It also allows a party in any other administrative proceeding to file an EAJA application and claim coverage, and have the issue resolved in the resulting proceeding on the fee application.

4. Section 1(c)(1) of Pub. L. 99–80 increased the net worth limitations on parties eligible to recover fees under EAJA. It also added local government units to the categories of eligible entities. Section 7 of Pub. L. 99–80 makes these expanded eligibility criteria applicable to proceedings pending on or after August 5, 1985 (the effective date of that statute), and to proceedings commenced after September 30, 1984 (the sunset date of the original EAJA), even if finally disposed of before August 5, 1985. The final rule amends sections 13.4(b) and 13.10(a)(5) to make the same changes with respect to the same categories of cases. The passage of time has made it unnecessary to provide explicitly for older cases. However, for proceedings commenced before October 1, 1984, and finally decided before August 5, 1985, the older eligibility criteria governs, as follows: Individuals with a net worth of not more than $1 million; sole owners of unincorporated businesses if the owner has a net worth of not more than $5 million, including both personal and business interests, and if the business has no more than 500 employees; and all other partnerships, corporations, associations, or public or private organizations with a net worth of not more than $5 million and with not more than 500 employees.

5. Section 1(c)(3) of Pub. L. 99–80 defines the ''position of the agency'' to include the action or omission that was the basis for the proceeding, and section 1(a)(1) restricts the analysis of whether that position was substantially justified to the administrative record. The final rule revises sections 13.5(a) and 13.10(a)(2) likewise, and it also amends section 13.25(a) to the same end.

6. We no longer take the position that the applicant must have actually paid (or must have actually become obligated to pay) the attorney fees and expenses in order to recover those fees and expenses under EAJA. Accordingly, the final rule deletes the sentence in Section 13.6(a) that stated this position.

7. Pub. L. 104–121 increased the allowable hourly rate for fees from $75 to $125. The final rule amends section 13.6(b) to the same effect.

8. The final rule amends section 13.12(d) to make clear that the adjudicative officer may require further substantiation of fees as well as expenses.

9. The EAJA and the HHS regulation require the prevailing party to file the fee application within 30 days of the final disposition of the administrative proceeding. 5 U.S.C. 504(a)(2); 45 CFR 13.22(a). Section 7(b) of Pub. L. 99–80 provides that, in cases commenced after September 30, 1984 (the sunset date of the original EAJA), and finally disposed of before August 5, 1985 (the effective date of the new law), this 30-day period runs from the latter date. The final rule amends section 13.22(a) to this effect.

10. Section 1(b) of Pub. L. 99–80 provides that when the Government appeals the merits of a proceeding, any fee application is stayed until the appeal is finally resolved, and it specifies that a court decision is deemed to finally dispose of such an appeal only when that decision is final and unreviewable. There is a similar, but more inclusive, stay provision in section 13.22(d). The final rule amends sections 13.22(b) and (d) to conform with the statute. The final rule also revises section 13.23(a) to make clear that, when a fee proceeding is stayed in these circumstances, the agency need answer the fee application only after the final disposition of the underlying controversy.

11. The final rule revises section 13.27 to designate as the review authority on fee decisions the same person or component that would have jurisdiction over an appeal of the merits of the adjudication. It eliminates as unnecessary the requirement that the

appellate authority review fee awards where neither party appeals. It also revises section 13.27(b) to provide for cross-exceptions to be filed from an initial decision on a fee application.

12. Appendix A to the regulation lists the HHS proceedings that are covered by the regulation if the agency's litigating party enters an appearance and participates. The final rule revises the appendix to correct descriptions of categories of proceedings, to correct statutory citations for categories of proceedings, to add regulatory citations for categories, and to add new categories of proceedings that are covered.

13. We interpret the EAJA to include certain HHS proceedings for which the statutory entitlement to a hearing rests either on a statute tracking the language Section 205(b) of the Social Security Act (42 U.S.C. 405(b)) or on a statute incorporating that provision by reference and for which the position of the United States is represented by counsel or otherwise. This interpretation is further supported by the legislative history of Pub. L. 99–80, discussing analogous hearings conducted under the Social Security Administration Representation Project, which was discontinued in 1987. Thus, the final rule adds certain HHS proceedings to Appendix A.

Economic Impact

We have examined the impacts of this final rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980 Pub. L. 96–354), the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132 (Federalism).

Executive Order 12866 (the Order) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects ($100 million or more in any 1 year).

We have determined that the final rule is consistent with the principles set forth in the Order, and we also find that the final rule would not have economically significant effects. In addition, the rule is not a major rule as defined at 5 U.S.C. 804(2). In accordance with the provisions of the Order, this regulation was reviewed by the Office of Management and Budget.

The Secretary certifies that this regulation will not have a significant economic impact on a substantial number of small entities. The basis for the Secretary's certification is that, although small entities are eligible to apply for awards, the regulation will apply only to a small number of the proceedings held by the Department each year, and, in many of those proceedings, there will not be any fee award because the Department's position will be substantially justified or its demand will be reasonable. Also, most of the changes reflected in the regulation are mandated by the statute, so it is the statute rather than the regulation that would have any impact. Finally, the procedures prescribed by the regulation are no more onerous than those imposed by the current rule. In sum, the regulation will have negligible effect on such entities.

The Secretary states, in accordance with section 3(c) of Executive Order 12988 (Civil Justice Reform), that the Department has reviewed this final rule in light of section 3 of that Order and that the rule meets the applicable standards in subsections (a) and (b) of that Order.

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million. As noted above, we find that this final rule would not have an effect of this magnitude on the economy.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this final rule under the threshold criteria of Executive order 13132, and we find that there would be no substantial direct effect on the States, on the relationship between the States and the national Government, or on the distribution of power between the levels of government on our federal system. Thus, a federalism impact statement is not required.

Information Collection

In the Notice of Proposed Rulemaking, we solicited comments on the information collection requirements found in proposed sections 13.10, 13.11, and 13.12. We received no comments. We have reconsidered the collection and find that the collection falls within the exception to the Paperwork Reduction Act of 1995 (PRA) at 44 U.S.C. 3518(c)(1)(ii) and in the Office of Management and Budget implementing regulations at 5 CFR 1320.4(a)(2) for collections of information during the conduct of a civil action to which the United States or any official or agency is a party, or during the conduct of an administrative action involving an agency against specific individuals or entities. Therefore, the final rule does not contain information collection requirements covered by the PRA.

List of Subjects in 45 CFR Part 13

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

■ For the reasons set out in the preamble, the Secretary amends 45 CFR part 13 as follows:

PART 13—[AMENDED]

■ 1. The authority citation for part 13 is revised to read as follows:

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

■ 2. In § 13.1, the third sentence is revised to read as follows:

§ 13.1 Purpose of these rules.

* * * The Department may reimburse parties for expenses incurred in adversary adjudications if the party prevails in the proceeding and if the Department's position in the proceeding was not substantially justified or if the action is one to enforce compliance with a statutory or regulatory requirement and the Department's demand is substantially in excess of the ultimate decision and is unreasonable when compared with that decision. * * *

■ 3. Section 13.2 is revised to read as follows:

§ 13.2 When these rules apply.

These rules apply to adversary adjudications before the Department.

■ 4. Section 13.3 is amended by removing the last sentence in paragraph (a), by redesignating paragraph (b) as paragraph (c), and by adding a new paragraph (b) as follows:

§ 13.3 Proceedings covered.

* * * * *

(b) If the agency's litigating party enters an appearance, Department proceedings listed in Appendix A to this part are covered by these rules. Also covered are any other proceedings under statutes that incorporate by reference the procedures of sections 1128(f), 1128A(c)(2), or 1842(j)(2) of the Social Security Act, 42 U.S.C. 1320a–7(f), 1320a–7a(c)(2), or 1395u(j)(2). If a proceeding is not covered under either

of the two previous sentences, a party may file a fee application as otherwise required by this part and may argue that the Act covers the proceeding. Any coverage issue shall be determined by the adjudicative officer and, if necessary, by the appellate authority on review.

* * * * *

■ 5. Section 13.4(b) is revised to read as follows:

§ 13.4 Eligibility of applicants.

* * * * *

(b) The categories of eligible applicants are as follows:

(1) Charitable or other tax-exempt organizations described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(2) Cooperative associations as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees;

(3) Individuals with a net worth of not more than $2 million;

(4) Sole owners of unincorporated businesses if the owner has a net worth of not more than $7 million, including both personal and business interests, and if the business has not more than 500 employees;

(5) All other partnerships, corporations, associations, local governmental units, and public and private organizations with a net worth of not more than $7 million and with not more than 500 employees; and

(6) Where an award is sought on the basis stated in § 13.5(c) of this part, small entities as defined in 5 U.S.C. 601.

* * * * *

■ 6. Section 13.5 is amended by redesignating paragraphs (a) through (d) as paragraphs (b)(1) through (b)(4), respectively; adding new paragraph (a) and a paragraph (b) heading; revising newly designated paragraph (b)(1); and adding a new paragraph (c) to read as follows:

§ 13.5 Standards for awards.

(a) An award of fees and expenses may be made either on the basis that the Department's position in the proceeding was not substantially justified or on the basis that, in a proceeding to enforce compliance with a statutory or regulatory requirement, the Department's demand substantially exceeded the ultimate decision and was unreasonable when compared with that decision. These two bases are explained in greater detail in paragraphs (b) and (c) of this section.

(b) *Awards where the Department's position was not substantially justified.*

(1) Awards will be made on this basis only where the Department's position in the proceeding was not substantially justified. The Department's position includes, in addition to the position taken by the agency in the proceeding, the agency action or failure to act that was the basis for the proceeding. Whether the Department's position was substantially justified is to be determined on the basis of the administrative record as a whole. The fact that a party has prevailed in a proceeding does not create a presumption that the Department's position was not substantially justified. The burden of proof as to substantial justification is on the agency's litigating party, which may avoid an award by showing that its position was reasonable in law and fact.

* * * * *

(c) *Awards where the Department's demand was substantially excessive and unreasonable.*

(1) Awards will be made on this basis only where the adversary adjudication arises from the Department's action to enforce a party's compliance with a statutory or regulatory requirement. An award may be made on this basis only if the Department's demand that led to the proceeding was substantially in excess of the ultimate decision in the proceeding, and that demand is unreasonable when compared with that decision, given all the facts and circumstances of the case.

(2) Any award made on this basis shall be limited to the fees and expenses that are primarily related to defending against the excessive nature of the demand. An award shall not include fees and expenses that are primarily related to defending against the merits of charges, or fees and expenses that are primarily related to defending against the portion of the demand that was not excessive, to the extent that these fees and expenses are distinguishable from the fees and expenses primarily related to defending against the excessive nature of the demand.

(3) Awards will be denied if the party has committed a willful violation of law or otherwise acted in bad faith, or if special circumstances make an award unjust.

§ 13.6 [Amended]

■ 7. In § 13.6, the second sentence of paragraph (a) is removed and the first sentence of paragraph (b) is amended by removing ''$75.00'' and adding in its place ''$125.00''.

■ 8.–9. In § 13.10, paragraphs (a)(2) and (a)(3) and the first sentence of paragraph (a)(5) introductory text are revised; paragraph (a)(5)(i) is amended by removing the word ''or'' at the end and paragraph (a)(5)(ii) is amended by adding the word ''or'' at the end; and paragraph (a)(5)(iii) is added to read as follows:

§ 13.10 Contents of application.

(a) * * *

(2) Where an award is sought on the basis stated in § 13.5(b) of this part, a declaration that the applicant believes it has prevailed, and an identification of the position of the Department that the applicant alleges was not substantially justified. Where an award is sought on the basis stated in § 13.5(c) of this part, an identification of the statutory or regulatory requirement that the applicant alleges the Department was seeking to enforce, and an identification of the Department's demand and of the document or documents containing that demand;

(3) Unless the applicant is an individual, a statement of the number of its employees on the date on which the proceeding was initiated, and a brief description of the type and purpose of its organization or business. However, where an award is sought solely on the basis stated in § 13.5(c) of this part, the applicant need not state the number of its employees;

* * * * *

(5) A statement that the applicant's net worth as of the date on which the proceeding was initiated did not exceed the appropriate limits as stated in § 13.4(b) of this part. * * *

* * * * *

(iii) It states that it is applying for an award solely on the basis stated in § 13.5(c) of this part, and that it is a small entity as defined in 5 U.S.C. 601, and it describes the basis for its belief that it qualifies as a small entity under that section.

* * * * *

■ 10.–12. Section 13.11(a) is amended by removing the first sentence and adding in its place the sentences reading as follows:

§ 13.11 Net worth exhibits.

(a) Each applicant must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 13.4(f) of this part) when the proceeding was initiated. This requirement does not apply to a qualified tax-exempt organization or cooperative association. Nor does it apply to a party that states that it is applying for an award solely on the basis stated in § 13.5(c) of this part. * * *

* * * * *

■ 13. Section 13.12(d) is revised to read as follows:

§ 13.12 Documentation of fees and expenses.

* * * * *

(d) The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any fees or expenses claimed, pursuant to § 13.25 of this part.

■ 14. Section 13.22 is amended by revising paragraphs (b) and (d), as follows:

§ 13.22 When an application may be filed.

* * * * *

(b) For purposes of this rule, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the agency and to the courts.

* * * * *

(d) If review or reconsideration is sought or taken, whether within the agency or to the courts, of a decision as to which an applicant believes it has prevailed, proceedings on the application shall be stayed pending final disposition of the underlying controversy.

■ 15. In § 13.23(a), the first sentence is removed and two sentences are added in its place to read as follows:

§ 13.23 Responsive pleadings.

(a) The agency's litigating party shall file an answer within 30 calendar days after service of the application or, where the proceeding is stayed as provided in § 13.22(d) of this part, within 30 calendar days after the final disposition of the underlying controversy. The answer shall either consent to the award or explain in detail any objections to the award requested and identify the facts relied on in support of the agency's position. * * *

* * * * *

■ 16. Section 13.25(a) is amended by adding the following sentence at the end:

§ 13.25 Further proceedings.

(a) * * * In no such further proceeding shall evidence be introduced from outside the administrative record in order to prove that the Department's position was, or was not, substantially justified.

* * * * *

■ 17. Section 13.27 is revised to read as follows:

§ 13.27 Agency review.

(a) The appellate authority for any proceedings shall be the official or component that would have jurisdiction over an appeal of the merits.

(b) If either the applicant or the agency's litigating party seeks review of the adjudicative officer's decision on the fee application, it shall file and serve exceptions within 30 days after issuance of the initial decision. Within another 30 days after receipt of such exceptions, the opposing party, if it has not done so previously, may file its own exceptions to the adjudicative officer's decision. The appellate authority shall issue a final decision on the application as soon as possible or remand the application to the adjudicative officer for further proceedings. Any party that does not file and serve exceptions within the stated time limit loses the opportunity to do so.

■ 18. Appendix A to part 13 is revised to read as follows:

Appendix A to Part 13

Proceedings covered	Statutory authority	Applicable regulations
Office of Inspector General		
1. Proceedings to impose civil monetary penalties, assessments, or exclusions from Medicare and State health care programs.	42 U.S.C. 1320a–7a(c)(2); 1320b–10(c); 1395i–3(b)(3)(B)(ii), (g)(2)(A)(i); 1395/(h)(5)(D), (i)(6); 1395m(a)(11)(A), (a)(18), (b)(5)(C), (j)(2)(A)(iii); 1395u(j)(2), (k), (*l*)(3), (m)(3), (n)(3), (p)(3)(A); 1395y(b)(3)(C), (b)(6)(B); 1395cc(g); 1395dd(d)(1)(A), (B); 1395mm(i)(6)(B); 1395nn(g)(3), (4); 1395ss(d); 1395bbb(c)(1); 1396b(m)(5)(B); 1396r(b)(3)(B)(ii), (g)(2)(A)(i); 1396t(i)(3); 11131(c); 11137(b)(2).	42 CFR Part 1003; 42 CFR Part 1005.
2. Appeals of exclusions from Medicare and State health care programs and/or other programs under the Social Security Act.	42 U.S.C. 1320a–7(f); 1395/(h)(5)(D); 1395m(a)(11)(A), (b)(5)(C); 1395u(j)(2), (k), (*l*)(3), (m)(3), (n)(3), (p)(3)(B).	42 CFR Part 1001; 42 CFR Part 1005.
3. Appeal of exclusions from programs under the Social Security Act, for which services may be provided on the recommendation of a Peer Review Organization.	42 U.S.C. 1320c–5(b)(4), (5)	42 CFR Part 1004; 42 CFR Part 1005.
4. Proceedings to impose civil penalties and assessments for false claims and statements.	31 U.S.C. 3803	45 CFR Part 79.
Centers for Medicare & Medicaid Services		
1. Proceedings to suspend or revoke licenses of clinical laboratories.	42 U.S.C. 263a(i); 1395w–2	42 CFR Part 493, Subpart R.
2. Proceedings provided to a fiscal intermediary before assigning or reassigning Medicare providers to a different fiscal intermediary.	42 U.S.C. 1395h(e)(1)–(3)	42 CFR 421.114, 421.128.
3. Appeals of determinations that an institution or agency is not a Medicare provider of services, and appeals of terminations or nonrenewals of Medicare provider agreements.	42 U.S.C. 1395cc(h); 1395dd(d)(1)(A)	42 CFR 489.53(d); 42 CFR Part 498.
4. Proceedings before the Provider Reimbursement Review Board when Department employees appear as counsel for the intermediary.	42 U.S.C. 1395oo	42 CFR Part 405, Subpart R.

Proceedings covered	Statutory authority	Applicable regulations
5. Appeals of CMS determinations that an intermediate care facility for the mentally retarded (ICFMR) no longer qualifies as an ICFMR for Medicaid purposes.	42 U.S.C. 1396i	42 CFR Part 498.
6. Proceedings to impose civil monetary penalties, assessments, or exclusions from Medicare and State health care programs.	42 U.S.C. 1395i–3(h)(2)(B)(ii); 1395*l*(q)(2)(B)(i); 1395m(a)(11)(A), (c)(4)(C); 1395w–2(b)(2)(A); 1395w–4(g)(1), (g)(3)(B), (g)(4)(B)(ii); 1395nn(g)(5); 1395ss(a)(2), (p)(8), (p)(9)(C), (q)(5)(C), (r)(6)(A), (s)(3), (t)(2); 1395bbb(f)(2)(A); 1396r(h)(3)(C)(ii); 1396r–8(b)(3)(B), (C)(ii); 1396t(j)(2)(C); 1396u(h)(2).	42 CFR Part 1003.
7. Appeals of exclusions from Medicare and State health care programs and/or other programs under the Social Security Act.	42 U.S.C. 1395*l*(q)(2)(B)(ii); 1395m(a)(11)(A), (c)(5)(C); 1395w–4(g)(1), (g)(3)(B), (g)(4)(B)(ii).	42 CFR Part 498; 42 CFR 1001.107.
Food and Drug Administration		
1. Proceedings to withdraw approval of new drug applications.	21 U.S.C. 355(e)	21 CFR Part 12; 21 CFR 314.200.
2. Proceedings to withdraw approval of new animal drug applications and medicated feed applications.	21 U.S.C. 360b(e), (m)	21 CFR Part 12; 21 CFR Part 514, Subpart B.
3. Proceedings to withdraw approval of medical device premarket approval applications.	21 U.S.C. 306e(e), (g)	21 CFR Part 12.
Office for Civil Rights		
1. Proceedings to enforce Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin by recipients of Federal financial assistance.	42 U.S.C. 2000d–1	45 CFR 80.9.
2. Proceedings to enforce section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of handicap by recipients of Federal financial assistance.	29 U.S.C. 794a; 42 U.S.C. 2000d–1	45 CFR 84.61.
3. Proceedings to enforce the Age Discrimination Act of 1975, which prohibits discrimination on the basis of age by recipients of Federal financial assistance.	42 U.S.C. 6104(a)	45 CFR 91.47.
4. Proceedings to enforce Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in certain education programs by recipients of Federal financial assistance.	20 U.S.C. 1682	45 CFR 86.71.

Dated: October 14, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 04–1163 Filed 1–20–04; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 15 and 76

[DA 03–3848]

Editorial Modification of the Commission's Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document provides a more efficiently organized presentation of the various materials, *e.g.,* standards, specifications, and similar documents that are referenced in the regulations for radio frequency devices and multichannel video and cable television services in the rules, certain administrative revisions are necessary to those rules.

DATES: Effective January 21, 2004.

FOR FURTHER INFORMATION CONTACT: Alan Stillwell, Office of Engineering and Technology, (202) 418–2925.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Order,* DA 03–3848, adopted December 4, 2003 and released December 5, 2003. The full text of this document is available on the Commission's Internet site at *http://www.fcc.gov.* It is also available for inspection and copying during regular business hours in the FCC Reference Center (Room CY–A257), 445 12th Street., SW., Washington, DC 20554. The full text of this document also may be purchased from the Commission's duplication contractor, Qualex International, Portals II, 445 12th St., SW., Room CY–B402, Washington, DC 20554; telephone (202) 863–2893; fax (202) 863–2898; e-mail *qualexint@aol.com.*

Summary of the Order

1. In order to provide a more efficiently organized presentation of the various materials, *e.g.,* standards, specifications, and similar documents that are referenced in the regulations for radio frequency devices in part 15 of the rules and in the regulations for multichannel video and cable television services in part 76 of the rules, certain administrative revisions are necessary to those rules.

2. Authority for adoption of the foregoing revisions is contained in 47 CFR 0.231(b).

3. The amendments adopted pertain to agency organization, procedure, and practice. Consequently, the notice and