

# Rules and Regulations

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## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Part 2610

RIN 3209-AA19

### Implementation of the Equal Access to Justice Act

**AGENCY:** Office of Government Ethics (OGE).

**ACTION:** Final rule.

**SUMMARY:** The Office of Government Ethics is adopting as final, with one correction, a previously published interim regulation establishing procedures, in accordance with the Equal Access to Justice Act and guidance from the Administrative Conference of the United States, for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before the Office of Government Ethics. This regulation describes the parties eligible for awards and the proceedings which are covered. The rule also explains how to apply for awards, and the procedures and standards which the Office of Government Ethics will use to make awards.

**EFFECTIVE DATE:** September 26, 1995.

**FOR FURTHER INFORMATION CONTACT:** Janet K. Roell, Office of Government Ethics, telephone 202-523-5757, FAX 202-523-6325.

**SUPPLEMENTARY INFORMATION:** In this rulemaking document, the Office of Government Ethics is adopting as a final regulation, with correction of one typographical error, its previously published interim regulation under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504. See 57 FR 33267-33272 (July 28, 1992), as corrected at 59 FR 34755 (July 7, 1994). The EAJA requires every agency to establish, by regulation, procedures for the submission and

consideration of applications by eligible prevailing private parties for an award of fees and expenses incurred in connection with adversary adjudications before the agency. The interim OGE regulation (5 CFR part 2610), generally followed, with certain modifications, the final revised model rule issued on May 6, 1986 (51 FR 16659-16669) by the Administrative Conference of the United States pursuant to its consultative role under EAJA.

A 60-day comment period was provided in the interim regulation, and OGE received two comments. One comment addressed the appealability of the Board of Contract Appeals (BCA) decisions by the Director of the Office. The other comment addressed the fees that attorneys may be awarded when representing someone under the EAJA. The first commentator questioned whether a decision of a BCA should be reviewable by the OGE Director. He stated that all decisions of BCAs are autonomous and should remain so. After reviewing this matter, OGE does not believe any change to the EAJA regulation is needed. The Office of Government Ethics, which is a small agency, does not have a BCA and would have to request that agency's BCA hearings be held by an agency with a BCA. In this regard, OGE would coordinate with the rules and procedures established by that BCA, including the reviewability of its decisions. This Office notes that, to date, it has not had any EAJA claims filed in contract or any other matters before it.

The second comment letter addressed the issue of increasing fees for attorney representation. That commentator, citing *Jones v. Lujan*, 887 F.2d 1096, 1101 (D.C. Cir. 1989), suggested that OGE increase the \$75 per hour maximum attorney fee rate currently allowed in its EAJA regulation to reflect the increases in the cost of living. The court in the *Jones* case awarded the prevailing private party an increased attorney litigation fee rate using a cost of living increase formula under 28 U.S.C. 2412(d)(2)(A)(ii). However, the court did not order the agency involved in that case, the Department of Interior, to change the similar fee structure as to administrative proceedings in its EAJA regulation and it did not. Upon review of the comment letter and case, and after

checking several other agencies' EAJA rules (most of which likewise continue to provide for the \$75 per hour maximum attorney fee rates), OGE has decided not to amend its regulation in this regard at this time. Section 2610.108 does provide a rulemaking mechanism for the maximum rate for attorney fees. Moreover, an EAJA reform bill (S. 554) was introduced earlier this year in the Senate which would, among other things, raise the maximum rate. This Office will continue to monitor its regulation, both as to the appropriateness of the fee rate and in general. Again, OGE notes that so far it has not received any EAJA applications.

### Executive Order 12866

In promulgating this final regulation, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This regulation has also been reviewed by the Office of Management and Budget under that Executive order.

### Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this regulation will not have a significant economic impact on a substantial number of small entities because the number of proceedings covered by the rule will be extremely small and they will primarily affect current and former executive branch Federal employees.

### Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain information collection requirements that require the approval of the Office of Management and Budget, since the collections of information called for under this rule are expected to involve nine or fewer persons each year. Section 2610.201(f) of this rule contains a statement informing the public of this matter.

### List of Subjects in 5 CFR Part 2610

Administrative practice and procedure, Claims, Conflict of interests, Equal access to justice, Government employees.

Approved: June 16, 1995.

**Donald E. Campbell,**

*Deputy Director, Office of Government Ethics.*

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is adopting the interim regulation codified at 5 CFR part 2610, published at 57 FR 33267-33272 (July 28, 1992), as corrected at 59 FR 34755 (July 7, 1994), as a final regulation with the following amendment:

#### **PART 2610—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT**

1. The authority citation for part 2610 continues to read as follows:

**Authority:** 5 U.S.C. 504(c)(1); 5 U.S.C. App. (Ethics in Government Act of 1978).

2. In §2610.106, the word "ineligible" in the third sentence of paragraph (a) is revised to read "eligible".

[FR Doc. 95-18613 Filed 7-27-95; 8:45 am]

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#### **DEPARTMENT OF AGRICULTURE**

##### **Animal and Plant Health Inspection Service**

##### **7 CFR Part 301**

[Docket No. 95-035-1]

##### **Black Stem Rust; Addition of Rust-Resistant Varieties**

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Direct final rule.

**SUMMARY:** We are amending the black stem rust quarantine and regulations to add three varieties to the list of rust-resistant *Berberis* species. This change will allow for the interstate movement of these newly developed varieties without unnecessary restrictions.

**DATES:** This rule will be effective on September 26, 1995, unless we receive written adverse comments or written notice of intent to submit adverse comments on or before August 28, 1995.

**ADDRESSES:** Please send an original and three copies of any adverse comments or notice of intent to submit adverse comments to Docket No. 95-035-1, Regulatory Analysis and Development, PPD, APHIS, Suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your submission refers to Docket No. 95-035-1. Submissions received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m.

and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments and notices are requested to call ahead on (202) 690-2817 to facilitate entry into the comment reading room.

**FOR FURTHER INFORMATION CONTACT:** Mr. Stephen Poe, Operations Officer, Domestic and Emergency Operations, PPQ, APHIS, Suite 4C03, 4700 River Road Unit 134, Riverdale, MD 20737-1236; (301) 734-6365.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Black stem rust is one of the most destructive plant diseases of small grains that is known to exist in the United States. The disease is caused by a fungus that reduces the quality and yield of infected wheat, oat, barley, and rye crops by robbing host plants of food and water. In addition to infecting small grains, the fungus lives on a variety of alternate host plants that are species of the genera *Berberis*, *Mahoberberis*, and *Mahonia*. The fungus is spread from host to host by wind-borne spores.

The black stem rust quarantine and regulations, contained in 7 CFR 301.38 through 301.38-8 (referred to below as the regulations), quarantine the conterminous 48 States and the District of Columbia, and govern the interstate movement of certain plants of the genera *Berberis*, *Mahoberberis*, and *Mahonia*, known as barberry plants. The species of these plants are categorized as either rust-resistant or rust-susceptible. Rust-resistant plants do not pose a risk of spreading black stem rust or of contributing to the development of new races of the rust; rust-susceptible plants do pose such risks.

Section 301.38-2 of the regulations includes a listing of regulated articles and indicates species of the genera *Berberis*, *Mahoberberis*, and *Mahonia*, known to be rust-resistant. Although rust-resistant species are included as regulated articles, they may be moved into or through protected areas if accompanied by a certificate. In accordance with the procedures described below under "Effective Date," this direct final rule will add *Berberis candidula* 'Amstelveen', *Berberis thunbergii* 'Lustre green', and *Berberis thunbergii* 'Monry', to the list of rust-resistant *Berberis* species in § 301.38-2(b).

The addition of the species listed above to the list of rust-resistant *Berberis* species is based on recent testing to determine rust-resistance conducted by the Agricultural Research Service of the United States Department of Agriculture (USDA) at its Cereal Rust

Laboratory in St. Paul, MN. The testing is performed in the following manner: In a greenhouse, the suspect plant or test subject is placed under a screen with a control plant—a known rust-susceptible species of *Berberis*, *Mahoberberis*, or *Mahonia*. Infected wheat stems, a primary host of black stem rust, are placed on top of the screen. The plants are moistened and maintained in 100 percent humidity. This causes the spores to swell and fall on the plants lying under the screen. The plants are then observed for 7 days at 20-80 percent relative humidity. If the rust-susceptible plant shows signs of infection after 7 days and the test plants do not, the test results indicate that the test plants are rust-resistant. This test must be performed 12 times, and all 12 tests must yield the same result before USDA can make a determination as to whether the test plants are rust-resistant. The test may be conducted on 12 individual plants, or it may be performed multiple times on fewer plants (e.g., six plants tested twice or three plants tested four times). The tests must be performed on new growth, just as the leaves are unfolding. Therefore, the tests are usually conducted in the spring or fall, during the growing season. All 12 tests generally cannot be conducted on the same day because of the plants' different growth stages. Based on over 30 years of experience with this test, we believe that 12 is the reliable test sample size on which USDA can make its determination. We do not know of any plant that was subsequently discovered to be rust-susceptible after undergoing this procedure 12 times and being determined by USDA to be rust-resistant.

##### **Dates**

We are publishing this rule without a prior proposal because we view this action as noncontroversial and anticipate no adverse public comment. This rule will be effective, as published in this document, 60 days after the date of publication in the **Federal Register** unless we receive written adverse comments or written notice of intent to submit adverse comments within 30 days of the date of publication of this rule in the **Federal Register**.

Adverse comments are comments that suggest the rule should not be adopted or that suggest the rule should be changed.

If we receive written adverse comments or written notice of intent to submit adverse comments, we will publish a notice in the **Federal Register** withdrawing this rule before the effective date. We will then publish a