

## GRADES AND GRADE REQUIREMENTS—Continued

Grading factors	Grades U.S. Nos.				
	1	2	3	4	5

- (a) Does not meet the requirements for U.S. Nos. 1, 2, 3, 4, or 5; or  
 (b) Has a musty, sour, or commercially objectionable foreign odor (except smut or garlic odor); or  
 (c) Is heating or of distinctly low quality.

<sup>1</sup> Includes damaged kernels (total), foreign material, shrunken and broken kernels.

<sup>2</sup> Unclassed wheat of any grade may contain not more than 10.0 percent of wheat of other classes.

<sup>3</sup> Includes contrasting classes.

<sup>4</sup> Includes any combination of animal filth, castor beans, crotalaria seeds, glass, stones, or unknown foreign substance.

\* \* \* \* \*

Dated: February 15, 2005.

**David R. Shipman,**

*Deputy Administrator, Grain Inspection,  
Packers and Stockyards Administration.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Parts 13 and 14

#### Rules of Practice in FAA Civil Penalty Actions

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; technical amendment.

**SUMMARY:** The FAA is amending the procedural regulations governing the assessment of civil penalties against persons other than individuals acting as pilots, flight engineers, mechanics or repairmen. The rules establish a clear separation of functions between those agency employees who prosecute civil penalty actions and those who advise the Administrator, acting as FAA decisionmaker, about appeals of decisions by Department of Transportation (DOT) administrative law judges (ALJs). Recent organizational changes in the Office of the Chief Counsel necessitate updating these regulations so they accurately reflect the Office's current structure and division of functions. We are also amending the rules to provide the FAA Civil Penalty Hearing Docket's new address, new instructions on filing of documents, and information about the availability of documents and FAA decisions via the Internet. We are amending the procedural rule governing appeals from initial decisions regarding applications for fees under the Equal Access to Justice Act (EAJA) to reinsert language that was inadvertently omitted during a previous revision.

**DATES:** This rule is effective on February 18, 2005.

#### FOR FURTHER INFORMATION CONTACT:

Vicki Leemon, Office of the Chief Counsel, Adjudication Branch, 800 Independence Avenue, SW., Washington, DC 20591; telephone 202/385-8227.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Administrator may impose a civil penalty against a person other than an individual acting as a pilot, flight engineer, mechanic, or repairman, after notice and an opportunity for a hearing on the record, for violations cited in 49 U.S.C. 46301(d)(2) or 47531. 49 U.S.C. 46301(d)(7)(A) and 47531. These violations, in general, involve aviation safety issues. Also, under 49 U.S.C. 5123 and 49 CFR 1.47(k), the Administrator may, after notice and an opportunity for a hearing, assess a civil penalty against any person who knowingly violates the Federal hazardous materials transportation law, 49 U.S.C. chapter 51, or any of its implementing regulations.

The rules governing proceedings in these civil penalty cases are set forth in 14 CFR 13.16 and 14 CFR part 13, subpart G. Briefly, under these rules, these proceedings are conducted "in-house" as follows: (1) An "agency attorney" prosecutes a civil penalty case (14 CFR 13.203(a)); (2) a DOT ALJ conducts the hearing and issues an initial decision (14 CFR 13.205); and (3) the Administrator, acting as the FAA decisionmaker, issues a decision resolving any appeal from an initial decision (14 CFR 13.233).

To ensure that this process operates fairly and in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 554(d), the FAA has issued rules requiring a separation of the functions performed by (1) "agency attorneys," who prosecute civil penalty actions, and (2) attorneys who advise the Administrator on appeals from initial decisions. Separating these functions insulates the Administrator from any advice or influence by an FAA

employee engaged in the investigation or prosecution of civil penalty actions. It also insulates the prosecutors from possible influence by the advisers to the Administrator on appeals.

#### Changes in Position Titles in the Separation of Functions Rules

On March 3, 2004, the FAA published Notice 1100.290, announcing the creation of two Deputy Chief Counsel positions: the Deputy Chief Counsel for Policy and Adjudication, and the Deputy Chief Counsel for Operations. As a result, it is no longer accurate to refer only to the "Deputy Chief Counsel" in the rules that provide for the separation of functions in the Chief Counsel's Office, 14 CFR 13.202 (Definition of agency attorney) and 13.203.

To describe accurately the current division of functions within the Chief Counsel's Office, we are revising the rules to add: (1) The Deputy Chief Counsel for Operations to the list of attorneys who prosecute civil penalty actions as specified in 14 CFR 13.202's definition of "agency attorney," and (2) the Deputy Chief Counsel for Policy and Adjudication to 14 CFR 13.203(c)'s list of lawyers who advise the Administrator regarding the resolution of appeals. We are also revising 14 CFR 13.202 to add the Deputy Chief Counsel for Policy and Adjudication to the list of attorneys who may not prosecute civil penalty actions.

Under the current organization of the Chief Counsel's Office, the Deputy Chief Counsel for Policy and Adjudication supervises the Assistant Chief Counsel for Regulations. The Assistant Chief Counsel for Regulations and members of her staff occasionally provide advice to agency attorneys, but are otherwise uninvolved in prosecuting civil penalty cases. The Deputy Chief Counsel for Policy and Adjudication does not and will not supervise the Assistant Chief Counsel for Regulations or any member of her staff in connection with providing advice to an agency attorney engaged in the prosecution of any civil penalty case. The Assistant Chief Counsel for

Regulations and the members of her staff do not and shall not consult or discuss with the Deputy Chief Counsel for Policy and Adjudication any issue on which their advice is sought by an agency attorney. Thus, the Deputy Chief Counsel for Policy and Adjudication will be kept "out of the loop" when either the Assistant Chief Counsel for Regulations or an attorney on her staff is consulted by agency attorneys prosecuting a civil penalty action. As a result, this division of functions within the Office of the Chief Counsel does not, and will not, contravene 14 CFR 13.202(3), which provides that an attorney supervised in a civil penalty action by an adviser to the Administrator in that civil penalty (or a factually related) action shall not prosecute that action.

Also, to ensure that the Assistant Chief Counsel for Regulations and her staff do not prosecute civil penalty cases but limit their role to that of occasional advisors to agency attorneys, we are revising the definition of "agency attorney" in Section 13.202 to omit the Assistant Chief Counsel for Regulations, as well as attorneys in the Regulations Division. This revision will make the rule consistent with the current practice within the Office of the Chief Counsel. Also, this revision will make 14 CFR 13.202's list of attorneys who may prosecute civil penalty actions consistent with the Administrator's current delegation of authority in civil penalty actions in 14 CFR 13.16(e) to certain FAA attorneys. The Assistant Chief Counsel for Regulations and members of her staff are not included in the list of attorneys to whom the Administrator has delegated the authority to (1) Initiate actions and assess civil penalties; (2) refer cases to the United States Attorney General or a delegate of the Attorney General for collecting civil penalties; and (3) compromise the amount of a civil penalty.

The position of the Special Counsel and Director of Civil Penalty Adjudications was eliminated several years ago. As a result, we are removing all references to this position in 14 CFR 13.202 and 13.203.

#### **The Hearing Docket**

The FAA Civil Penalty Hearing Docket is now located in Room 2014 of the Wilbur Wright Building, 600 Independence Avenue, SW., Washington, DC 20591. Anyone hand-delivering a document for filing—or wishing to review any docket materials in person—should go to the Wilbur Wright Building at the above address. Packages sent by expedited courier to

the Hearing Docket should be addressed as follows: Hearing Docket, Federal Aviation Administration, 600 Independence Avenue, SW., Wilbur Wright Building—Room 2014, Washington, DC 20591; Att: Hearing Docket Clerk, AGC-430.

All envelopes and packages sent by U.S. Mail to individuals in the Wilbur Wright Building are processed by the FAA Headquarters' mail room staff located at 800 Independence Avenue, SW., Washington, DC 20591. Consequently, anyone using U.S. Mail to file a document should use the following address: Hearing Docket, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; Att: Hearing Docket Clerk, AGC-430, Wilbur Wright Building—Room 2014.

Accordingly, this amendment revises the following regulations: 14 CFR 13.16(h) (filing a request for hearing); 14 CFR 13.209 (filing an answer); 14 CFR 13.210 (filing documents, generally); 14 CFR 13.230(b) (examination and copying of the record); and 14 CFR 13.233 (filing appeals from initial decisions).

#### **On-Line Accessibility of Documents Filed in the Hearing Docket**

The Secretary of Transportation directed the Office of the Secretary and eight of the DOT operating administrations, including the FAA, to consolidate their separate paper-based docket facilities into a single centralized facility and convert to an electronic image-based system. 61 FR 29282, June 10, 1996. Documents in non-security civil penalty cases (governed by the procedural rules in 14 CFR part 13, subpart G) in which the complaint was filed on or after December 1, 1997, have been scanned into the Docket Management System (DMS). 63 FR 19559, 19570–19571, April 20, 1998. (The Hearing Docket remains the official docket, and continues to retain the original documents.) The documents in these civil penalty cases are available on the Internet at <http://dms.dot.gov>. While the availability of these documents on the Internet was announced in the **Federal Register** on April 20, 1998, 14 CFR part 13, subpart G was not amended to reflect the availability of documents on the DMS website. The FAA is adding a new 14 CFR 13.210(e) to inform the parties about the availability of documents through the DMS website. Also, we are revising 14 CFR 13.230 to notify members of the public that they may review and copy the documents in the record at the Docket Management Facility, located on the Plaza Level of the Nassif Building at

the U.S. Department of Transportation, 400 Seventh Street, SW., Room PL-401, Washington, DC 20590.

The decisions of the Administrator, indexes of the decisions, and other useful information are available on the FAA civil penalty adjudication Web site at <http://www.faa.gov/agc/cpwebsite>. The new Section 13.210(e) also describes the FAA civil penalty adjudication Web site.

#### **Review by FAA Decisionmaker of an Initial Decision in an EAJA Action**

Part 14 of Title 14 of the Code of Federal Regulations applies to actions under the EAJA. Originally 14 CFR 14.28 provided that either the applicant or the FAA counsel may appeal from the initial decision issued by an ALJ regarding an application for fees under the EAJA in a civil penalty proceeding under subpart G of part 13 of the Federal Aviation Regulations. When 14 CFR 14.28 was revised in 1999, creating paragraphs (a) and (b), the phrase "in accordance with subpart G of part 13 of the Federal Aviation Regulations, specifically 14 CFR 13.233" was inadvertently omitted from the new paragraph (a). 64 FR 32936, June 18, 1999. This amendment reinserts the language. By reinserting this phrase, it will be clear to the parties that the procedural rules in 14 CFR part 13, subpart G, govern any appeal from an initial decision concerning a fee application under the EAJA when the underlying action was governed by 14 CFR part 13, subpart G.

#### **Procedural Matters**

In general, under the APA, 5 U.S.C. 553, agencies must publish regulations for public comment and give the public at least 30 days notice before adopting regulations. There is an exception to these requirements if the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. In this case, the FAA finds that notice and comment requirements are unnecessary due to the administrative nature of the changes. The revisions simply update 14 CFR 13.202 and 13.203 regarding recent office changes. It is in the public interest that these revisions take effect promptly so that members of the public will understand how the FAA does business. Also, it is in the public interest that the revisions to 14 CFR 13.16, 13.209, 13.210, 13.230 and 13.233 take effect promptly so that members of the public know how to file documents and how to gain access to the Hearing Docket. The revision to 14 CFR 14.28(a) merely reinserts language that was inadvertently omitted during a

previous revision. The amendments set forth in this notice do not affect the rights or duties of any regulated entity.

List of Subjects

14 CFR Part 13

Administrative practice and procedure, Air transportation, Aviation safety, Hazardous materials transportation, Investigations, Law enforcement, Penalties.

14 CFR Part 14

Claims, Equal access to justice, Lawyers, Reporting and recordkeeping requirements.

The Amendments

Accordingly, the Federal Aviation Administration amends parts 13 and 14, chapter 1 of title 14, Code of Federal Regulations as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

1. The authority citation for part 13 continues to read as follows:

Authority: 18 U.S.C. 6002; 28 U.S.C. 2461 (note); 49 U.S.C. 106(g), 5121–5124, 40113–40114, 44103–44106, 44702–44703, 44709–44710, 44713, 46101–46110, 46301–46316, 46318, 46501–46502, 46504–46507, 47106, 47111, 47112, 47122, 47306, 47531–47532; 49 CFR 1.47.

2. Amend § 13.16 by revising the second sentence of paragraph (h) to read as follows:

§ 13.16 Civil penalties.

Administrative assessment against a person other than an individual acting as a pilot, flight engineer, mechanic, or repairman. Administrative assessment against all persons for hazardous materials violations.

\* \* \* \* \*

(h) \* \* \* A person requesting a hearing shall file a written request for a hearing with the hearing docket clerk, using the appropriate address set forth in § 13.210(a) of this part, and shall mail a copy of the request to the agency attorney. \* \* \*

\* \* \* \* \*

3. Amend the definition of "Agency attorney" in § 13.202 by revising the introductory text and paragraphs (1) and (2) to read as follows:

§ 13.202 Definitions.

\* \* \* \* \*

Agency attorney means the Deputy Chief Counsel for Operations, the Assistant Chief Counsel, Enforcement, the Assistant Chief Counsel, Europe, Africa, and Middle East Area Office, each Regional Counsel, the Aeronautical

Center Counsel, or the Technical Center Counsel, or an attorney on the staff of the Assistant Chief Counsel, Enforcement, the Assistant Chief Counsel, Europe, Africa, and Middle East Area Office, each Regional Counsel, the Aeronautical Center Counsel, or the Technical Center Counsel who prosecutes a civil penalty action. An agency attorney shall not include:

(1) The Chief Counsel, the Deputy Chief Counsel for Policy and Adjudication, or the Assistant Chief Counsel for Litigation;

(2) Any attorney on the staff of the Assistant Chief Counsel for Litigation;

\* \* \* \* \*

4. Amend § 13.203 by revising paragraph (c) to read as follows:

§ 13.203 Separation of functions.

\* \* \* \* \*

(c) The Chief Counsel, the Deputy Chief Counsel for Policy and Adjudication, and the Assistant Chief Counsel for Litigation, or an attorney on the staff of the Assistant Chief Counsel for Litigation will advise the FAA decisionmaker regarding an initial decision or any appeal of a civil penalty action to the FAA decisionmaker.

5. Amend § 13.209 by revising the first sentence of paragraph (b) to read as follows:

§ 13.209 Answer.

\* \* \* \* \*

(b) Filing and address. A person filing an answer shall personally deliver or mail the original and one copy of the answer for filing with the hearing docket clerk, not later than 30 days after service of the complaint to the Hearing Docket at the appropriate address set forth in § 13.210(a) of this subpart.

\* \* \* \* \*

6. Amend § 13.210 by revising paragraph (a) and adding paragraph (e) to read as follows:

§ 13.210 Filing of documents.

(a) Address and method of filing. A person tendering a document for filing shall personally deliver or mail the signed original and one copy of each document to the Hearing Docket using the appropriate address:

(1) If delivery is in person, or via expedited courier service: Federal Aviation Administration, 600 Independence Avenue, SW., Wilbur Wright Building—Room 2014, Washington, DC 20591; Att: Hearing Docket Clerk, AGC-430.

(2) If delivery is via U.S. Mail: Federal Aviation Administration, 800 Independence Avenue, SW.,

Washington, DC 20591; Att: Hearing Docket Clerk, AGC-430, Wilbur Wright Building—Room 2014.

\* \* \* \* \*

(e) Internet accessibility of documents filed in the Hearing Docket. (1) Unless protected from public disclosure by an order of the ALJ under § 13.226, all documents filed in the Hearing Docket are accessible through the DOT's Docket Management System (DMS): http://dms.dot.gov. To access a particular case file, use the DMS number assigned to the case.

(2) Decisions and orders issued by the Administrator in civil penalty cases, as well as indexes of decisions and other pertinent information are available through the FAA civil penalty adjudication Web site at http://www.faa.gov/agc/website.

7. Amend § 13.230 by removing the first sentence of paragraph (b) and adding two sentences in its place to read as follows:

§ 13.230 Record.

\* \* \* \* \*

(b) Examination and copying of record. Any person may examine the record at the Hearing Docket, Federal Aviation Administration, 600 Independence Avenue, SW., Wilbur Wright Building—Room 2014, Washington, DC 20591. Documents may also be examined and copied at the Docket Management Facility, Department of Transportation, 400 Seventh Street, SW., Room PL-401, Washington, DC 20590. \* \* \*

PART 14—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980

1. The authority citation for part 14 continues to read as follows:

Authority: 5 U.S.C. 504; 49 U.S.C. 106(f), 40113, 46104 and 47122.

2. Amend § 14.28(a) by revising the first sentence to read as follows:

§ 14.28 Review by FAA decisionmaker.

(a) In proceedings other than those under part 17 of this chapter and the AMS, either the applicant or the FAA counsel may seek review of the initial decision on the fee application in accordance with subpart G of part 13 of this chapter, specifically § 13.233. \* \* \*

\* \* \* \* \*

Issued in Washington, DC on February 10, 2005.

Rebecca MacPherson,

Assistant Chief Counsel for Regulations

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