

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****15 CFR Part 904**

[Docket No. 040902252-6040-02; I.D. 092804C]

RIN 0648-AS54

**Civil Procedures**

**AGENCY:** Office of General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Final rule.

**SUMMARY:** NOAA is amending its Civil Procedures governing NOAA's administrative proceedings for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property. The intended impact of this action is to conform the civil procedure rules to changes in applicable Federal laws and regulations, improve the efficiency and fairness of administrative proceedings, clarify any ambiguities or inconsistencies in the existing civil procedure rules, eliminate redundant language and correct language errors and conform the civil procedure rules to current agency practice.

**DATES:** This rule becomes effective April 10, 2006.

**SUPPLEMENTARY INFORMATION:****I. Background**

As announced in the *Federal Register* on October 12, 2004 (69 FR 60569), NOAA is amending its Civil Procedures governing the Agency's administrative proceedings for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property. The initial comment period for the proposed rule closed on December 13, 2004. In response to requests from interested parties, the comment period was reopened on January 5, 2005 (70 FR 740), and the second comment period closed on January 31, 2005.

**II. Revisions to Final Rule***General Revisions*

In addition to some grammatical and other non-substantive errors that were found in the language of the proposed rule, the Agency identified several inconsistencies in the use of terminology. Where these were found, a

single word or phrase has been selected to express each concept. These changes are enumerated below, in the order in which they first appear.

1. The phrase "civil penalty" is used in place of the words "penalty" and "assessment" and in place of the phrase "civil monetary penalty" for consistency and to clarify that the term is defined in § 904.2 to mean civil administrative monetary penalty.

2. The phrase "administrative proceedings" is used in place of the word "proceedings" and the word "adjudication" for consistency and to clarify that the phrase refers to the entire administrative process, from issuance of a NOVA through final disposition.

3. The phrase "permit sanctions" is used in place of the word "sanctions" to clarify that the phrase refers to sanctions on individual or vessel permits and to differentiate them from the sanctions discussed in § 904.204 (q).

4. The phrase "U.S. Government" is used in place of the word "government" to clarify that the phrase refers to the government of the United States of America.

5. When used in reference to the U.S. Government or an agency of the U.S. Government, the term "U.S." is used in place of "United States". Note, however, that "United States" continues to be used to refer to the Nation.

6. When used in reference to a time period that constitutes a deadline for the purposes of this Part, the number of days is written numerically (e.g., "30"). Where such reference included numbers that were written out in words (e.g., "thirty") or written both in words and numerically (e.g., thirty (30)), these references have been replaced with a numerical reference alone.

7. The phrase "Notice of Violation and Assessment" has been replaced with "NOVA" to reflect the fact that "NOVA" is defined in § 904.2 as meaning a Notice of Violation and Assessment of civil penalty.

8. The phrase "Notice of Permit Sanction" has been replaced with "NOPS" to reflect the fact that "NOPS" is defined in § 904.2 as meaning Notice of Permit Sanction.

9. The word "hearing" is used in place of the phrase "civil administrative hearing" to reflect that a definition of "hearing" has been added to § 904.2.

10. All reference to Notices that are not defined in § 904.2 have been capitalized (e.g., Notice of Appearance) to clarify that Notices constitute a particular type of document for the purposes of this Part.

11. "U.S. Department of Justice" is used in place of "Justice Department" for consistency and clarity.

12. "ALJ Docketing Center" is used in place of "Office of Administrative Law Judges" for consistency and accuracy.

13. "Judge" is used in place of "Administrative Law Judge" for consistency and to reflect that "Judge" is defined in § 904.2.

14. "Respondent" is used in place of "violation" in subpart E both for consistency and to reflect the fact that the term "respondent" is defined in § 904.2 to mean a person issued a written warning or a NOVA, NOPS, NIDP or other Notice.

15. "Violation" is used in place of "offense" except in reference to criminal offenses.

16. The names of the various Notices, such as Notice of Proposed Forfeiture, are capitalized for clarity.

**Subpart A—General***1. Purpose and Scope*

Section 904.1: Paragraph (d) is intended to make clear that the procedures set forth in this Part apply not only to the enumerated statutes in paragraph (c), but also to all: later enacted statutes; amendments, modifications or recodifications of existing statutes; authorities granted to NOAA not within statutes otherwise administered by NOAA; and NOAA's enforcement of statutes or authorities not solely administered by NOAA.

*2. Definitions*

Section 904.2: The definition of "applicant" has been removed because the term is only used only once in this part.

A new definition of "civil penalty" was added to explain that the phrase refers to civil administrative monetary penalties.

A new definition of "hearing" was added to distinguish the term from the phrase "administrative proceeding" and explain that it refers to a civil administrative hearing on a NOVA, NOPS and/or NIDP.

The definition of "initial decision" was revised to clarify the distinction between an initial decision and a final administrative decision.

The definition of "party" was revised slightly to correct grammatical errors. No substantive changes were intended by these amendments.

A new definition of "respondent" was added to clarify that the term refers to a person issued a written warning, NOVA, NOPS, NIDP or other Notice.

The definition of the term "sanction" was replaced with a definition of

“permit sanction” to reflect the change in terminology described above.

The definition of “written warning” was revised to reflect the fact that no permit sanction or civil penalty is imposed or assessed in cases where a written warning is issued.

### 3. *Filing and Service of Notices, Documents, and Other Papers*

Section of 904.3: Paragraph (a) was revised to reflect that a Notice of Proposed Forfeiture, Notice of Seizure, Notice of Summary Sale or Written Warning may be served in the same manner as a NOVA, NOPS or NIDP.

Paragraph (b) was revised to clarify that service of documents and papers other than Notices is effective upon the date of postmark (or as otherwise shown for government franked mail).

### 4. *Computation of Time Periods*

Section 904.4: In paragraph (a), the title and paragraph designation of the paragraph were removed to reflect that paragraph (b) has been removed.

Paragraph (b) was removed to eliminate any confusion created by adding 3 days to the prescribed period when a document or paper other than a Notice is served by mail.

### 5. *Appearance*

Section 904.5: In paragraph (b), NIDP was added to the list of documents that may be issued in a matter regarding which an attorney or other representative might contact the Agency on behalf of a respondent.

## **Subpart B—Civil Penalties**

### 1. *Notice of Violation and Assessment (NOVA)*

Section 904.101: In paragraph (a), the words “the person alleged to be subject to a civil penalty” were removed to reflect the fact that “respondents” is defined in § 904.2.

### 2. *Final Administrative Decision*

Section 904.104: In paragraph (a), the phrase “on the 30th day after” was replaced with the phrase “30 days after” for clarity.

### 3. *Payment of Final Civil Penalty*

Section 904.105: In paragraph (a), the word “NOVA” is used in place of “assessment” for clarity because the entire NOVA becomes a final administrative decision and order of NOAA under § 904.104 or under subpart C of this part. The words “by credit card” are added to reflect that payment of civil penalties may also be made by credit card.

### 4. *Compromise of Civil Penalty*

Section 904.106: In paragraphs (a) and (d), the words “imposed” and “imposition” were replaced with “assessed” and “assessment” for clarity, consistency and accuracy.

In paragraph (b), the words “other interested person” were replaced with “a representative subject to the requirements of § 904.5” to reflect the fact that only a representative who has entered an appearance pursuant to § 904.5 may negotiate a compromise civil penalty on behalf of a respondent.

In paragraph (c), the words “an assessment” were replaced with “a NOVA” and the words “is final” were replaced with “becomes final” to improve clarity and the words “or payable” were removed as redundant.

### 5. *Joint and Several Respondents*

Section 904.107: In response to a comment, the Agency has reconsidered its proposal, as presented in the proposed rule, to change the current language regarding hearing requests by joint and several respondents so that a hearing request by one joint and several respondent would no longer be considered a hearing request by all. This proposed change was intended to streamline administrative proceedings but, after reconsideration, the Agency has determined that it will further complicate rather than streamline proceedings. The Agency has changed the language in paragraphs (b) and (c) to further clarify how the hearing request process will work. While Paragraph (b) retains the language currently in the regulations, a new sentence was added to clarify the impact of settlement with one joint and several respondent on the others. Paragraph (c) was also amended to clarify that a decision by the Judge or the Administrator after a hearing requested by one joint and several respondent is not binding on other joint and several respondent(s) who have resolved the matter through settlement with the Agency.

In paragraph (a), the words “in total” were added to clarify that the total amount collected from all joint and several respondents may not exceed the total amount assessed.

In paragraph (b), some additional language was added to clarify that if the joint and several respondent who requests a hearing settles with the Agency prior to that hearing, upon notification by the Agency the remaining joint and several respondent(s) must affirmatively request a hearing or the case will be removed from the court’s docket as provided in § 904.213.

### 6. *Factors Considered in Assessing Civil Penalties*

Section 904.108: Paragraph (d) was revised to clarify that information relevant to a respondent’s ability to pay includes income tax returns and past, present and future income.

Paragraph (e) was modified to clarify the time period during which a respondent may submit information regarding their ability to pay an assessed civil penalty.

Paragraph (f) was revised to clarify that information regarding ability to pay submitted to the Judge prior to the hearing may also be considered in an administrative review.

## **Subpart C—Hearing and Appeal Procedures**

### 1. *Scope and Applicability*

Section 904.200: In paragraph (a) the words “in administrative proceedings” were removed as redundant.

Paragraph (b) was revised to clarify the scope of the ALJ’s authority.

### 2. *Hearing Requests and Case Docketing*

Section 904.201: In paragraph (a) the words “requester” and “Notice” were replaced with “respondent” and “NOVA, NOPS or NIDP”, respectively, for clarity.

Paragraph (b) was revised, and paragraph (c) was removed to reflect the fact that decisions on the timeliness of hearing requests will be made by the Judge.

Paragraph (d) was redesignated as paragraph (c).

### 3. *Duties and Powers of Judge*

Section 904.204: A new paragraph (a) was added to make explicit that the Judge has the authority to rule on the timeliness of hearing requests.

The word “proceeding” was replaced with “hearing” for clarity and accuracy at the beginning of this section and in paragraph (b).

Paragraph (d) was amended for clarity.

In paragraph (f), the word “contested” was added before “discovery requests” to clarify the discovery requests on which the Judge will rule.

In paragraph (m), the word “civil” is added before “penalty” and the word “amount” is replaced with “civil penalty” for clarity and consistency.

In paragraph (l), the phrase “or of technical or scientific facts within the generalized or specialized knowledge of the Department of Commerce as an expert body;” was removed as overbroad.

In paragraph (q)(1), the word “adjudicatory” is replaced with “administrative” for consistency.

#### 4. Disqualification of Judge

Section 904.205: In paragraph (a), the words “a particular case” are replaced with “an administrative proceeding” for clarity and consistency.

#### 5. Pleadings, Motions, and Service

Section 904.206: In paragraph (d), the phrase “date of service thereof” is replaced with “service of the motion” for clarity.

In paragraph (e), the word “of” is replaced with “after” and the phrase “raised in the answer” is added to the second sentence for clarity.

#### 6. Extensions of Time

Section 904.208: The words “and as provided in § 904.201(b)” are removed to reflect the fact that the language to which they were referring has also been removed.

#### 7. Expedited Administrative Proceedings

Section 904.209: This section has been revised to better explain the process by which administrative proceedings may be expedited.

#### 8. Failure To Appear

Section 904.211: This section has been revised to clarify that failure of any party (a respondent or the Agency) to appear at a scheduled hearing may result in an adverse ruling by the Judge.

#### 9. Failure To Prosecute or Defend

Section 904.212: Throughout this section, “either” has been replaced with “any” to reflect the fact that there may be more than one respondent in any given administrative proceeding.

#### 10. Consolidation

Section 904.215: The words “Chief Administrative Law” were added before “Judge” in response to a comment received on the proposed rule to reflect a decision made by the Agency that, as it is the Chief Administrative Law Judge who assigns Judges to hear the Agency’s cases, it is appropriate that the Chief Administrative Law Judge make any decisions regarding consolidation. The phrase “either upon request of a party or *sua sponte*” was added for clarity.

#### 11. Prehearing Conference

Section 904.216: In paragraph (a), the word “any” was added before “other time” to correct a grammatical error. The words “court reporter” have been used in place of “stenographer” for accuracy.

In paragraph (a)(5), “hearing” is replaced with “administrative proceeding” for accuracy.

#### Discovery

##### 1. Discovery Generally

Section 904.240: In paragraph (a), the words “Preliminary Position on Issues and Procedures” have been removed to reflect that “PPIP” is defined in § 904.2.

In paragraph (c), the word “the” is added before “hearing” to correct a grammatical error.

##### 2. Subpoenas

Section 904.245: In paragraph (b), the timeframe for submitting applications for subpoenas was changed from 10 days to 15 days to avoid conflicts with paragraph (c).

In paragraph (d), “NOAA” was replaced by “the requesting party” for accuracy.

#### Hearings

##### 1. Notice of Time and Place of Hearing

Section 904.250: In paragraph (c), the following changes were made for consistency and clarity: the words “all or part of a proceeding” are replaced with “one or more issues”; the words “substantially all important” are replaced with “such”; and the words “the proceeding” are replaced with “those issues”.

In paragraph (d), the words “as provided in § 904.209” were added and subparagraphs (1) and (2) were deleted to reflect that the process for expediting administrative proceedings under this Part is described in § 904.209.

##### 2. Evidence

Section 904.251: In paragraph (a)(3), the words “party charged” were replaced with “respondent” for clarity.

Paragraph (f) was revised to improve clarity: the phrase “stipulation in writing” was replaced with “written stipulation” and the words “involved in the proceeding” were removed.

##### 3. Ex Parte Communications

Section 904.255: In paragraph (f), the words “or any other Notice” were added after “NIDP” to reflect the fact that the issuance of other Notices will trigger the rule regarding *ex parte* communications as well.

#### Post-Hearing

##### 1. Recordation of Hearing

Section 904.260: In paragraph (b), the phrase “administrative proceeding” was replaced with “hearing” for accuracy.

##### 2. Post Hearing Briefs

Section 904.261: In paragraph (a), the word “calendar” is removed as unnecessary.

#### Decision

##### 1. Initial Decision

Section 904.271: Paragraph (c) is revised to reflect how and to whom the ALJ Docketing Center should serve initial decisions. It was also revised to reflect that the Judge will only certify the record to the Administrator upon request.

Paragraph (d) is revised to be consistent with § 904.273 and “30 days” is changed to “60 days”.

In paragraph (d)(2), the words “rehearing or” are deleted to reflect that § 904.272 provides for petitions for reconsideration, not rehearing.

##### 2. Administrative Review of Decision

Section 904.273: The first sentence of paragraph (a) is revised to clarify the language. No substantive change in the procedures is intended by these changes. A new sentence was added to the end of the paragraph to reflect the new requirement that copies of the petition and all other documents must be served on all parties and the Assistant General Counsel for Enforcement and Litigation (AGCEL) and to provide an address for such service on the AGCEL.

Paragraph (b) is redesignated as paragraph (c). The second sentence of the paragraph was removed to reflect the fact that service of petitions is described in paragraph (a). The third sentence of the paragraph is modified to reflect the fact that review undertaken on the Administrator’s initiative must be timely and to include reference to new paragraph (h).

A new paragraph (b) is added to reiterate that the Administrator may undertake review of an initial decision on his or her own initiative.

Existing paragraph (c) is removed in its entirety.

A new paragraph (d) is added. This paragraph incorporates the language and substance of existing paragraph (d), as well as other format and content requirements for petitions for review.

Existing paragraph (e) is redesignated as paragraph (f).

A new paragraph (e) is added which explains that the Administrator may deny a petition for review if it is untimely or fails to meet the content and format requirements described in paragraph (d).

Existing paragraph (f) is redesignated as paragraph (g). A sentence is added that outlines the content and format

requirements for any answer. The last sentence of the paragraph is revised to clarify that no further replies are allowed unless requested by the Administrator.

Existing paragraph (g) is redesignated as paragraph (i) and has been revised to clarify the language. No substantive changes in procedure are intended by these revisions.

A new paragraph (h) is added to explain that, if the Administrator takes no action in response to a petition within 120 days of its service, the petition is deemed denied and the initial decision becomes the final Agency decision.

Existing paragraph (h) is redesignated as paragraph (j) and revised to clarify the manner in which issues for briefing will be identified and the fact that the Administrator may choose not to order additional briefing. In addition, the last sentence was removed as redundant.

Existing paragraph (i) is redesignated as paragraph (k) and revised for style and to explain that the Administrator's decision constitutes final Agency action for purposes of judicial review except where the Administrator decides to remand the case to the ALJ.

A new paragraph (l) is added to explain that initial decisions are not subject to judicial review unless the party has exhausted its opportunity for administrative review by filing a petition with the Administrator, and the Administrator has issued a final order on the petition that constitutes final Agency action or the initial decision has become final pursuant to new paragraph (h). As discussed below in the response to comments, this addition is based on comments concerning the importance and benefit of maintaining administrative review.

A new paragraph (m) is added to explain that, for the purposes of any subsequent judicial review of the Agency decision, any issues not identified in a petition for review, in an answer, by the Administrator, or in any modifications to the initial decision, are waived. This new paragraph (m) does not create any new requirement, as this rule is established in a large body of case law. The Agency concluded paragraph (m) was an appropriate addition to ensure that parties are aware of this requirement.

A new paragraph (n) is added to explain that, if during judicial review a decision is vacated or remanded by a court, the Administrator shall issue an order governing further administrative proceedings in the matter.

## **Subpart D—Permit Sanctions and Denials**

### **General**

#### *1. Scope and Applicability*

Section 904.300: In paragraph (a), the words “policies and” are removed for accuracy.

#### *2. Bases for Permit Sanctions and Denials*

Section 904.301: In paragraph (c), the words “the sanction of any vessel permit” are replaced with “a vessel's permit sanction” to improve clarity.

#### *3. Notice of Permit Sanction (NOPS)*

Section 904.302: In paragraph (a), the words “personally or by certified mail, return receipt request” are replaced with “as provided in § 904.3” to reflect that the modes of service are described in § 904.3.

In paragraph (b), the word “calendar” is removed as unnecessary.

#### *4. Notice of Intent To Deny Permit (NIDP)*

Section 904.303: In paragraph (a), the phrase “criminal fine” was added for accuracy.

In paragraph (b), “§ 904.302(a)” is replaced with “§ 904.3” to reflect the modes of service are described in § 904.3. The word “permit” is added before “applicant” to clarify that a NIDP may be issued to a person who has applied or is expected to apply for a permit.

#### *5. Opportunity for Hearing*

Section 904.304: In paragraph (b), the words “a judicial or administrative hearing” are replaced with “an administrative or judicial proceeding” for consistency and clarity.

#### *6. Final Administrative Decision*

Section 904.305: In paragraph (a), “on the 30th day after” was replaced with “30 days after” for clarity and consistency.

## **Permit Sanctions for Noncompliance**

#### *1. Compliance*

Section 904.311: The words “fine or penalty” were replaced with “criminal fine or civil penalty” for clarity and consistency.

## **Subpart E—Written Warnings**

#### *1. Procedures*

Section 904.402: In paragraph (a), the words “who finds a violation of one of the laws” is replaced with “or Agency counsel” to reflect that written warnings may be issued either by authorized

officers or by Agency counsel. The words “as provided in § 904.3” are added to clarify that written warnings will be served by the procedures described in § 904.3. The words “in lieu of other law enforcement action that could be taken under the applicable statute” are removed as unnecessary.

In paragraph (d), the words “civil or criminal” are replaced with “administrative or judicial” for consistency and accuracy.

#### *2. Review and Appeal of a Written Warning*

Section 904.403: Throughout this section, the word “respondent” replaces “person” both for accuracy and to reflect that the term “respondent” is defined in § 904.2 to include persons who have been issued a written warning.

## **Subpart F—Seizure and Forfeiture Procedures**

#### *1. Notice of Seizure*

Section 904.501: This section is revised to clarify that Notices of Seizure will be served in the manner described in § 904.3.

#### *2. Bonded Release of Seized Property*

Section 904.502: In paragraph (b)(1) and paragraph (c), the term “petitioner” is replaced with “requester” for accuracy and consistency.

#### *3. Administrative Forfeiture Proceedings*

Section 904.504: In paragraph (b)(1), the words “If seized property is appraised at a value of \$500,000 or less, instead of referring the matter to the United States Attorney” have been removed as unnecessary because paragraph (a) already limits the application of this section to property that is determined under § 904.503 to have a value of \$500,000 or less. The words “personally, or by registered or certified mail, return receipt requested” have been replaced with “as provided in § 904.3” to reflect that procedures for service of Notices are already described in § 904.3.

In paragraph (b)(4), the words “30 days of final notice” are replaced with “30 days of the date the final Notice is” for clarity and to correct a grammatical error. The words “by registered or certified mail, return receipt requested” have been replaced with “as provided in § 904.3” to reflect that procedures for service of Notices are already described in § 904.3. The words “as provided in § 904.3” are added to clarify that the Declaration of Forfeiture will describe any efforts made, pursuant to § 904.3, to serve the Notice of Proposed Forfeiture.

#### 4. Summary Sale

Section 904.505: In paragraph (c), the words “by registered or certified mail, return receipt requested” have been replaced with “as provided in § 904.3” to reflect that procedures for service of Notices are already described in § 904.3.

#### 5. Return of Seized Property

Section 904.510: In paragraph (b), the words “by registered or certified mail, return receipt requested” have been replaced with “as provided in § 904.3” to reflect that procedures for service of Notices are already described in § 904.3.

### III. Response to Comments

#### General Comments

*Comment 1:* One commenter suggested that NOAA’s Civil Procedure regulations should provide a mechanism for cases to be heard in front of a jury in U.S. District Court.

*Response:* This *Comment* is outside of the scope of the proposed rule, however, the Agency notes that jurisdiction is conferred by the Administrative Procedure Act (APA) and the statutes that NOAA enforces, and not by NOAA’s Civil Procedure regulations.

*Comment 2:* One commenter stated that the administrative process is unfair because the Administrative Law Judges (ALJs) are NOAA employees and therefore are not impartial.

*Response:* This *Comment* is outside of the scope of the proposed rule, however, the Agency notes that the ALJs who hear NOAA’s civil administrative enforcement cases are, in fact, employees of the U.S. Coast Guard, currently located within the Department of Homeland Security. The ALJs are, however, acting under NOAA’s delegated authority pursuant to the Oceans Act of 1992. See Section 5218 of H.R. 5617 (Public Law 102–587). Moreover, the APA requires review at the Agency level before cases proceed to U.S. District Court.

*Comment 3:* One commenter thought that NOAA’s Civil Procedure regulations should apply to Council members and NOAA scientists, and not solely to the commercial fishing industry.

*Response:* The 904 regulations apply to the civil administrative process that applies when anyone is charged with violating one of the statutes or regulations that NOAA enforces.

*Comment 4:* Two commenters expressed concerns with the rulemaking process and encouraged inclusion of the public in the process.

*Response:* NOAA published the proposed regulation in the **Federal Register** on October 12, 2004, and

provided for sixty days of public comments. Comments were solicited and accepted from all members of the public. On January 5, 2005, NOAA extended the *Comment* period for an additional thirty days. In addition, during the *Comment* period, NOAA added a link to the proposed regulations on the Web site for NOAA’s Office of General Counsel for Enforcement and Litigation. During the same time period, fact sheets detailing major changes in the proposed regulations was sent to all of the Fisheries Management Councils, posted in each of the regional offices and on each region’s Web site.

*Comment 5:* One commenter recommended that all civil penalties be increased by 2500%.

*Response:* Civil penalties are set by the individual statutes enforced by NOAA, as passed by the U.S. Congress. This rulemaking does not address the amounts of civil penalties and therefore, this *Comment* is not addressed further. The Agency notes, however, that civil monetary penalties are adjusted for inflation at least once every four years pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Debt Collection Improvement Act of 1996 (Public Law 104–134). Adjusted civil penalty amounts are published in the **Federal Register**.

*Comment 6:* One commenter suggested that permit suspensions imposed on companies for criminal offenses should be permanent.

*Response:* NOAA’s Civil Procedure regulations deal exclusively with civil administrative enforcement procedures and do not address criminal offenses, thus this *Comment* is outside of the scope of the proposed rule, and is not addressed here.

*Comment 7:* One commenter expressed the opinion that permits are being inappropriately issued to individuals whose intent is to kill scarce animals.

*Response:* The 904 regulations do not relate in any way to the issuance of permits, therefore this *Comment* is outside of the scope of the proposed rule, and is not addressed here.

#### Section 904.3—Filing and Service of Notices, Documents and Other Papers

*Comment 8:* One commenter suggested that NOAA establish a definition for the phrase “last known address” in paragraph (a), to provide for clarity and ease of reference.

*Response:* The phrase “last known address” appears in paragraphs (a) and (b) of the regulation. NOAA’s longstanding use of the phrase “last known address” is comparable to the

method of service provision contained in the Federal Rules of Civil Procedure, Rule 5(b)(2)(B): “Mailing a copy to the last known address of the person served.” NOAA feels that the plain meaning of the phrase “last known address” is sufficiently apparent to make further clarification unnecessary.

#### Section 904.4—Computation of Time Periods

*Comment 9:* One commenter suggested that in paragraph (b) the phrase “take some proceedings” may not be grammatically correct. Perhaps the phrase “bring some proceeding” should be used.

*Response:* NOAA has decided to delete section § 904.4 (b), therefore this *Comment* is now moot.

#### Section 904.101—Notice of Violation and Assessment (NOVA)

*Comment 10:* One commenter noted that paragraph (b) raises questions regarding “ability to pay” that are addressed in comments on § 904.108.

*Response:* See NOAA’s response to comments pertaining to § 904.108.

#### Section 904.107—Joint and Several Respondents

*Comment 11:* One commenter thought that the Agency needs to clarify, in § 904.107 (b) and (c), the effect of a settlement with one joint and several respondent on the penalty assessed against the remaining respondent(s). The commenter suggested that any hearing with remaining joint and several respondent(s) be cast in terms of the total penalty assessment made with the understanding that, if there was a settlement payment, the Agency could only collect the remaining amount due after subtracting the amount of the settlement payment from the amount of the total assessment made.

*Response:* In light of comments received, as well as further internal review of the issue of joint and several liability, the Agency has decided not to make the changes to § 904.107 included in the proposed rule. However, the Agency has amended § 904.107(a) to clarify what happens to a hearing request when the requesting party settles with the Agency prior to the hearing.

#### Section 904.108—Factors Considered in Assessing Penalties

*Comment 12:* One commenter expressed concern that it is unclear whether “ability to pay” is considered in making the initial penalty assessment or is an affirmative defense that may be raised by the respondent. In paragraph (b), the proposed regulation provides

that “NOAA may, in consideration of a respondent’s ability to pay, increase or decrease a penalty from an amount that would otherwise be warranted by other relevant factors.” Whereas paragraph (c) provides, “the respondent has the burden of proving [an] inability [to pay].”

*Response:* Ability to pay must be considered by NOAA in determining an initial penalty assessment whenever the statute being enforced so requires. In those cases, it is the Agency’s burden to show that it considered the respondent’s ability to pay in determining the initial penalty assessment. Both in such cases, and in cases where the statute being enforced does not require that NOAA consider ability to pay, a respondent may seek to have the proposed penalty reduced based on alleged inability to pay. In those instances, the respondent must submit verifiable, complete and accurate financial information to support their claim. The burden of proving inability to pay lies with the respondent.

*Comment 13:* One commenter noted that the provisions in paragraph (e) establish three different time frames in which a respondent can submit financial information regarding ability to pay. They are: (a) Within sixty (60) days of receipt of the NOVA; (b) at least thirty (30) days in advance of the hearing if the respondent requested a hearing and wishes his or her inability to pay to be considered by the judge in the initial decision; and (c) at the hearing, in which case Agency counsel will have 30 days after the hearing in which to respond to the submission.

*Response:* In keeping with statutory requirements, for administrative efficiency, and to establish a single, consistent time frame for submitting ability to pay information, the language in paragraph (e) will be modified to clarify that in order to be considered by agency counsel, or in the initial decision of the administrative law judge, ability to pay information must be submitted to Agency Counsel at least 30 days prior to the hearing. Any information regarding the respondent’s ability to pay submitted after that time may not be considered by Agency Counsel or by the judge. If the Judge decides to admit any information submitted less than 30 days in advance of the hearing then Agency Counsel will have 30 days to respond to the submission from the date of admission.

#### Section 904.200—Scope and Applicability

*Comment 14:* One commenter noted that in the preamble of the proposed regulations, the discussion of 904.200

(b) states: “Paragraph (b) would be amended to delegate authority to the Judges to make initial and final decisions, and to take other actions related to the conduct of hearings, *without that authority being subject to the administrative direction of the Chief Administrative Law Judge.*” The commenter finds the statement that the Judge’s authority is not subject to the administrative direction of the Chief Administrative Law Judge both unnecessary and confusing. First, ALJs derive their independence from the APA, which sets out their duties and imperatives in some detail. See 5 U.S.C. 554; see also *Butz v. Economou*, 438 U.S. 478, 513 (1978). There has never been any question relating to the independence of ALJs or their authority to hear APA cases.

Second, the reference to “administrative direction” and the Judges not being subject to such direction is incorrect. Things like proper assignment of cases to judges are mandated. See 5 U.S.C. 3105. Further, judges’ travel authorizations, procurement activities, use of legal assistance, hiring of court reporters, and many other aspects of “administrative direction,” are valid and necessary. The commenter believes that the supplemental information remark regarding paragraph (b) is unnecessary, might be contrary to law and should be eliminated.

*Response:* The remarks in the preamble of the proposed regulations were not intended to conflict with existing law, or with the established administrative practices among ALJs who hear NOAA enforcement cases. This change was not included in the final language of NOAA’s Civil Procedure regulations published here and therefore is to be given no effect.

#### Section 904.201—Hearing Requests and Case Docketing

*Comment 15:* In § 904.201, the commenter suggested replacing “Office of Administrative Law Judges” with “ALJ Docketing Center”.

*Response:* The Agency agrees and has made this change throughout NOAA’s Civil Procedure regulations.

*Comment 16:* One commenter suggested that NOAA rule on the timeliness of hearing requests because the ALJ is without authority to do so. If the Agency decides not to handle such rulings it needs to establish a procedure for alerting the docketing center of late filings.

*Response:* The Agency believes that the determination of whether a request is untimely properly lies with the ALJ. The determination that a request is

untimely is dispositive. It is therefore the role of the ALJ to consider the procedural history and any attendant arguments and render a final decision. This process is consistent with Federal District Court practice.

The Agency will forward any untimely hearing requests to the Chief Administrative Law Judge at the ALJ Docketing Center along with a Motion in Opposition, documentation of service and any other materials that support the Agency’s claim that the hearing request is untimely. The Agency will request that the Chief Administrative Law Judge deny the untimely hearing request. The Chief Administrative Law Judge shall issue an order on the timeliness of the hearing request.

#### Section 904.202—Filing of Documents

*Comment 17:* One commenter suggested that discovery requests and answers be required to be filed with the ALJ in order to facilitate discovery, which can often become complicated and cause unnecessary delay.

*Response:* The Agency appreciates the fact that discovery might be facilitated by participation by the ALJ. However, discovery is an opportunity for both parties to develop their cases independent of judicial review. Issues relating to contested requests for discovery, failure to comply with discovery orders or requests, or timeliness of discovery, for example, are appropriate for adjudication by the ALJ prior to hearing. The content of discovery requests and responses, however, should remain between the parties. Information that is discoverable is not always admissible, therefore, to the greatest extent possible such information should not be provided to the ALJ in advance of the hearing. Therefore, the Agency declines to include this suggested change in the final rule.

#### Section 904.204—Duties and Powers of Judge

*Comment 18:* One commenter suggested changing § 904.204(k) to clarify that the section is only applicable to expert witnesses.

*Response:* This section affords the ALJ the authority to “require a party or witness at any time during the proceeding to state his or her position concerning any issue or his or her theory in support of such position.” One commenter suggests that requiring a witness to state a position or theory is objectionable and irrelevant unless the witness is an expert. However, that is not true in an administrative hearing conducted pursuant to the APA. As stated at § 904.251(a)(2), all evidence

that is relevant, material, reliable, and probative is admissible at a hearing. Formal rules of evidence do not necessarily apply to administrative proceedings. The nature of an administrative hearing is less formal than a trial and the goal is to allow the parties to introduce any and all relevant evidence to assist the ALJ in making an informed decision. Should the ALJ feel that the position or theory of a party or witness would be informative or useful to the ALJ's determination, these procedural rules grant the ALJ the authority to solicit that information. The ALJ may ask a party or a witness any question they deem relevant and, as the trier of fact, determine the appropriate weight to attach. Additionally, nothing in this section prevents an ALJ from requiring that a party or witness be qualified as an expert before accepting opinion or theory testimony.

*Comment 19:* One commenter questioned the source of NOAA's authority to collect attorney's fees and expenses and whether this provision conflicts with the Equal Access to Justice Act.

*Response:* The regulation in question plainly states that the ALJ may "award attorney fees and expenses as provided by applicable statute or regulation." See 15 CFR § 904.204 (o). The qualification clearly limits the ALJ to awards of attorney fees that are expressly allowed by law under the statutes enforced by NOAA. Further, the regulation comports with the Equal Access to Justice Act (EAJA) in that EAJA expressly allows the payment of attorney fees and expenses to respondents in certain instances. See 5 U.S.C. 504 (a). Nothing in the clear language of this regulation expands or limits the ALJ's authority beyond what expressly exists in an applicable statute and/or regulation.

*Comment 20:* One commenter suggested that provisions for assessment of penalties and fees for violations of Agency procedural rules and ALJ orders be eliminated as few agencies allow for such. The commenter further suggests that if NOAA maintains these provisions a process needs to be established for determining and enforcing penalties.

*Response:* The commenter is correct that some Federal agencies do not give ALJs the authority to impose monetary sanctions for violations of the agency's procedural rules or an ALJ's order. However, a number of agencies do give the ALJ the authority to impose monetary sanctions, including: The Office of the Comptroller of the Currency, the FDIC, the Commodity Futures Trading Commission, the United States International Trade

Commission, the Social Security Administration, and the Department of Health and Human Services. The Federal Labor Relations Authority leaves open the possibility of monetary sanctions, but does not specifically address it in its regulations. Section 904.204 (q) lays out the grounds for imposing a sanction, the types of available sanctions and the procedures for imposing a sanction.

*Comment 21:* One commenter noted that the imposition of sanctions, under § 904.204 (q), is subject to interlocutory review. Interlocutory review is infrequently used in NOAA proceedings. The commenter suggests that allowing it here would cause delay. The commenter recommends that the Agency eliminate interlocutory review in its entirety because it is inconsistent with the elimination of the administrative appeals process and because most agencies do not allow for interlocutory review.

*Response:* While NOAA appreciates the fact that interlocutory review may cause delay in administrative proceedings, the Agency has chosen to keep the interlocutory review process. Although it is an infrequently exercised option, in certain instances it is important tool for all parties to address issues of immediate concern. Further, the Agency believes that it is appropriate for sanctions to be subject to interlocutory review in the same manner as other rulings by the ALJ. ALJ-imposed sanctions could dramatically affect the remainder of the case, and possibly the outcome, and therefore warrant interlocutory review. The commenter's concern with the inconsistency between the elimination of administrative appeals and interlocutory review is now moot as the Agency has decided not to eliminate administrative appeals.

*Comment 22:* One commenter suggested that § 904.204 (q) provide for the removal of counsel from the proceeding for misconduct. The commenter further suggests the development of provisions to prevent such counsel from representing clients in future administrative enforcement actions.

*Response:* The sanction provisions established in § 904.204 (q) are quite broad and allow the ALJs latitude to fashion an appropriate sanction. The Agency has articulated certain examples of types of sanctions, but did not make the list exhaustive in order to allow the ALJ to ensure that any sanction imposed meet the needs of that particular case. The language of § 904.204 (q)(2) reads: "Sanctions which may be imposed include, but are not limited to, one or

more of the following[.]" Under the Agency's reading of this language, an ALJ would be authorized to remove counsel or other authorized representative from the proceeding for misconduct. However, at this time, the Agency is not prepared to develop provisions that would extend such a removal beyond an individual case.

*Comment 23:* One commenter expressed concern that the authority to impose sanctions not be tailored to benefit only the Agency.

*Response:* The proposed rule adds a paragraph (q) to 15 CFR § 904.204. As indicated in paragraph (q), this gives the judge authority, upon the motion of any party, to impose sanctions on another party. The ability to be subjected to sanctions by the ALJ or to make a motion to impose sanctions on another party is identical for both the Agency and respondents. This change affects all parties equally.

#### Section 904.205—Disqualification of Judge

*Comment 24:* One commenter suggested that § 904.205 be revised to make clear that an adverse ruling on a motion to withdraw or disqualify a judge is not subject to interlocutory review.

*Response:* This comment is outside the scope of the proposed rule, as this provision has not been changed from its current iteration, however, the Agency continues to believe that adverse rulings on a motion to withdraw or disqualify a judge falls appropriately within the scope of issues on which a party may request interlocutory review.

#### Section 904.207—Amendment of Pleading or Record

*Comment 25:* One commenter suggested that § 904.207 (a) be revised to lengthen the time period allowed for amending a pleading or record.

*Response:* NOAA does not expect that allowing amendment of a pleading until 20 days before a hearing as a matter of course will cause the proceeding to be delayed. Historically, such amendments are unusual and, when made, generally do not dramatically change the theory of the case requiring new methods of proof or additional time to prepare a defense. Examples of such non-prejudicial amendments have included NOAA's withdrawal of one count out of multiple counts, addition of a necessary party such as the reinstated corporate form of an individually charged party, and correction of transposed numbers for a date of violation or vessel documentation. Allowing the parties to amend their pleadings until 20 days prior to hearing without leave of the



court facilitates administrative efficiency. In the event amendments made until 20 days prior to hearing are documented as causing significant delays in the proceedings, NOAA may revisit this section at another time to address the concern.

#### Section 904.211—Failure To Appear

*Comment 26:* A few commenters suggested that the language of § 904.211 (a) be revised to better describe the section's application to NOVAs, NOPSs and NIDPs and to clarify the language regarding dismissals and default judgments. Another commenter noted that the authority to enter a default judgment or impose sanctions should not be tailored to benefit only the Agency.

*Response:* The Agency agrees that the language of § 904.211 (a) should be revised to improve its clarity. This provision is not intended to benefit only the Agency, it is intended to treat parties equally. The proposed rule amends section 904.211 (a) to reflect that if the respondent fails to appear at a hearing then the ALJ is authorized to find the facts as alleged in the NOVA, NOPS and/or NIDP and enter a default judgment against the respondent. Similarly, if the Agency fails to appear at a hearing, the ALJ is authorized to dismiss the case against the Respondent(s) with prejudice. The final rule has been amended to clarify the Agency's intention as described above, and to address the other concerns raised by the commenters.

*Comment 27:* One commenter suggested that if the ALJ has authority akin to the model rules of Civil Procedure such authority should include dismissal and/or summary judgment upon motion of either party without requiring approval of the non-moving party.

*Response:* The Agency has the authority to establish the rules of procedure for its administrative enforcement program. In some ways, NOAA's regulations do mirror the Federal Rules of Civil Procedure (FRCP), but in many ways they do not. Many of the more elaborate procedures found in the FRCP are not conducive to the objectives of the Agency's administrative enforcement program. The Agency believes that the proposals made by this commenter will decrease the effectiveness and efficiency of NOAA's administrative process and have therefore elected not to make the suggested changes.

#### Section 904.213—Settlements

*Comment 28:* One commenter suggested that the Agency clarify

§ 904.213 to better describe how the amount of a settlement against one joint and several respondent will be communicated to the ALJ. See also § 904.107 (b) and (c).

*Response:* As discussed above, the Agency has decided not to make its proposed changes to § 904.107, and instead is reverting back to the existing language. However, the Agency has added a clarification to § 904.107 (a) to better describe how a settlement with one joint and several respondents affects any other joint and several respondents.

#### Section 904.215—Consolidation

*Comment 29:* One commenter suggested revising § 904.215 to authorize the Chief Administrative Law Judge, rather than individual Administrative Law Judges, to consolidate cases.

*Response:* The Agency concurs. NOAA uses the Administrative Law Judge Docketing Center of the U.S. Coast Guard to assign administrative law judges to hear the Agency's administrative penalty cases. Therefore, using case consolidation procedures that coincide with USCG administrative practice and that the U.S. Coast Guard Administrative Law Judges are already accustomed to using will result in a more efficient administration of the Agency's cases. Moreover, this change will create no additional procedural burdens for the Agency or the respondents.

#### Section 904.216—Prehearing Conferences

*Comment 30:* One commenter suggested that § 904.216 needs to be clarified and raises two specific questions. First, the commenter questions whether the ALJ is required to use a court reporter to record a pre-hearing conference, and second, whether the ALJ should always order transcripts of the pre-hearing conference even when the parties have not requested such transcripts.

*Response:* The Agency agrees that § 904.216 needs to be modified to provide that any certified court reporter, including stenographers, are an alternative to the ALJ creating his own audio recording. Section 904.216 (a) as proposed states that the ALJ "shall record such conference by audio recording or stenographer". How the ALJ causes such recording to be made is subject to the discretion of the ALJ. However, the Agency anticipates that, if practicable, the ALJ would exercise that discretion after determining the preferences and concerns of the parties. In certain cases, the ALJ may decide that a simple audio recording taken by the

ALJ or the ALJ's assistant is sufficient. In other cases, circumstances (such as the quality of the ALJ's recording equipment, the complexity of the issues or the number of conference participants) may warrant the hiring of a court reporter to record the conference.

Although many court reporters use stenographic equipment, the Agency does not intend to limit the equipment or recording media that can be used by a court reporter. Accordingly, the Agency has deleted the word "stenographer" and inserted the phrase "court reporter". Use of "reporter" or "court reporter" is consistent with the rules governing U.S. District Courts, including 28 U.S.C. 753. Moreover, with regard to whether a transcript is provided, if the ALJ or any party to the proceeding desires to have a transcript of all or a portion of the prehearing conference, then the ALJ has the responsibility to order and arrange for a prompt transcription of the record.

#### Section 904.240—Discovery Generally

*Comment 31:* One commenter suggested that the deadline for discovery be changed to thirty days before the hearing instead of twenty days.

*Response:* The commenter's suggested revision is outside of the scope of the proposed rule, therefore, it is not addressed here.

#### Section 904.254—Interlocutory Review

*Comment 32:* One commenter suggested that § 904.254 be revised to eliminate interlocutory review and if the Agency elects not to eliminate interlocutory review, the commenter suggests clarifying judicial authority.

*Response:* The Agency does not wish to eliminate interlocutory review at this point. Although infrequently utilized, it provides an important tool to all parties during the administrative process. The proposed and final rule expands this section and clarifies the appropriate circumstances for interlocutory review.

#### Section 904.255—Ex Parte Communication

*Comment 33:* One commenter raised the question of whether denial of a party's claim based on ex parte communication under § 904.255 is subject to interlocutory review.

*Response:* Section 904.255 does not explicitly make denials of a party's claim based on ex parte communications subject to interlocutory review. Therefore, whether or not interlocutory review is appropriate for review of such a denial is governed by the language of section 904.254 and



would need to meet the requirements of that section.

*Comment 34:* One commenter suggested that § 904.255(d)(2) be revised to clarify how classified information should be presented to the ALJ, how the ALJ should identify classified information, and whether or not the ALJs need security clearance to review classified evidence.

*Response:* There are guidelines that cover the transfer and release of classified information to judicial organizations. This is covered in Chapter 21 of the Department of Commerce Manual of Security Policies and Procedures. This policy will apply to the Administrative Law Judges who hear NOAA's civil administrative enforcement cases. The policy also clarifies how to identify classified information. Security clearances are required to review classified evidence, however the security clearances possessed by the Administrative Law Judges who hear NOAA's administrative cases is appropriate.

#### Section 904.273—Administrative Review of Decision

*Comment 35:* One commenter thought that direct appeal to U.S. District Court leaves too much control over civil penalty assessments in the hands of Agency enforcement attorneys.

*Response:* The Agency, in large part in response to comments received on its proposed rule, has decided not to eliminate administrative appeals, therefore this comment is now moot. However, neither the suggestion to eliminate administrative appeals nor the decision to keep them affects civil penalty assessments.

*Comment 36:* One commenter thought that it is unclear whether or not the revisions create a right for the Agency to appeal to U.S. District Court. If they do, the commenter suggests that such a right is not authorized by the Magnuson-Stevens Fishery Conservation and Management Act.

*Response:* The Agency, in large part in response to comments received on its proposed rule, has decided not to eliminate administrative appeals, therefore this comment is now moot.

*Comment 37:* One commenter suggested that direct appeal to U.S. District Court creates a disincentive for respondents to seek due process because it is cost prohibitive.

*Response:* The Agency, in large part in response to comments received on its proposed rule, has decided not to eliminate administrative appeals, therefore this comment is now moot. However, concern over issues raised by commenters, such as costs to

respondents, played an important role in the Agency's determination not to eliminate the administrative appeals process.

*Comment 38:* One commenter recommended that the Agency reconsider its decision to eliminate the administrative appeals process because such a decision presents numerous issues for the Agency. The commenter highlighted several benefits that are derived from administrative review. First, requiring parties to pursue all administrative solutions prior to seeking judicial relief preserves judicial economy. Second, it protects the Agency's interests by giving the Agency an opportunity to develop a factual record and apply its expertise. Third, agency autonomy is preserved and judicial resources are conserved, because the agency is given an opportunity to discover and correct its mistakes before the matter is ever subject to judicial review and possibly resolve conflicts without judicial intervention. Fourth, the agency is able to establish policy through adjudication.

In addition, the commenter noted several disadvantages to eliminating administrative appeals because it may lead to inconsistent adjudication among ALJs; difficulty identifying precedent; negative impact on the Agency's ability to articulate its policies; and negative impact on respondents.

Overall, commenters representing a wide range of interests stressed the importance of administrative review and the benefits to both the Agency and parties from having the administrative process occur between the ALJ decision and any judicial review in Federal court.

*Response:* After consideration of these and the other comments listed above advocating retention of the administrative appeals process as well as the Agency's further analysis of the potential impacts of eliminating administrative appeals, the Agency has decided not to eliminate the administrative appeals process. In fact, the comments on this point convinced the Agency that the administrative process should be mandatory for any party who wants to obtain review of the ALJ decision. Accordingly, § 904.273 has been retained, with some modifications as described above.

## IV. Administrative Requirements

### A. The Regulatory Flexibility Act

When this rule was proposed, the Administrator certified, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601–612, that it would not have a significant economic impact on a substantial

number of small entities. No comments were received on the certification to lead the Agency to change that determination.

### B. Executive Order 12866

Under Executive Order 12866 (58 FR 51,735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. It was determined when this rule was proposed that it is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

### C. Paperwork Reduction Act

At the proposed rule stage, it was determined that this regulatory action contains no information collection activities and, therefore, no information collection request (ICR) was submitted to the Office of Management and Budget (OMB) for review in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

### List of Subjects in 15 CFR Part 904

Administrative practice and procedure, fisheries, fishing, fishing vessels, penalties, seizures and forfeitures.

Dated: March 2, 2006.

**James R. Walpole,**

*General Counsel, National Oceanic and Atmospheric Administration.*

■ For the reasons set forth in the preamble, the NOAA Office of General Counsel for Enforcement and Litigation revises 15 CFR part 904 as follows:

■ 1. Part 904 is revised to read as follows:

## PART 904—CIVIL PROCEDURES

### Subpart A—General

Sec.

- 904.1 Purpose and scope.
- 904.2 Definitions and acronyms.
- 904.3 Filing and service of notices, documents, and other papers.
- 904.4 Computation of time periods.
- 904.5 Appearances.

### Subpart B—Civil Penalties

- 904.100 General.
- 904.101 Notice of violation and assessment (NOVA).
- 904.102 Procedures upon receipt of a NOVA.
- 904.103 Hearing.
- 904.104 Final administrative decision.
- 904.105 Payment of final civil penalty.
- 904.106 Compromise of civil penalty.
- 904.107 Joint and several respondents.
- 904.108 Factors considered in assessing civil penalties.

**Subpart C—Hearing and Appeal Procedures****General**

- 904.200 Scope and applicability.
- 904.201 Hearing requests and case docketing.
- 904.202 Filing of documents.
- 904.203 [Reserved]
- 904.204 Duties and powers of Judge.
- 904.205 Disqualification of Judge.
- 904.206 Pleadings, motions, and service.
- 904.207 Amendment of pleading or record.
- 904.208 Extensions of time.
- 904.209 Expedited administrative proceedings.
- 904.210 Summary decision.
- 904.211 Failure to appear.
- 904.212 Failure to prosecute or defend.
- 904.213 Settlements.
- 904.214 Stipulations.
- 904.215 Consolidation.
- 904.216 Prehearing conferences.

**Discovery**

- 904.240 Discovery generally.
- 904.241 Depositions.
- 904.242 Interrogatories.
- 904.243 Admissions.
- 904.244 Production of documents and inspection.
- 904.245 Subpoenas.

**Hearings**

- 904.250 Notice of time and place of hearing.
- 904.251 Evidence.
- 904.252 Witnesses.
- 904.253 Closing of record.
- 904.254 Interlocutory review.
- 904.255 *Ex parte* communications.

**Post-Hearing**

- 904.260 Recordation of hearing.
- 904.261 Post-hearing briefs.

**Decision**

- 904.270 Record of decision.
- 904.271 Initial decision.
- 904.272 Petition for reconsideration.
- 904.273 Administrative review of decision.

**Subpart D—Permit Sanctions and Denials****General**

- 904.300 Scope and applicability.
- 904.301 Bases for permit sanctions or denials.
- 904.302 Notice of permit sanction (NOPS).
- 904.303 Notice of intent to deny permit (NIDP).
- 904.304 Opportunity for hearing.
- 904.305 Final administrative decision.

**Permit Sanctions for Noncompliance**

- 904.310 Nature of permit sanctions.
- 904.311 Compliance.

**Permit Sanctions for Violations**

- 904.320 Nature of permit sanctions.
- 904.321 Reinstatement of permit.
- 904.322 Interim action.

**Subpart E—Written Warnings**

- 904.400 Purpose and scope.
- 904.401 Written warning as a prior violation.
- 904.402 Procedures.
- 904.403 Review and appeal of a written warning.

**Subpart F—Seizure and Forfeiture Procedures**

- 904.500 Purpose and scope.
- 904.501 Notice of seizure.
- 904.502 Bonded release of seized property.
- 904.503 Appraisalment.
- 904.504 Administrative forfeiture proceedings.
- 904.505 Summary sale.
- 904.506 Remission of forfeiture and restoration of proceeds of sale.
- 904.507 Recovery of certain storage costs.
- 904.508 Voluntary forfeiture by abandonment.
- 904.509 Disposal of forfeited property.
- 904.510 Return of seized property.

**Authority:** 16 U.S.C. 1801–1882; 16 U.S.C. 1531–1543; 16 U.S.C. 1361–1407; 16 U.S.C. 3371–3378; 16 U.S.C. 1431–1439; 16 U.S.C. 773–773k; 16 U.S.C. 951–961; 16 U.S.C. 5001–5012; 16 U.S.C. 3631–3644; 42 U.S.C. 9101 *et seq.*; 30 U.S.C. 1401 *et seq.*; 16 U.S.C. 971–971k; 16 U.S.C. 781 *et seq.*; 16 U.S.C. 2401–2413; 16 U.S.C. 2431–2444; 16 U.S.C. 972–972h; 16 U.S.C. 916–916l; 16 U.S.C. 1151–1175; 16 U.S.C. 3601–3608; 16 U.S.C. 1851 note; 15 U.S.C. 5601 *et seq.*; Pub. L. 105–277; 16 U.S.C. 1822 note, Section 801(f); 16 U.S.C. 2465(a); 16 U.S.C. 5103(b); 16 U.S.C. 1385 *et seq.*; 16 U.S.C. 1822 note (Section 4006); 16 U.S.C. 4001–4017; 22 U.S.C. 1980(g); 16 U.S.C. 5506(a); 16 U.S.C. 5601–5612; 16 U.S.C. 1822; 16 U.S.C. 973–973(r); 15 U.S.C. 330–330(e).

**Subpart A—General****§ 904.1 Purpose and scope.**

(a) This part sets forth the procedures governing NOAA's administrative proceedings for assessment of civil penalties, suspension, revocation, modification, or denial of permits, issuance and use of written warnings, and release or forfeiture of seized property.

(b) This subpart defines terms appearing in this part and sets forth rules for the filing and service of documents in administrative proceedings covered by this part.

(c) The following statutes authorize NOAA to assess civil penalties, impose permit sanctions, issue written warnings, and/or seize and forfeit property in response to violations of those statutes:

- (1) American Fisheries Act of 1998, Public Law 105–277;
- (2) Anadromous Fish Products Act, 16 U.S.C. 1822 note, Section 801(f);
- (3) Antarctic Conservation Act of 1978, 16 U.S.C. 2401–2413;
- (4) Antarctic Marine Living Resources Convention Act of 1984, 16 U.S.C. 2431–2444;
- (5) Antarctic Protection Act of 1990, 16 U.S.C. 2465(a);
- (6) Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. 5103(b);
- (7) Atlantic Salmon Convention Act of 1982, 16 U.S.C. 3601–3608;

(8) Atlantic Striped Bass Conservation Act, 16 U.S.C. 1851 note;

(9) Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971–971k;

(10) Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1401 *et seq.*;

(11) Dolphin Protection Consumer Information Act, 16 U.S.C. 1385 *et seq.*;

(12) Driftnet Impact Monitoring, Assessment, and Control Act, 16 U.S.C. 1822 note (Section 4006);

(13) Eastern Pacific Tuna Licensing Act of 1984, 16 U.S.C. 972–972h;

(14) Endangered Species Act of 1973, 16 U.S.C. 1531–1543;

(15) Fish and Seafood Promotion Act of 1986, 16 U.S.C. 4001–4017;

(16) Fisherman's Protective Act of 1967, 22 U.S.C. 1980(g);

(17) Fur Seal Act Amendments of 1983, 16 U.S.C. 1151–1175;

(18) High Seas Fishing Compliance Act, 16 U.S.C. 5506(a);

(19) Lacey Act Amendments of 1981, 16 U.S.C. 3371–3378;

(20) Land Remote-Sensing Policy Act of 1992, 15 U.S.C. 5601 *et seq.*;

(21) Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801–1882;

(22) Marine Mammal Protection Act of 1972, 16 U.S.C. 1361–1407;

(23) National Marine Sanctuaries Act, 16 U.S.C. 1431–1439;

(24) North Pacific Anadromous Stocks Convention Act of 1992, 16 U.S.C. 5001–5012;

(25) Northern Pacific Halibut Act of 1982, 16 U.S.C. 773–773k;

(26) Northwest Atlantic Fisheries Convention Act of 1995, 16 U.S.C. 5601–5612;

(27) Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. 9101 *et seq.*;

(28) Pacific Salmon Treaty Act of 1985, 16 U.S.C. 3631–3644;

(29) Shark Finning Prohibition Act, 16 U.S.C. 1822;

(30) South Pacific Tuna Act of 1988, 16 U.S.C. 973–973(r);

(31) Sponge Act, 16 U.S.C. 781 *et seq.*;

(32) Tuna Conventions Act of 1950, 16 U.S.C. 951–961;

(33) Weather Modification Reporting Act, 15 U.S.C. 330–330e; and

(34) Whaling Convention Act of 1949, 16 U.S.C. 916–916l.

(d) The procedures set forth in this part are intended to apply to administrative proceedings under these and any other statutes or authorities administered by NOAA.

**§ 904.2 Definitions and acronyms.**

Unless the context otherwise requires, or as otherwise noted, terms in this Part have the meanings prescribed in the applicable statute or regulation. In

addition, the following definitions apply:

*Administrator* means the Administrator of NOAA or a designee.

*Agency* means the National Oceanic and Atmospheric Administration (NOAA).

*ALJ Docketing Center* means the Docketing Center of the Office of Administrative Law Judges.

*Applicable statute* means a statute cited in § 904.1(c), and any regulations issued by NOAA to implement it.

*Authorized officer means:*

(1) Any commissioned, warrant, or petty officer of the USCG;

(2) Any special agent or fishery enforcement officer of NMFS;

(3) Any officer designated by the head of any Federal or state agency that has entered into an agreement with the Secretary to enforce the provisions of any statute administered by NOAA; or

(4) Any USCG personnel accompanying and acting under the direction of any person described in paragraph (1) of this definition.

*Citation* means a written warning (see section 311(c) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1861(c), and section 11(c) of the Northern Pacific Halibut Act of 1982, 16 U.S.C. 773i(c)).

*Civil penalty* means a civil administrative monetary penalty assessed under the civil administrative process described in this part.

*Decision* means an initial or final administrative decision of the Judge.

*Ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include inquiries regarding procedures, scheduling, and status.

*Final administrative decision* means an order or decision of NOAA assessing a civil penalty or permit sanction which is not subject to further Agency review under this part, and which is subject to collection proceedings or judicial review in an appropriate Federal district court as authorized by law.

*Forfeiture* includes, but is not limited to, surrender or relinquishment of any claim to an item by written agreement, or otherwise; or extinguishment of any claim to, and transfer of title to an item to the U.S. Government by court order or by order of the Administrator under a statute.

*Hearing* means a civil administrative hearing on a NOVA, NOPS and/or NIDP.

*Initial decision* means a decision of the Judge that, under applicable statute and regulation, is subject to review by the Administrator.

*Judge* means Administrative Law Judge.

*NIDP* means Notice of Intent to Deny Permit.

*NMFS* means the National Marine Fisheries Service.

*NOAA* (see *Agency*) means either the Administrator or a designee acting on behalf of the Administrator.

*NOPS* means Notice of Permit Sanction.

*NOVA* means Notice of Violation and Assessment of civil penalty.

*Party* means the respondent and the Agency; a joint and several respondent, vessel owner, or permit holder, if they enter an appearance; and any other person allowed to participate under § 904.204(b).

*Permit* means any license, permit, certificate, or other approval issued by NOAA under an applicable statute.

*Permit holder* means the holder of a permit or any agent or employee of the holder, and includes the owner and operator of a vessel for which the permit was issued.

*Permit sanction* means suspension, revocation, or modification of a permit (see § 904.320).

*PPIP* means Preliminary Position on Issues and Procedures.

*Respondent* means a person issued a written warning, NOVA, NOPS, NIDP or other notice.

*Settlement agreement* means any agreement resolving all or part of an administrative or judicial action. The terms of such an agreement may include, but are not limited to, payment of a civil penalty, and/or imposition of a permit sanction.

*USCG* means the U.S. Coast Guard.

*Vessel owner* means the owner of any vessel that may be liable in rem for any civil penalty, or whose permit may be subject to sanction in proceedings under this part.

*Written warning* means a notice in writing to a person that a violation has been documented against the person or against the vessel which is owned or operated by the person, where no civil penalty or permit sanction is imposed or assessed.

#### **§ 904.3 Filing and service of notices, documents, and other papers.**

(a) Service of a NOVA (§ 904.101), NOPS (§ 904.302), NIDP (§ 904.303), Notice of Proposed Forfeiture (§ 904.504), Notice of Seizure (§ 904.501), Notice of Summary Sale (§ 904.505) or Written Warning (§ 904.402) may be made by certified mail (return receipt requested), facsimile, electronic transmission, or third party commercial carrier to an addressee's last known address or by personal delivery. Service of a notice under this subpart will be considered effective upon receipt.

(b) Service of documents and papers, other than such Notices as described in paragraph (a) of this section, may be made by first class mail (postage prepaid), facsimile, electronic transmission, or third party commercial carrier, to an addressee's last known address or by personal delivery. Service of documents and papers will be considered effective upon the date of postmark (or as otherwise shown for government-franked mail), facsimile transmission, delivery to third party commercial carrier, electronic transmission or upon personal delivery.

(c) Whenever this part requires service of a NOVA, NOPS, NIDP, document, or other paper, such service may effectively be made on the agent for service of process, on the attorney for the person to be served, or other representative. Refusal by the person to be served (including an agent, attorney, or representative) of service of a document or other paper will be considered effective service of the document or other paper as of the date of such refusal. In cases where certified notification is returned unclaimed, service will be considered effective if the U.S. Postal Service provides an affidavit stating that the party was receiving mail at the same address during the period when certified service was attempted.

(d) Any documents or pleadings filed or served must be signed:

(1) By the person or persons filing the same,

(2) By an officer thereof if a corporation,

(3) By an officer or authorized employee if a government instrumentality, or

(4) By an attorney or other person having authority to sign.

#### **§ 904.4 Computation of time periods.**

For a NOVA, NOPS or NIDP, the 30 day response period begins to run on the date the notice is received. All other time periods begin to run on the day following the service date of the document, paper, or event that begins the time period. Saturdays, Sundays, and Federal holidays will be included in computing such time, except that when such time expires on a Saturday, Sunday, or Federal holiday, in which event such period will be extended to include the next business day. This method of computing time periods also applies to any act, such as paying a civil penalty, required by this part to take place within a specified period of time. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and

legal holidays will be excluded in the computation.

#### **§ 904.5 Appearances.**

(a) A party may appear in person or by or with counsel or other representative.

(b) Whenever an attorney or other representative contacts the Agency on behalf of another person with regard to any matter that has resulted in, or may result in, a written warning, a NOVA, NOPS, NIDP, or a forfeiture proceeding, that attorney or other representative shall file a Notice of Appearance with the Agency. Such notice shall indicate the name of the person on whose behalf the appearance is made.

(c) Each attorney or other representative who represents a party in any hearing shall file a written Notice of Appearance with the Judge. Such notice shall indicate the name of the case, the docket number, and the party on whose behalf the appearance is made.

### **Subpart B—Civil Penalties**

#### **§ 904.100 General.**

This subpart sets forth the procedures governing NOAA administrative proceedings for the assessment of civil penalties under the statutes cited in § 904.1(c).

#### **§ 904.101 Notice of violation and assessment (NOVA).**

(a) A NOVA will be issued by NOAA and served upon the respondent(s). The NOVA will contain:

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the provisions of the Act, regulation, license, permit, agreement, or order allegedly violated;

(3) The findings and conclusions upon which NOAA bases the assessment;

(4) The amount of the civil penalty assessed; and

(5) Information concerning the respondent's rights upon receipt of the NOVA, and will be accompanied by a copy of the regulations in this part governing the proceedings.

(b) In assessing a civil penalty, NOAA will take into account information available to the Agency concerning any factor to be considered under the applicable statute, and any other information that justice or the purposes of the statute require.

(c) The NOVA may also contain a proposal for compromise or settlement of the case. NOAA may also attach documents that illuminate the facts believed to show a violation.

#### **§ 904.102 Procedures upon receipt of a NOVA.**

(a) The respondent has 30 days from receipt of the NOVA in which to respond. During this time the respondent may:

(1) Accept the penalty or compromise penalty, if any, by taking the actions specified in the NOVA;

(2) Seek to have the NOVA amended, modified, or rescinded under paragraph (b) of this section;

(3) Request a hearing under § 904.201(a);

(4) Request an extension of time to respond under paragraph (c) of this section; or

(5) Take no action, in which case the NOVA becomes a final administrative decision in accordance with § 904.104.

(b) The respondent may seek amendment or modification of the NOVA to conform to the facts or law as that person sees them by notifying Agency counsel at the telephone number or address specified in the NOVA. If amendment or modification is sought, Agency counsel will either amend the NOVA or decline to amend it, and so notify the respondent.

(c) The respondent may, within the 30 day period specified in paragraph (a) of this section, request an extension of time to respond. Agency counsel may grant an extension of up to 30 days unless he or she determines that the requester could, exercising reasonable diligence, respond within the 30 day period. If Agency counsel does not respond to the request within 48 hours of its receipt, the request is granted automatically for the extension requested, up to a maximum of 30 days. A telephonic response to the request within the 48 hour period is considered an effective response, and will be followed by written confirmation.

(d) Agency counsel may, for good cause, grant an additional extension beyond the 30 day period specified in paragraph (c) of this section.

#### **§ 904.103 Hearing.**

(a) Any hearing request under § 904.102(a)(3) is governed by the hearing and review procedures set forth in subpart C of this part.

(b) [Reserved]

#### **§ 904.104 Final administrative decision.**

(a) If no request for hearing is timely filed as provided in § 904.201(a), the NOVA becomes effective as the final administrative decision and order of NOAA 30 days after service of the NOVA or on the last day of any delay period granted.

(b) If a request for hearing is timely filed in accordance with § 904.201(a),

the date of the final administrative decision is as provided in subpart C of this part.

#### **§ 904.105 Payment of final civil penalty.**

(a) Respondent must make full payment of the civil penalty within 30 days of the date upon which the NOVA becomes effective as the final administrative decision and order of NOAA under § 904.104 or the date of the final administrative decision as provided in subpart C of this part. Payment must be made by mailing or delivering to NOAA at the address specified in the NOVA a check or money order made payable in U.S. currency in the amount of the assessment to the "Department of Commerce/NOAA," by credit card, or as otherwise directed.

(b) Upon any failure to pay the civil penalty assessed, NOAA may request the U.S. Department of Justice to recover the amount assessed in any appropriate district court of the United States, may act under § 904.106, or may commence any other lawful action.

#### **§ 904.106 Compromise of civil penalty.**

(a) NOAA, in its sole discretion, may compromise, modify, remit, or mitigate, with or without conditions, any civil penalty assessed, or which is subject to assessment, except as stated in paragraph (d) of this section.

(b) The compromise authority of NOAA under this section may be exercised either upon the initiative of NOAA or in response to a request by the respondent or a representative subject to the requirements of § 904.5. Any such request should be sent to Agency counsel at the address specified in the NOVA.

(c) Neither the existence of the compromise authority of NOAA under this section nor NOAA's exercise thereof at any time changes the date upon which a NOVA becomes final.

(d) NOAA will not compromise, modify, or remit a civil penalty assessed, or subject to assessment, under the Deep Seabed Hard Mineral Resources Act while an action to review or recover the civil penalty is pending in a court of the United States.

#### **§ 904.107 Joint and several respondents.**

(a) A NOVA may assess a civil penalty against two or more respondents jointly and severally. Each joint and several respondent is liable for the entire penalty but, in total, no more than the amount finally assessed may be collected from the respondents.

(b) A hearing request by one joint and several respondent is considered a request by the other joint and several

respondent(s). Agency counsel, having received a hearing request from one joint and several respondent, will send a copy of it to the other joint and several respondent(s) in the case. However, if the requesting joint and several respondent settles with the Agency prior to the hearing, upon notification by the Agency, any remaining joint and several respondent(s) must affirmatively request a hearing within the time period specified or the case will be removed from the court's docket as provided in § 904.213.

(c) A final administrative decision by the Judge or the Administrator after a hearing requested by one joint and several respondent is binding on all parties including all other joint and several respondent(s), whether or not they entered an appearance unless they have otherwise resolved the matter through settlement with the Agency.

**§ 904.108 Factors considered in assessing civil penalties.**

(a) Factors to be taken into account in assessing a civil penalty, depending upon the statute in question, may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior violations, and ability to pay; and such other matters as justice may require.

(b) NOAA may, in consideration of a respondent's ability to pay, increase or decrease a civil penalty from an amount that would otherwise be warranted by the other relevant factors. A civil penalty may be increased if a respondent's ability to pay is such that a higher civil penalty is necessary to deter future violations, or for commercial violators, to make a civil penalty more than a cost of doing business. A civil penalty may be decreased if the respondent establishes that he or she is unable to pay an otherwise appropriate civil penalty amount.

(c) Except as provided in paragraph (g) of this section, if a respondent asserts that a civil penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to NOAA. NOAA will not consider a respondent's inability to pay unless the respondent, upon request, submits such financial information as Agency counsel determines is adequate to evaluate the respondent's financial condition. Depending on the circumstances of the case, Agency counsel may require the respondent to complete a financial information request form, answer written interrogatories, or

submit independent verification of his or her financial information. If the respondent does not submit the requested financial information, he or she will be presumed to have the ability to pay the civil penalty.

(d) Financial information relevant to a respondent's ability to pay includes but is not limited to, the value of respondent's cash and liquid assets; ability to borrow; net worth; liabilities; income tax returns; past, present, and future income; prior and anticipated profits; expected cash flow; and the respondent's ability to pay in installments over time. A respondent will be considered able to pay a civil penalty even if he or she must take such actions as pay in installments over time, borrow money, liquidate assets, or reorganize his or her business. NOAA's consideration of a respondent's ability to pay does not preclude an assessment of a civil penalty in an amount that would cause or contribute to the bankruptcy or other discontinuation of the respondent's business.

(e) Financial information regarding respondent's ability to pay should be submitted to Agency counsel as soon as possible after the receipt of the NOVA. If a respondent has requested a hearing on the violation alleged in the NOVA and wants the initial decision of the Judge to consider his or her inability to pay, verifiable, complete, and accurate financial information must be submitted to Agency counsel at least 30 days in advance of the hearing, except where the applicable statute expressly provides for a different time period. No information regarding the respondent's ability to pay submitted by the respondent less than 30 days in advance of the hearing will be admitted at the hearing or considered in the initial decision of the Judge, unless the Judge rules otherwise. If the Judge decides to admit any information related to the respondent's ability to pay submitted less than 30 days in advance of the hearing, Agency Counsel will have 30 days to respond to the submission from the date of admission. In deciding whether to submit such information, the respondent should keep in mind that the Judge may assess *de novo* a civil penalty either greater or smaller than that assessed in the NOVA.

(f) Issues regarding ability to pay will not be considered in an administrative review of an initial decision if the financial information was not previously presented by the respondent to the Judge prior to or at the hearing.

(g) Whenever a statute requires NOAA to take into consideration a respondent's ability to pay when assessing a civil penalty, NOAA will take into

consideration information available to it concerning a respondent's ability to pay. In all cases, the NOVA will advise, in accordance with § 904.102, that the respondent may seek to have the civil penalty amount modified by Agency counsel on the basis that he or she does not have the ability to pay the civil penalty assessed. A request to have the civil penalty amount modified on this basis must be made in accordance with § 904.102 and should be accompanied by supporting financial information. Agency counsel may request that the respondent submit such additional verifiable, complete and accurate financial information as Agency counsel determines is necessary to evaluate the respondent's financial condition (such as by responding to a financial information request form or written interrogatories, or by authorizing independent verification of respondent's financial condition). A respondent's failure to provide the requested information may serve as the basis for inferring that such information would not have supported the respondent's assertion of inability to pay the civil penalty assessed in the NOVA.

(h) Whenever a statute requires NOAA to take into consideration a respondent's ability to pay when assessing a civil penalty and the respondent has requested a hearing on the violation alleged in the NOVA, the Agency must submit information on the respondent's financial condition so that the Judge may consider that information, along with any other factors required to be considered, in the Judge's *de novo* assessment of a civil penalty. Agency counsel may obtain such financial information through discovery procedures under § 904.240, or otherwise. A respondent's refusal or failure to respond to such discovery requests may serve as the basis for inferring that such information would have been adverse to any claim by respondent of inability to pay the assessed civil penalty, or result in respondent being barred from asserting financial hardship.

**Subpart C—Hearing and Appeal Procedures**

**General**

**§ 904.200 Scope and applicability.**

(a) This subpart sets forth the procedures governing the conduct of hearings and the issuance of initial and final administrative decisions of NOAA involving alleged violations of the laws cited in § 904.1(c) and regulations implementing these laws, including

civil penalty assessments and permit sanctions and denials. By separate regulation, these rules may be applied to other proceedings.

(b) The Judge is delegated authority to make the initial or final administrative decision of the Agency in proceedings subject to the provisions of this subpart, and to take actions to promote the efficient and fair conduct of hearings as set out in this subpart. The Judge has no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA.

(c) This subpart is not an independent basis for claiming the right to a hearing but, instead, prescribes procedures for the conduct of hearings, the right to which is provided by other authority.

#### **§ 904.201 Hearing requests and case docketing.**

(a) If the respondent wishes a hearing on a NOVA, NOPS or NIDP, the request must be dated and in writing, and must be served either in person or mailed to the Agency counsel specified in the notice. The respondent must either attach a copy of the NOVA, NOPS or NIDP or refer to the relevant NOAA case number. Agency counsel will promptly forward the request for hearing to the ALJ Docketing Center.

(b) If a written application is made to NOAA after the expiration of the time period established in this part for the required filing of hearing requests, Agency counsel will promptly forward the request for hearing along with a motion in opposition, documentation of service and any other relevant materials to the ALJ Docketing Center for a determination on whether such request shall be considered timely filed. Determinations by the ALJ regarding untimely hearing requests under this section shall be in writing.

(c) Upon its receipt for filing in the ALJ Docketing Center, each request for hearing will be promptly assigned a docket number and thereafter the proceeding will be referred to by such number. Written notice of the assignment of hearing to a Judge will promptly be given to the parties.

#### **§ 904.202 Filing of documents.**

(a) Pleadings, papers, and other documents in the proceeding must be filed in conformance with § 904.3 directly with the Judge, with copies served on the ALJ Docketing Center and all other parties.

(b) Unless otherwise ordered by the Judge, discovery requests and answers will be served on the opposing party and need not be filed with the Judge.

#### **§ 904.203 [Reserved]**

#### **§ 904.204 Duties and powers of Judge.**

The Judge has all powers and responsibilities necessary to preside over the parties and the hearing, to hold prehearing conferences, to conduct the hearing, and to render decisions in accordance with these regulations and 5 U.S.C. 554 through 557, including, but not limited to, the authority and duty to do the following:

(a) Rule on timeliness of hearing requests pursuant to § 904.201(b);

(b) Rule on a request to participate as a party in the hearing by allowing, denying, or limiting such participation (such ruling will consider views of the parties and be based on whether the requester could be directly and adversely affected by the determination and whether the requester can be expected to contribute materially to the disposition of the proceedings);

(c) Schedule the time, place, and manner of conducting the pre-hearing conference or hearing, continue the hearing from day to day, adjourn the hearing to a later date or a different place, and reopen the hearing at any time before issuance of the decision, all in the Judge's discretion, having due regard for the convenience and necessity of the parties and witnesses;

(d) Schedule and regulate the course of the hearing and the conduct of the participants and the media, including the power to rule on motions to close the hearing in the interests of justice; seal the record from public scrutiny to protect privileged information, trade secrets, and confidential commercial or financial information; and strike testimony of a witness who refuses to answer a question ruled to be proper;

(e) Administer oaths and affirmations to witnesses;

(f) Rule on contested discovery requests, establish discovery schedules, and, whenever the ends of justice would thereby be served, take or cause depositions or interrogatories to be taken and issue protective orders under § 904.240(d);

(g) Rule on motions, procedural requests, and similar matters;

(h) Receive, exclude, limit, and otherwise rule on offers of proof and evidence;

(i) Examine and cross-examine witnesses and introduce into the record on the Judge's own initiative documentary or other evidence;

(j) Rule on requests for appearance of witnesses or production of documents and take appropriate action upon failure of a party to effect the appearance or production of a witness or document ruled relevant and necessary to the

proceeding; as authorized by law, issue subpoenas for the appearance of witnesses or production of documents;

(k) Require a party or witness at any time during the proceeding to state his or her position concerning any issue or his or her theory in support of such position;

(l) Take official notice of any matter not appearing in evidence that is among traditional matters of judicial notice; or of a non-privileged document required by law or regulation to be filed with or published by a duly constituted government body; or of any reasonably available public document; provided that the parties will be advised of the matter noticed and given reasonable opportunity to show the contrary;

(m) For stated good reason(s), assess a civil penalty *de novo* without being bound by the civil penalty assessed in the NOVA;

(n) Prepare and submit a decision or other appropriate disposition document and certify the record;

(o) Award attorney fees and expenses as provided by applicable statute or regulation;

(p) Grant preliminary or interim relief; or

(q) Impose, upon the motion of any party, or *sua sponte*, appropriate sanctions.

(1) Sanctions may be imposed when any party, or any person representing a party, in an administrative proceeding under this part has failed to comply with this part, or any order issued under this part, and such failure to comply:

(i) Materially injures or prejudices another party by causing additional expenses; prejudicial delay; or other injury or prejudice;

(ii) Is a clear and unexcused violation of this part, or any order issued under this part; or

(iii) Unduly delays the administrative proceeding.

(2) Sanctions that may be imposed include, but are not limited to, one or more of the following:

(i) Issuing an order against the party;

(ii) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(iii) Expelling the party from the administrative proceedings;

(iv) Precluding the party from contesting specific issues or findings;

(v) Precluding the party from making a late filing or conditioning a late filing on any terms that are just;

(vi) Assessing reasonable expenses, incurred by any other party as a result of the improper action or failure to act; and

(vii) Taking any other action, or imposing any restriction or sanction,

authorized by applicable statute or regulation, deemed appropriate by the Judge.

(3) No sanction authorized by this section, other than refusal to accept late filings, shall be imposed without prior notice to all parties and an opportunity for any party against whom sanctions would be imposed to be heard. Such opportunity to be heard may be on such notice, and the response may be in such form as the Judge directs and may be limited to an opportunity for a party or a party's representative to respond orally immediately after the act or inaction is noted by the Judge.

(4) The imposition of sanctions is subject to interlocutory review pursuant to § 904.254 in the same manner as any other ruling.

(5) Nothing in this section shall be read as precluding the Judge from taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation.

#### **§ 904.205 Disqualification of Judge.**

(a) The Judge may withdraw voluntarily from an administrative proceeding when the Judge deems himself/herself disqualified.

(b) A party may in good faith request the Judge to withdraw on the grounds of personal bias or other disqualification. The party seeking the disqualification must file with the Judge a timely affidavit or statement setting forth in detail the facts alleged to constitute the grounds for disqualification, and the Judge will rule on the matter. If the Judge rules against disqualification, the Judge will place all matters relating to such claims of disqualification in the record.

#### **§ 904.206 Pleadings, motions, and service.**

(a) The original of all pleadings and documents must be filed with the Judge and a copy served upon the ALJ Docketing Center and each party. All pleadings or documents when submitted for filing must show that service has been made upon all parties. Such service must be made in accordance with § 904.3(b).

(b) Pleadings and documents to be filed may be reproduced by printing or any other process, provided the copies are clear and legible; must be dated, the original signed in ink or as otherwise verified for electronic mail; and must show the docket description and title of the proceeding, and the title, if any, address, and telephone number of the signatory. If typewritten, the impression may be on only one side of the paper and must be double spaced, if possible, except that quotations may be single spaced and indented.

(c) Motions must normally be made in writing and must state clearly and concisely the purpose of and relief sought by the motion, the statutory or principal authority relied upon, and the facts claimed to constitute the grounds requiring the relief requested.

(d) Unless otherwise provided, the answer to any written motion, pleading, or petition must be served within 20 days after service of the motion. If a motion states that opposing counsel has no objection, it may be acted upon as soon as practicable, without awaiting the expiration of the 20 day period. Answers must be in writing, unless made in response to an oral motion made at a hearing; must fully and completely advise the parties and the Judge concerning the nature of the opposition; must admit or deny specifically and in detail each material allegation of the pleading answered; and must state clearly and concisely the facts and matters of law relied upon. Any new matter raised in an answer will be deemed controverted.

(e) A response to an answer will be called a reply. A short reply restricted to new matters raised in the answer may be served within 15 days after service of an answer. The Judge has discretion to dispense with the reply. No further responses are permitted.

#### **§ 904.207 Amendment of pleading or record.**

(a) A party may amend its pleading as a matter of course at least 20 days prior to a hearing. Within 20 days prior to a hearing a party may amend its pleading only by leave of the Judge or by written consent of the adverse party; leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period is longer, unless the Judge otherwise orders.

(b) The Judge, upon his or her own initiative or upon application by a party, may order a party to make a more definite statement of any pleading.

(c) Harmless errors in pleadings or elsewhere in the record may be corrected (by deletion or substitution of words or figures), and broad discretion will be exercised by the Judge in permitting such corrections.

#### **§ 904.208 Extensions of time.**

If appropriate and justified, the Judge may grant any request for an extension of time. Requests for extensions of time must, except in extraordinary circumstances, be made in writing.

#### **§ 904.209 Expedited administrative proceedings.**

In the interests of justice and administrative efficiency, the Judge, on his or her own initiative or upon the application of any party, may expedite the administrative proceeding. A motion by a party to expedite the administrative proceeding may, at the discretion of the Judge, be made orally or in writing with concurrent actual notice to all parties. Upon granting a motion to expedite the scheduling of an administrative proceeding, the Judge may expedite pleading schedules, prehearing conferences and the hearing, as appropriate. If a motion for an expedited administrative proceeding is granted, a hearing on the merits may not be scheduled with less than 5 business days notice, unless all parties consent to an earlier hearing.

#### **§ 904.210 Summary decision.**

The Judge may render a summary decision disposing of all or part of the administrative proceeding if:

- (a) Jointly requested by every party to the administrative proceeding; and
- (b) There is no genuine issue as to any material fact and a party is entitled to summary decision as a matter of law.

#### **§ 904.211 Failure to appear.**

(a) If, after proper service of notice, any party appears at the hearing and an opposing party fails to appear, the Judge is authorized to:

- (1) Dismiss the case with prejudice, where the Agency is a non-appearing party; or
- (2) Where the respondents have failed to appear, find the facts as alleged in the NOVA, NOPS and/or NIDP and enter a default judgment against the respondents.

(b) Following an order of default judgment, a non-appearing party may file a petition for reconsideration, in accordance with § 904.272. Only petitions citing reasons for non-appearance, as opposed to arguing the merits of the case, will be considered.

(c) The Judge will place in the record all the facts concerning the issuance and service of the notice of time and place of hearing.

(d) The Judge may deem a failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision on the record.

(e) Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision.

#### **§ 904.212 Failure to prosecute or defend.**

(a) Whenever the record discloses the failure of any party to file documents,



respond to orders or notices from the Judge, or otherwise indicates an intention on the part of any party not to participate further in the administrative proceeding, the Judge may issue:

(1) An order requiring any party to show why the matter that is the subject of the failure to respond should not be disposed of adversely to that party's interest;

(2) An order requiring any party to certify intent to appear at any scheduled hearing; or

(3) Any order, except dismissal, as is necessary for the just and expeditious resolution of the case.

(b) [Reserved]

#### § 904.213 Settlements.

If settlement is reached before the Judge has certified the record, the Judge shall remove the case from the docket upon notification by the Agency.

#### § 904.214 Stipulations.

The parties may, by stipulation, agree upon any matters involved in the administrative proceeding and include such stipulations in the record with the consent of the Judge. Written stipulations must be signed and served upon all parties.

#### § 904.215 Consolidation.

The Chief Administrative Law Judge may order that two or more administrative proceedings that involve substantially the same parties or the same issues be consolidated and/or heard together, either upon request of a party or *sua sponte*.

#### § 904.216 Prehearing conferences.

(a) Prior to any hearing or at any other time deemed appropriate, the Judge may, upon his or her own initiative, or upon the application of any party, direct the parties to appear for a conference or arrange a telephone conference. The Judge shall provide at least 24 hours notice of the conference to the parties, and shall record such conference by audio recording or court reporter, to consider:

(1) Simplification or clarification of the issues or settlement of the case by consent;

(2) The possibility of obtaining stipulations, admissions, agreements, and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

(3) Agreements and rulings to facilitate the discovery process;

(4) Limitation of the number of expert witnesses or other avoidance of cumulative evidence;

(5) The procedure, course, and conduct of the administrative proceeding;

(6) The distribution to the parties and the Judge prior to the hearing of written testimony and exhibits in order to expedite the hearing; or

(7) Such other matters as may aid in the disposition of the administrative proceeding, including the status of settlement discussions.

(b) The Judge in his or her discretion may issue an order showing the matters disposed of in such conference, and shall provide a transcript of the conference upon the request of a party.

#### Discovery

##### § 904.240 Discovery generally.

(a) *Preliminary position on issues and procedures (PPIP)*. Prior to hearing the Judge will ordinarily require the parties to submit a written PPIP. Except for information regarding a respondent's ability to pay an assessed civil penalty, this PPIP will normally obviate the need for further discovery.

(1) The PPIP shall include the following information: A factual summary of the case; a summary of all factual and legal issues in dispute; a list of all defenses that will be asserted, together with a summary of all factual and legal bases supporting each defense; a list of all potential witnesses, together with a summary of their anticipated testimony; and a list of all potential exhibits.

(2) The PPIP shall be signed by the party and by an attorney, if one is retained. The PPIP shall be served upon all parties, along with a copy of each potential exhibit listed in the PPIP.

(3) A party has the affirmative obligation to supplement the PPIP as available information or documentation relevant to the stated charges or defenses becomes known to the party.

(b) *Additional discovery*. Upon written motion by a party, the Judge may allow additional discovery only upon a showing of relevance, need, and reasonable scope of the evidence sought, by one or more of the following methods: Deposition upon oral examination or written questions, written interrogatories, production of documents or things for inspection and other purposes, and requests for admission. With respect to information regarding a respondent's ability to pay an assessed civil penalty, the Agency may serve any discovery request (*i.e.*, deposition, interrogatories, admissions, production of documents) directly upon the respondent without first seeking an order from the Judge.

(c) *Time limits*. Motions for depositions, interrogatories, admissions,

or production of documents or things may not be filed within 20 days of the hearing except on order of the Judge for good cause shown. Oppositions to a discovery motion must be filed within 10 days of service unless otherwise provided in these rules or by the Judge.

(d) *Oppositions*. Oppositions to any discovery motion or portion thereof must state with particularity the grounds relied upon. Failure to object in a timely fashion constitutes waiver of the objection.

(e) *Scope of discovery*. The Judge may limit the scope, subject matter, method, time, or place of discovery. Unless otherwise limited by order of the Judge, the scope of discovery is as follows:

(1) *In general*. As allowed under paragraph (b) of this section, parties may obtain discovery of any matter, not privileged, that is relevant to the allegations of the charging document, to the proposed relief, or to the defenses of any respondent, or that appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Hearing preparation: Materials*. A party may not obtain discovery of materials prepared in anticipation of litigation except upon a showing that the party seeking discovery has a substantial need for the materials in preparation of his or her case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party are not discoverable under this section.

(3) *Hearing preparation: Experts*. A party may discover the substance of the facts and opinions to which an expert witness is expected to testify and a summary of the grounds for each opinion. A party may also discover facts known or opinions held by an expert consulted by another party in anticipation of litigation but not expected to be called as a witness upon a showing of exceptional circumstances making it impracticable for the party seeking discovery to obtain such facts or opinions by other means.

(f) *Failure to comply*. If a party fails to comply with any provision of this section, including any PPIP, subpoena or order concerning discovery, the Judge may, in the interest of justice:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that the matter or matters covered by the order or subpoena are established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise

rely upon, in support of any claim or defense, testimony by such party, officer, or agent, or the documents or other evidence;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown; or

(5) Strike part or all of a pleading (except a request for hearing), a motion or other submission by the party, concerning the matter or matters covered by the order or subpoena.

#### § 904.241 Depositions.

(a) *Notice.* If a motion for deposition is granted, and unless otherwise ordered by the Judge, the party taking the deposition of any person must serve on that person and on any other party written notice at least 15 days before the deposition would be taken (or 25 days if the deposition is to be taken outside the United States). The notice must state the name and address of each person to be examined, the time and place where the examination would be held, the name and mailing address of the person before whom the deposition would be taken, and the subject matter about which each person would be examined.

(b) *Taking the deposition.* Depositions may be taken before any officer authorized to administer oaths by the law of the United States or of the place where the examination is to be held, or before a person appointed by the Judge. Each deponent will be sworn, and any party has the right to cross-examine. Objections are not waived by failure to make them during the deposition unless the ground of the objection is one that might have been removed if presented at that time. The deposition will be recorded, transcribed, signed by the deponent, unless waived, and certified by the officer before whom the deposition was taken. All transcription costs associated with the testimony of a deponent will be borne by the party seeking the deposition. Each party will bear its own expense for any copies of the transcript. See also § 904.252(a).

(c) *Alternative deposition methods.* By order of the Judge, the parties may use other methods of deposing parties or witnesses, such as telephonic depositions or depositions upon written questions. Objections to the form of written questions are waived unless made within 5 days of service of the questions.

(d) *Use of depositions at hearing.* (1) At hearing, part or all of any deposition, so far as admissible under the rules of evidence applied as though the witness were then testifying, may be used

against any party who was present or represented at the taking of the deposition or had reasonable notice.

(2) The deposition of a witness may be used by any party for any purpose if the Judge finds:

(i) That the witness is unable to attend due to death, age, health, imprisonment, disappearance or distance from the hearing site; or

(ii) That exceptional circumstances make it desirable, in the interest of justice, to allow the deposition to be used.

(3) If only part of a deposition is offered in evidence by a party, any party may introduce any other part.

#### § 904.242 Interrogatories.

(a) *Use at hearing.* If ordered by the Judge, any party may serve upon any other party written interrogatories. Answers may be used at hearing in the same manner as depositions under § 904.241(d).

(b) *Answers and objections.* Answers and objections must be made in writing under oath, and reasons for the objections must be stated. Answers must be signed by the person making them and objections must be signed by the party or attorney making them. Unless otherwise ordered, answers and objections must be served on all parties within 20 days after service of the interrogatories.

(c) *Option to produce records.* Where the answer to an interrogatory may be ascertained from the records of the party upon whom the interrogatory is served, it is sufficient to specify such records and afford the party serving the interrogatories an opportunity to examine them.

#### § 904.243 Admissions.

(a) *Request.* If ordered by the Judge, any party may serve on any other party a written request for admission of the truth of any relevant matter of fact set forth in the request, including the genuineness of any relevant document described in the request. Copies of documents must be served with the request. Each matter of which an admission is requested must be separately stated.

(b) *Response.* Each matter is admitted unless a written answer or objection is served within 20 days of service of the request, or within such other time as the Judge may allow. The answering party must specifically admit or deny each matter, or state the reasons why he or she cannot truthfully admit or deny it.

(c) *Effect of admission.* Any matter admitted is conclusively established unless the Judge on motion permits

withdrawal or amendment of it for good cause shown.

#### § 904.244 Production of documents and inspection.

(a) *Scope.* If ordered by the Judge, any party may serve on any other party a request to produce a copy of any document or specifically designated category of documents, or to inspect, copy, photograph, or test any such document or tangible thing in the possession, custody, or control of the party upon whom the request is served.

(b) *Procedure.* The request must set forth:

(1) The items to be produced or inspected by item or by category, described with reasonable particularity, and

(2) A reasonable time, place, and manner for inspection. The party upon whom the request is served must serve within 20 days a response or objections, which must address each item or category and include copies of the requested documents.

#### § 904.245 Subpoenas.

(a) *In general.* Subpoenas for the attendance and testimony of witnesses and the production of documentary evidence for the purpose of discovery or hearing may be issued as authorized by the statute under which the proceeding is conducted.

(b) *Timing.* Applications for subpoenas must be submitted at least 15 days before the scheduled hearing or deposition.

(c) *Motions to quash.* Any person to whom a subpoena is directed or any party may move to quash or limit the subpoena within 10 days of its service or on or before the time specified for compliance, whichever is shorter. The Judge may quash or modify the subpoena.

(d) *Enforcement.* In case of disobedience to a subpoena, the requesting party may request the U.S. Department of Justice to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

#### Hearings

##### § 904.250 Notice of time and place of hearing.

(a) The Judge shall be responsible for scheduling the hearing. With due regard for the convenience of the parties, their representatives, or witnesses, the Judge shall fix the time, place and date for the hearing and shall notify all parties of the same. The Judge will promptly serve on the parties notice of the time and place of hearing. The hearing will not be held

less than 20 days after service of the notice of hearing unless the hearing is expedited as provided under paragraph (c) of this section.

(b) A request for a change in the time, place, or date of the hearing may be granted by the Judge.

(c) Upon the consent of each party to the administrative proceeding, the Judge may order that one or more issues be heard on submissions or affidavits if it appears that such issues may be resolved by means of written materials and that efficient disposition of those issues can be made without an in-person hearing.

(d) At any time after commencement of an administrative proceeding, any party may move to expedite the scheduling of the administrative proceeding as provided in § 904.209.

#### § 904.251 Evidence.

(a) *In general.* (1) At the hearing, every party has the right to present oral or documentary evidence in support of its case or defense, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. This paragraph may not be interpreted to diminish the powers and duties of the Judge under § 904.204.

(2) All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing. Formal rules of evidence do not necessarily apply to the administrative proceedings, and hearsay evidence is not inadmissible as such.

(3) In any case involving a charged violation of law in which the respondent has admitted an allegation, evidence may be taken to establish matters of aggravation or mitigation.

(b) *Objections and offers of proof.* (1) A party shall state the grounds for objection to the admission or exclusion of evidence. Rulings on all objections shall appear in the record. Only objections made before the Judge may be raised on appeal.

(2) Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record.

(c) *Testimony.* (1) Testimony may be received into evidence by the following means:

- (i) Oral presentation; and
- (ii) Subject to the discretion of the Judge, written affidavit, telephone, video or other electronic media.

(2) Regardless of form, all testimony shall be under oath or affirmation requiring the witness to declare that the witness will testify truthfully, and subject to cross examination.

(d) *Exhibits and documents.* (1) All exhibits shall be numbered and marked with a designation identifying the sponsor. To prove the content of an exhibit, the original writing, recording or photograph is required except that a duplicate or copy is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or, given the circumstances, it would be unfair to admit the duplicate in lieu of the original. The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if the original is lost or destroyed, not obtainable, in the possession of the opponent, or not closely related to a controlling issue. Each exhibit offered in evidence or marked for identification shall be filed and retained in the record of decision, unless the Judge permits the substitution of copies for the original document.

(2) In addition to the requirements set forth in § 904.240(a)(2), parties shall exchange all remaining exhibits that will be offered at hearing prior to the beginning of the hearing, except for good cause or as otherwise directed by the Judge. Exhibits that are not exchanged as required may be denied admission into evidence. This requirement does not apply to demonstrative evidence.

(e) *Physical evidence.* (1) Photographs or videos or other electronic media may be substituted for physical evidence at the discretion of the Judge.

(2) Except upon the Judge's order, or upon request by a party, physical evidence will be retained after the hearing by the Agency.

(f) *Stipulations.* The parties may, by written stipulation at any stage of the administrative proceeding or orally at the hearing, agree upon any matters. Stipulations may be received in evidence before or during the hearing and, when received in evidence, shall be binding on the parties to the stipulation.

(g) *Official notice.* The Judge may take official notice of such matters as might be judicially noticed by the courts or of other facts within the specialized knowledge of the agency as an expert body. Where a decision or part thereof rests on official notice of a material fact not appearing in the evidence in the record, the fact of official notice shall be so stated in the decision, and any party, upon timely request, shall be afforded an opportunity to show the contrary.

(h) *Confidential and sensitive information.* (1) The Judge may limit introduction of evidence or issue protective orders that are required to

prevent undue disclosure of classified, confidential, or sensitive matters, which include, but are not limited to, matters of a national security, business, personal, or proprietary nature. Where the Judge determines that information in documents containing classified, confidential, or sensitive matters should be made available to another party, the Judge may direct the offering party to prepare an unclassified or non-sensitive summary or extract of the original. The summary or extract may be admitted as evidence in the record.

(2) If the Judge determines that the procedure described in paragraph (h)(1) of this section is inadequate and that classified or otherwise sensitive matters must form part of the record in order to avoid prejudice to a party, the Judge may advise the parties and provide opportunity for arrangements to permit a party or representative to have access to such matters.

(i) *Foreign law.* (1) A party who intends to raise an issue concerning the law of a foreign country must give reasonable notice. The Judge, in determining foreign law, may consider any relevant material or source, whether or not submitted by a party.

(2) Exhibits in a foreign language must be translated into English before such exhibits are offered into evidence. Copies of both the untranslated and translated versions of the proposed exhibits, along with the name and qualifications of the translator, must be served on the opposing party at least 10 days prior to the hearing unless the parties otherwise agree.

#### § 904.252 Witnesses.

(a) *Fees.* Witnesses, other than employees of a Federal agency, summoned in an administrative proceeding, including discovery, shall receive the same fees and mileage as witnesses in the courts of the United States.

(b) *Witness counsel.* Any witness not a party may have personal counsel to advise him or her as to his or her rights, but such counsel may not otherwise participate in the hearing.

(c) *Witness exclusion.* Witnesses who are not parties may be excluded from the hearing room prior to the taking of their testimony. An authorized officer is considered a party for the purposes of this subsection.

(d) *Oath or affirmation.* Witnesses shall testify under oath or affirmation requiring the witness to declare that the witness will testify truthfully.

(e) *Failure or refusal to testify.* If a witness fails or refuses to testify, the failure or refusal to answer any question found by the Judge to be proper may be

grounds for striking all or part of the testimony given by the witness, or any other action deemed appropriate by the Judge.

(f) *Testimony in a foreign language.* If a witness is expected to testify in a language other than the English language, the party sponsoring the witness must provide for the services of an interpreter and advise opposing counsel 10 days prior to the hearing concerning the extent to which interpreters are to be used. When available, the interpreter should be court certified under 28 U.S.C. 1827.

#### § 904.253 Closing of record.

At the conclusion of the hearing, the evidentiary record shall be closed unless the Judge directs otherwise. Once the record is closed, no additional evidence shall be accepted except upon a showing that the evidence is material and that there was good cause for failure to produce it in a timely fashion. The Judge shall reflect in the record, however, any approved correction to the transcript.

#### § 904.254 Interlocutory review.

(a) Application for interlocutory review shall be made to the Judge. The application shall not be certified to the Administrator except when the Judge determines that:

(1) The ruling involves a dispositive question of law or policy about which there is substantial ground for difference of opinion; or

(2) An immediate ruling will materially advance the completion of the proceeding; or

(3) The denial of an immediate ruling will cause irreparable harm to a party or the public.

(b) Any application for interlocutory review shall:

(1) Be filed with the Judge within 30 days after the Judge's ruling;

(2) Designate the ruling or part thereof from which appeal is being taken;

(3) Set forth the ground on which the appeal lies; and

(4) Present the points of fact and law relied upon in support of the position taken.

(c) Any party that opposes the application may file a response within 20 days after service of the application.

(d) The certification to the Administrator by the Judge shall stay proceedings before the Judge until the matter under interlocutory review is decided.

#### § 904.255 Ex parte communications.

(a) Except to the extent required for disposition of *ex parte* matters as authorized by law, the Judge may not

consult a person or party on any matter relevant to the merits of the administrative proceeding, unless there has been notice and opportunity for all parties to participate.

(b) Except to the extent required for the disposition of *ex parte* matters as authorized by law:

(1) No interested person outside the Agency shall make or knowingly cause to be made to the Judge, the Administrator, or any Agency employee who is or may reasonably be expected to be involved in the decisional process of the administrative proceeding an *ex parte* communication relevant to the merits of the adjudication; and

(2) Neither the Administrator, the Judge, nor any Agency employee who is or may reasonably be expected to be involved in the decisional process of the administrative proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the administrative proceeding.

(c) The Administrator, the Judge, or any Agency employee who is or may reasonably be expected to be involved in the decisional process who receives, makes, or knowingly causes to be made a communication prohibited by this rule shall place in the record of decision:

(1) All such written communications;

(2) Memoranda stating the substance of all such oral communications; and

(3) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (c)(1) and (c)(2) of this section.

(d)(1) Paragraphs (a), (b) and (c) of this section do not apply to communications concerning national defense or foreign policy matters. Such *ex parte* communications to or from an Agency employee on national defense or foreign policy matters, or from employees of the U.S. Government involving intergovernmental negotiations, are allowed if the communicator's position with respect to those matters cannot otherwise be fairly presented for reasons of foreign policy or national defense.

(2) *Ex parte* communications subject to this paragraph will be made a part of the record to the extent that they do not include information classified under an Executive order. Classified information will be included in a classified portion of the record that will be available for review only in accordance with applicable law.

(e) Upon receipt of a communication made, or knowingly caused to be made, by a party in violation of this section the Judge may, to the extent consistent with the interests of justice, national security, the policy of underlying statutes,

require the party to show cause why its claim or interest in the adjudication should not be dismissed, denied, disregarded, or otherwise adversely affected by reason of such violation.

(f) The prohibitions of this rule shall apply beginning after issuance of a NOVA, NOPS, NIDP or any other notice and until a final administrative decision is rendered, but in no event shall they begin to apply later than the time at which an administrative proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of her/his acquisition of such knowledge.

#### Post-Hearing

##### § 904.260 Recordation of hearing.

(a) All hearings shall be recorded.

(b) The official transcript of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith, will be filed with the ALJ Docketing Center. Transcripts of testimony will be available in any hearing and will be supplied to the parties at the cost of the Agency.

(c) The Judge may determine whether "ordinary copy", "daily copy", or other copy (as those terms are defined by contract) will be necessary and required for the proper conduct of the administrative proceeding.

##### § 904.261 Post-hearing briefs.

(a) The parties may file post-hearing briefs that include proposed findings of fact and conclusions of law within 30 days from service of the hearing transcript. Reply briefs may be submitted within 15 days after service of the proposed findings and conclusions to which they respond.

(b) The Judge, in his or her discretion, may establish a different date for filing either initial briefs or reply briefs with the court.

(c) In cases involving few parties, limited issues, and short hearings, the Judge may require or a party may request that any proposed findings and conclusions and reasons in support be presented orally at the close of a hearing. In granting such cases, the Judge will advise the parties in advance of hearing.

#### Decision

##### § 904.270 Record of decision.

(a) The exclusive record of decision consists of the official transcript of testimony and administrative proceedings; exhibits admitted into evidence; briefs, pleadings, and other documents filed in the administrative

proceeding; and descriptions or copies of matters, facts, or documents officially noticed in the administrative proceeding. Any other exhibits and records of any *ex parte* communications will accompany the record of decision.

(b) The Judge will arrange for appropriate storage of the records of any administrative proceeding, which place of storage need not necessarily be located physically within the ALJ Docketing Center.

#### **§ 904.271 Initial decision.**

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

#### **§ 904.272 Petition for reconsideration.**

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

#### **§ 904.273 Administrative review of decision.**

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with

an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

(l) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.

## Subpart D—Permit Sanctions and Denials

### General

#### § 904.300 Scope and applicability.

(a) This subpart sets forth procedures governing the suspension, revocation, modification, and denial of permits for reasons relating to enforcement of the statutes cited in § 904.1(c), except for the statutes listed in paragraph (b) of this section. Nothing in this subpart precludes sanction or denial of a permit for reasons not relating to enforcement. As appropriate, and unless otherwise specified in this subpart, the provisions of subparts A, B, and C of this part apply to this subpart.

(b) Regulations governing sanctions and denials of permits issued under the Deep Seabed Hard Mineral Resources Act (30 U.S.C. 1401 *et seq.*) appear at 15 CFR part 970.

#### § 904.301 Bases for permit sanctions or denials.

(a) Unless otherwise specified in a settlement agreement, or otherwise provided in this subpart, NOAA may take action under this subpart with respect to any permit issued under the statutes cited in § 904.1(c). The bases for an action to sanction or deny a permit include but are not limited to the following:

(1) The commission of any violation prohibited by any statute administered by NOAA, including violation of any regulation promulgated or permit condition or restriction prescribed thereunder, by the permit holder or with the use of a permitted vessel;

(2) The failure to pay a civil penalty assessed under subparts B and C of this part;

(3) The failure to pay a criminal fine imposed or to satisfy any other liability incurred in a judicial proceeding under any of the statutes administered by NOAA; or

(4) The failure to comply with any term of a settlement agreement.

(b) A permit sanction may be imposed, or a permit denied, under this subpart with respect to the particular permit pertaining to the violation or

nonpayment, and may also be applied to any NOAA permit held or sought by the permit holder or successor in interest to the permit, including permits for other activities or for other vessels. Examples of the application of this policy are the following:

(1) NOAA suspends Vessel A's fishing permit for nonpayment of a civil penalty pertaining to Vessel A. The owner of Vessel A buys Vessel B and applies for a permit for Vessel B to participate in the same or a different fishery. NOAA may withhold that permit until the sanction against Vessel A is lifted.

(2) NOAA revokes a Marine Mammal Protection Act permit for violation of its conditions. The permit holder subsequently applies for a permit under the Endangered Species Act. NOAA may deny the ESA application.

(3) Captain X, an officer in Country Y's fishing fleet, is found guilty of assaulting an enforcement officer. NOAA may impose a condition on the permits of Country Y's vessels that they may not fish in the Exclusive Economic Zone with Captain X aboard. (See § 904.320(c)).

(c) A permit sanction may not be extinguished by sale or transfer. A vessel's permit sanction is not extinguished by sale or transfer of the vessel, nor by dissolution or reincorporation of a vessel owner corporation, and shall remain with the vessel until lifted by NOAA.

#### § 904.302 Notice of permit sanction (NOPS).

(a) A NOPS will be served on the permit holder as provided in § 904.3. When a foreign fishing vessel is involved, service will be made on the agent authorized to receive and respond to any legal process for vessels of that country.

(b) The NOPS will set forth the permit sanction to be imposed, the bases for the permit sanction, and any opportunity for a hearing. It will state the effective date of the permit sanction, which will ordinarily not be earlier than 30 days after the date of receipt of the NOPS (see § 904.322).

(c) Upon demand by an authorized enforcement officer, a permit holder must surrender a permit against which a permit sanction has taken effect. The effectiveness of the permit sanction, however, does not depend on surrender of the permit.

#### § 904.303 Notice of intent to deny permit (NIDP).

(a) NOAA may issue a NIDP if the permit applicant has been charged with a violation of a statute, regulation, or permit administered by NOAA, for

failure to pay a civil penalty or criminal fine, or for failure to comply with any term of a settlement agreement.

(b) The NIDP will set forth the basis for its issuance and any opportunity for a hearing, and will be served in accordance with § 904.3.

(c) NOAA will not refund any fee(s) submitted with a permit application if a NIDP is issued.

(d) A NIDP may be issued in conjunction with or independent of a NOPS. Nothing in this section should be interpreted to preclude NOAA from initiating a permit sanction action following issuance of the permit, or from withholding a permit under § 904.310(c) or § 904.320.

#### § 904.304 Opportunity for hearing.

(a) Except as provided in paragraph (b) of this section, the recipient of a NOPS or NIDP will be provided an opportunity for a hearing, as governed by § 904.201.

(b) There will be no opportunity for a hearing if, with respect to the violation that forms the basis for the NOPS or NIDP, the permit holder had a previous opportunity to participate as a party in an administrative or judicial proceeding, whether or not the permit holder did participate, and whether or not such a hearing was held.

#### § 904.305 Final administrative decision.

(a) If no request for hearing is timely filed as provided in § 904.201(a), the NOPS or NIDP becomes effective as the final administrative decision and order of NOAA 30 days after service of the NOPS or NIDP or on the last day of any delay period granted.

(b) If a request for hearing is timely filed in accordance with § 904.201(a), the date of the final administrative decision is as provided in subpart C of this part.

#### Permit Sanctions for Noncompliance

##### § 904.310 Nature of permit sanctions.

(a) NOAA may suspend, modify, or deny a permit if:

(1) A civil penalty has been assessed against the permit holder under subparts B and C of this part, but the permit holder has failed to pay the civil penalty, or has failed to comply with any term of a settlement agreement; or

(2) A criminal fine or other liability for violation of any of the statutes administered by NOAA has been imposed against the permit holder in a judicial proceeding, but payment has not been made.

(b) NOAA will suspend any permit issued to a foreign fishing vessel under section 204(b) of the Magnuson-Stevens Fishery Conservation and Management

Act under the circumstances set forth in paragraph (a) of this section.

(c) NOAA will withhold any other permit for which the permit holder applies if either of the conditions in paragraph (a) of this section is applicable.

##### § 904.311 Compliance.

If the permit holder pays the criminal fine or civil penalty in full or agrees to terms satisfactory to NOAA for payment:

(a) The suspension will not take effect;

(b) Any permit suspended under § 904.310 will be reinstated by order of NOAA; or

(c) Any application by the permit holder may be granted if the permit holder is otherwise qualified to receive the permit.

#### Permit Sanction for Violations

##### § 904.320 Nature of permit sanctions.

Subject to the requirements of this subpart, NOAA may take any of the following actions or combination of actions if a permit holder or permitted vessel violates a statute administered by NOAA, or any regulation promulgated or permit condition prescribed thereunder:

(a) *Revocation.* A permit may be cancelled, with or without prejudice to issuance of the permit in the future. Additional requirements for issuance of any future permit may be imposed.

(b) *Suspension.* A permit may be suspended either for a specified period of time or until stated requirements are met, or both. If contingent on stated requirements being met, the suspension is with prejudice to issuance of any permit until the requirements are met.

(c) *Modification.* A permit may be modified, as by imposing additional conditions and restrictions. If the permit was issued for a foreign fishing vessel under section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, additional conditions and restrictions may be imposed on the application of the foreign nation involved and on any permits issued under such application.

##### § 904.321 Reinstatement of permit.

(a) A permit suspended for a specified period of time will be reinstated automatically at the end of the period.

(b) A permit suspended until stated requirements are met will be reinstated only by order of NOAA.

##### § 904.322 Interim action.

(a) To protect marine resources during the pendency of an action under this subpart, in cases of willfulness, or as

otherwise required in the interest of public health, welfare, or safety, a Judge may order immediate suspension, modification, or withholding of a permit until a decision is made on the action proposed in a NOPS or NIDP.

(b) The Judge will order interim action under paragraph (a) of this section, only after finding that there exists probable cause to believe that the violation charged in the NOPS or NIDP was committed. The Judge's finding of probable cause, which will be summarized in the order, may be made:

(1) After review of the factual basis of the alleged violation, following an opportunity for the parties to submit their views (orally or in writing, in the Judge's discretion); or

(2) By adoption of an equivalent finding of probable cause or an admission in any administrative or judicial proceeding to which the recipient of the NOPS or NIDP was a party, including, but not limited to, a hearing to arrest or set bond for a vessel in a civil forfeiture action or an arraignment or other hearing in a criminal action. Adoption of a finding or admission under this paragraph may be made only after the Judge reviews pertinent portions of the transcript or other records, documents, or pleadings from the other proceeding.

(c) An order for interim action under paragraph (a) of this section is unappealable and will remain in effect until a decision is made on the NOPS or NIDP. Where such interim action has been taken, the Judge will expedite any hearing requested under § 904.304.

#### Subpart E—Written Warnings

##### § 904.400 Purpose and scope.

This subpart sets forth the policy and procedures governing the issuance and use of written warnings by persons authorized to enforce the statutes administered by NOAA, and the review of such warnings. A written warning may be issued in lieu of assessing a civil penalty or initiating criminal prosecution for violation of any of the laws cited in § 904.1(c).

##### § 904.401 Written warning as a prior violation.

A written warning may be used as a basis for dealing more severely with a subsequent violation, including, but not limited to, a violation of the same statute or a violation involving an activity that is related to the prior violation.

##### § 904.402 Procedures.

(a) Any person authorized to enforce the laws listed in § 904.1(c) or Agency



counsel may issue a written warning to a respondent as provided in § 904.3.

(b) The written warning will:

(1) State that it is a "written warning";

(2) State the factual and statutory or regulatory basis for its issuance;

(3) Advise the respondent of its effect in the event of a future violation; and

(4) Inform the respondent of the right of review and appeal under § 904.403.

(c) NOAA will maintain a record of written warnings that are issued.

(d) If, within 120 days of the date of the written warning, further investigation indicates that the violation is more serious than realized at the time the written warning was issued, or that the respondent previously committed a similar violation for which a written warning was issued or other enforcement action was taken, NOAA may withdraw the warning and commence other administrative or judicial proceedings.

#### **§ 904.403 Review and appeal of a written warning.**

(a) If a respondent receives a written warning from an authorized officer, the respondent may seek review by Agency counsel. The request for review must be in writing and must present the facts and circumstances that explain or deny the violation described in the written warning. The request for review must be filed at the NOAA Office of the Assistant General Counsel for Enforcement and Litigation, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910, within 60 days of receipt of the written warning. Agency counsel may, in his or her discretion, affirm, vacate, or modify the written warning and will notify the respondent of his or her determination. The Agency counsel's determination constitutes the final agency action, unless it is appealed pursuant to paragraph (b) of this section.

(b) If a respondent receives a written warning from Agency counsel, or receives a determination from Agency counsel affirming a written warning issued by an authorized officer, the respondent may appeal to the NOAA Deputy General Counsel. The appeal must be filed at the NOAA Office of the General Counsel, Herbert Hoover Office Building, 14th & Constitution Avenue, NW., Washington, DC 20230, within 60 days of receipt of the written warning issued by Agency counsel, or the determination from Agency counsel affirming a written warning issued by an authorized officer.

(1) An appeal from an Agency counsel issued written warning must be in writing and must present the facts and circumstances that explain or deny the

violation described in the written warning.

(2) An appeal from an Agency counsel's determination affirming a written warning issued by an authorized officer must be in writing and include a copy of the Agency counsel's determination affirming the written warning.

(c) The NOAA Deputy General Counsel may, in his or her discretion, affirm, vacate, or modify the written warning and will notify the respondent of the determination. The NOAA Deputy General Counsel's determination constitutes the final agency action.

### **Subpart F—Seizure and Forfeiture Procedures**

#### **§ 904.500 Purpose and scope.**

(a) This subpart sets forth procedures governing the release, abandonment, forfeiture, remission of forfeiture, or return of seized property (including property seized and held solely as evidence) that is subject to forfeiture under the various statutes administered by NOAA.

(b) Except as provided in this subpart, these regulations apply to all seized property subject to forfeiture under the statutes listed in subpart A of this part. This subpart is in addition to, and not in contradiction of, any special rules regarding seizure, holding or disposition of property seized under these statutes.

#### **§ 904.501 Notice of seizure.**

Within 60 days from the date of the seizure, NOAA will serve the Notice of Seizure as provided in § 904.3 to the owner or consignee, if known or easily ascertainable, or other party that the facts of record indicate has an interest in the seized property. In cases where the property is seized by a state or local law enforcement agency; a Notice of Seizure will be given in the above manner within 90 days from the date of the seizure. The Notice will describe the seized property and state the time, place and reason for the seizure, including the provisions of law alleged to have been violated. The Notice will inform each interested party of his or her right to file a claim to the seized property, and state a date by which a claim must be filed, which may not be less than 35 days after service of the Notice. The Notice may be combined with a Notice of the sale of perishable fish issued under § 904.505. If a claim is filed the case will be referred promptly to the U.S. Department of Justice for institution of judicial proceedings.

#### **§ 904.502 Bonded release of seized property.**

(a) As authorized by applicable statute, at any time after seizure of any property, NOAA may, in its sole discretion, release any seized property upon deposit with NOAA of the full value of the property or such lesser amount as NOAA deems sufficient to protect the interests served by the applicable statute. In addition, NOAA may, in its sole discretion, accept a bond or other security in place of fish, wildlife, or other property seized. The bond will contain such conditions as NOAA deems appropriate.

(b) Property may be released under this section only if possession thereof will not violate or frustrate the purpose or policy of any applicable law or regulation. Property that will not be released includes, but is not limited to:

(1) Property in which NOAA is not satisfied that the requester has a substantial interest;

(2) Property whose entry into the commerce of the United States is prohibited;

(3) Live animals, except in the interest of the animals' welfare; or

(4) Property whose release appears to NOAA not to be in the best interest of the United States or serve the purposes of the applicable statute.

(c) If NOAA grants the request, the amount paid by the requester will be deposited in a NOAA expense account. The amount so deposited will for all purposes be considered to represent the property seized and subject to forfeiture, and payment of the amount by requester constitutes a waiver by requester of any claim arising from the seizure and custody of the property. NOAA will maintain the money so deposited pending further order of NOAA, order of a court, or disposition by applicable administrative proceedings.

(d) A request for release need not be in any particular form, but must set forth the following:

(1) A description of the property seized;

(2) The date and place of the seizure;

(3) The requester's interest in the property, supported as appropriate by bills of sale, contracts, mortgages, or other satisfactory evidence;

(4) The facts and circumstances relied upon by the requester to justify the remission or mitigation;

(5) An offer of payment to protect the United States' interest that requester makes in return for release;

(6) The signature of the requester, his or her attorney, or other authorized agent; and

(7) A request to defer administrative or judicial forfeiture proceedings until

completion of all other related judicial or administrative proceedings (including any associated civil penalty or permit sanction proceedings).

**§ 904.503 Appraisal.**

NOAA will appraise seized property to determine its domestic value. Domestic value means the price at which such or similar property is offered for sale at the time and place of appraisal in the ordinary course of trade. If there is no market for the seized property at the place of appraisal, the value in the principal market nearest the place of appraisal will be used. If the seized property may not lawfully be sold in the United States, its domestic value will be determined by other reasonable means.

**§ 904.504 Administrative forfeiture proceedings.**

(a) *When authorized.* This section applies to property that is determined under § 904.503 to have a value of \$500,000 or less, and that is subject to administrative forfeiture under the applicable statute. This section does not apply to conveyances seized in connection with criminal proceedings.

(b) *Procedure.* (1) NOAA will publish a Notice of Proposed Forfeiture once a week for at least three successive weeks in a newspaper of general circulation in the Federal judicial district in which the property was seized. However, if the value of the seized property does not exceed \$1,000, the Notice may be published by posting for at least three successive weeks in a conspicuous place accessible to the public at the National Marine Fisheries Service Enforcement Office, U.S. District Court, or the U.S. Customs House nearest the place of seizure, with the date of posting indicated on the Notice. In addition, a reasonable effort will be made to serve the Notice, as provided in § 904.3, on each person whose identity, address and interest in the property are known or easily ascertainable.

(2) The Notice of Proposed Forfeiture will:

(i) Describe the seized property, including any applicable registration or serial numbers;

(ii) State the time, place and reason for the seizure, including the provisions of law allegedly violated; and

(iii) Describe the rights of an interested person to file a claim to the property (including the right to petition to remit or mitigate the forfeiture).

(3)(i) Except as provided in paragraph (b)(4) of this section, any person claiming the seized property may file a claim with NOAA, at the address indicated in the Notice, within 30 days

of the date the final Notice was published or posted. The claim must state the claimant's interest in the property.

(ii) Filing a claim does not entitle the claimant to possession of the property. However, it does stop administrative forfeiture proceedings.

(iii) If the claim is timely filed in accordance with this section, NOAA will refer the matter to the U.S. Department of Justice to institute forfeiture proceedings in the appropriate U.S. District Court.

(4) If a claim is not filed within 30 days of the date the final Notice is published or posted in accordance with this section, NOAA will declare the property forfeited. The Declaration of Forfeiture will be in writing and will be served as provided in § 904.3, on each person whose identity and address and prior interest in the seized property are known or easily ascertainable. The Declaration will describe the property and state the time, place, and reason for its seizure, including the provisions of law violated. The Declaration will identify the Notice of Proposed Forfeiture, describing the dates and manner of publication of the Notice and any efforts made to serve the Notice as provided in § 904.3. The Declaration will state that in response to the Notice a proper claim was not timely received by the proper office from any claimant, and that therefore all potential claimants are deemed to admit the truth of the allegations of the Notice. The Declaration shall conclude with an order of condemnation and forfeiture of the property to the United States for disposition according to law. All forfeited property will be subject to disposition as authorized by law and regulations of NOAA.

(5) If the appraised value of the property is more than \$500,000, or a timely and satisfactory claim for property appraised at \$500,000 or less is submitted to NOAA, the matter will be referred to the U.S. Department of Justice to institute *in rem* proceedings in the appropriate U.S. District Court.

**§ 904.505 Summary sale.**

(a) In view of the perishable nature of fish, any person authorized to enforce a statute administered by NOAA may, as authorized by law, sell or cause to be sold, and any person may purchase, for not less than its domestic fair market value, fish seized under such statute.

(b) Any person purchasing fish subject to this section must deliver the proceeds of the sale to a person authorized to enforce a statute administered by NOAA immediately upon request of such authorized person.

Anyone who does not so deliver the proceeds may be subject to penalties under the applicable statute or statutes.

(c) NOAA will give Notice of the Sale as provided under § 904.3, to the owner or consignee, if known or easily ascertainable, or to any other party that the facts of record indicate has an interest in the seized fish, unless the owner or consignee or other interested party has otherwise been personally notified. Notice will be sent either prior to the sale, or as soon thereafter as practicable.

(d) The proceeds of the sale, after deducting any reasonable costs of the sale, will be subject to any administrative or judicial proceedings in the same manner as the seized fish would have been, including an action *in rem* for the forfeiture of the proceeds. Pending disposition of such proceedings, the proceeds will, as appropriate, either be deposited in a NOAA suspense account or submitted to the appropriate court.

(e) Seizure and sale of fish is without prejudice to any other remedy or sanction authorized by law.

**§ 904.506 Remission of forfeiture and restoration of proceeds of sale.**

(a) *Application of this section.* (1) This section establishes procedures for filing with NOAA a petition for relief from forfeitures incurred, or alleged to have been incurred, and from potential forfeiture of seized property, under any statute administered by NOAA that authorizes the remission or mitigation of forfeitures.

(2) Although NOAA may properly consider a petition for remission or mitigation of forfeiture and restoration of proceeds of sale along with other consequences of a violation, the remission or mitigation of a forfeiture and restoration of proceeds is not dispositive of any criminal charge filed, civil penalty assessed, or permit sanction proposed, unless NOAA expressly so states. Remission or mitigation of forfeiture and restoration of proceeds is in the nature of executive clemency and is granted in the sole discretion of NOAA only when consistent with the purposes of the particular statute involved and this section.

(3) If no petition is timely filed, or if the petition is denied, prior to depositing the proceeds NOAA may use the proceeds of sale to reimburse the U.S. Government for any costs that by law may be paid from such sums.

(4) If NOAA remits the forfeiture and the forfeited property has not been sold, then restoration may be conditioned

upon payment of any applicable costs as defined in this subpart.

(b) *Petition for relief from forfeiture.*

(1) Any person claiming an interest in any property which has been or may be administratively forfeited under the provisions of this section may, at any time after seizure of the property, but no later than 90 days after the date of forfeiture, petition the Assistant General Counsel for Enforcement and Litigation, NOAA/GCEL, 8484 Georgia Avenue, Suite 400, Silver Spring, Maryland 20910, for a remission or mitigation of the forfeiture and restoration of the proceeds of such sale, or such part thereof as may be claimed by the petitioner.

(2) The petition need not be in any particular form, but must set forth the following:

(i) A description of the property seized;

(ii) The date and place of the seizure;

(iii) The petitioner's interest in the property, supported as appropriate by bills of sale, contracts, mortgages, or other satisfactory evidence;

(iv) The facts and circumstances relied upon by the petitioner to justify the remission or mitigation of forfeiture and restoration of proceeds. If the claim is made after the property is forfeited, the petitioner must provide satisfactory proof that the petitioner did not know of the seizure prior to the declaration or condemnation of forfeiture, was in such circumstances as prevented him or her from knowing of the same, and that such forfeiture was incurred without any willful negligence or intention to violate the applicable statute on the part of the petitioner; and

(v) The signature of the petitioner, his or her attorney, or other authorized agent.

(3) NOAA will not consider a petition for remission or mitigation of forfeiture and restoration of proceeds while a forfeiture proceeding is pending in Federal court. Once such a case is referred to the U.S. Department of Justice for institution of judicial proceedings, and until the proceedings are completed, any petition received by NOAA will be forwarded to the U.S. Department of Justice for consideration.

(4) A false statement in a petition will subject petitioner to prosecution under 18 U.S.C. 1001.

(c) *Investigation.* NOAA will investigate the facts and circumstances shown by the petition and seizure, and may in this respect appoint an investigator to examine the facts and prepare a report of investigation.

(d) *Determination of petition.* (1) After investigation under paragraph (c) of this section, NOAA will make a

determination on the matter and notify the petitioner. NOAA may remit or mitigate the forfeiture, on such terms and conditions as are deemed reasonable and just under the applicable statute and the circumstances.

(2) Unless NOAA determines no valid purpose would be served, NOAA will condition a determination to remit or mitigate a forfeiture upon the petitioner's submission of an agreement, in a form satisfactory to NOAA, to hold the United States and its officers or agents harmless from any and all claims based on loss of or damage to the seized property or that might result from grant of remission or mitigation and restoration of proceeds. If the petitioner is not the beneficial owner of the property, or if there are others with a proprietary interest in the property, NOAA may require the petitioner to submit such an agreement executed by the beneficial owner or other interested party. NOAA may also require that the property be promptly exported from the United States.

(e) *Compliance with the determination.* A determination by NOAA to remit or mitigate the forfeiture and restore the proceeds upon stated conditions, as upon payment of a specified amount, will be effective for 60 days after the date of the determination. If the petitioner does not comply with the conditions within that period in a manner prescribed by the determination, or make arrangements satisfactory to NOAA for later compliance, the remission or mitigation and restoration of proceeds will be void, and judicial or administrative forfeiture proceedings will be instituted or resumed.

(f) *Appropriated property.* If forfeited property that is the subject of a claim for restoration of proceeds has been appropriated for official use, retention by the U.S. Government will be regarded as a sale for the purposes of this section.

**§ 904.507 Recovery of certain storage costs.**

If any fish, wildlife, or evidentiary property is seized and forfeited under the Endangered Species Act, 16 U.S.C. 1531 through 1543, any person whose act or omission was the basis for the seizure may be charged a reasonable fee for expenses to the United States connected with the transfer, board, handling or storage of such property. If any fish or wildlife is seized in connection with a violation of the Lacey Act Amendments of 1981, 16 U.S.C. 3371 through 3378, or any property is seized in connection with a violation of the Magnuson-Stevens Fishery

Conservation and Management Act, 16 U.S.C. 1801 through 1882, any person convicted thereof, or assessed a civil penalty therefor, may be assessed a reasonable fee for expenses of the United States connected with the storage, care and maintenance of such property. Within a reasonable time after forfeiture, NOAA will send to such person by registered or certified mail, return receipt requested, a bill for such fee. The bill will contain an itemized statement of the applicable costs, and instructions on the time and manner of payment. Payment must be made in accordance with the bill. If the recipient of the bill objects to the reasonableness of the costs assessed he or she may, within 30 days of receipt, file written objections with NOAA at the address stated in the bill. NOAA will promptly review the written objections and within 30 days mail the final determination to the party who filed them. NOAA's determination will constitute final agency action on the matter.

**§ 904.508 Voluntary forfeiture by abandonment.**

(a) The owner of seized property may voluntarily forfeit all right, title, and interest in the property by abandoning it to NOAA. Voluntary forfeiture by abandonment under this section may be accomplished by various means, including, but not limited to: expressly waiving any claim to the property by voluntarily relinquishing any right, title, and interest by written agreement or otherwise; or refusing or otherwise avoiding delivery of returned property; or failing to respond within 90 days of service of any certified or registered notice regarding a return of seized property issued under § 904.510(b).

(b) Property will be declared finally forfeited by abandonment, without recourse, upon a finding of abandonment by NOAA.

**§ 904.509 Disposal of forfeited property.**

(a) *Delivery to Administrator.* Upon forfeiture of any fish, wildlife, parts or products thereof, or other property to the United States, including the abandonment or waiver of any claim to any such property, it will be delivered to NOAA for storage or disposal according to the provisions of this section.

(b) *Disposal.* Disposal may be accomplished by one of the following means unless the property is the subject of a petition for remission or mitigation of forfeiture or disposed of by court order:

(1) Return to the wild;

(2) Use by NOAA or transfer to another government agency for official use;

(3) Donation or loan;

(4) Sale; or

(5) Destruction.

(c) *Purposes of disposal.* Disposal procedures may be used to alleviate overcrowding of evidence storage facilities; to avoid the accumulation of seized property where disposal is not otherwise accomplished by court order; to address the needs of governmental agencies and other institutions and organizations for such property for scientific, educational, and public display purposes; and for other valid reasons. In no case will property be used for personal purposes, either by loan recipients or government personnel.

(d) *Disposal of evidence.* Property that is evidence may be disposed of only after authorization by the NOAA Office of General Counsel. Disposal approval usually will not be given until the case involving the evidence is closed, except that perishable property may be authorized for disposal sooner.

(e) *Loans—(1) To institutions.* Property approved for disposal may be loaned to institutions or organizations requesting such property for scientific, educational, or public display purposes. Property will be loaned only after execution of a loan agreement which provides, among other things, that the loaned property will be used only for noncommercial scientific, educational, or public display purposes, and that it will remain the property of the U.S. Government, which may demand its return at any time. Parties requesting the loan of property must demonstrate the ability to provide adequate care and security for the property. Loans may be made to responsible agencies of foreign governments in accordance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

(2) *To individuals.* Property generally will not be loaned to individuals not affiliated with an institution or organization unless it is clear that the property will be used in a noncommercial manner, and for scientific, educational, or public display purposes which are in the public interest.

(3) *Selection of loan recipients.* Recipients of property will be chosen so as to assure a wide distribution of the property throughout the scientific, educational, public display and museum communities. Other branches of NMFS, NOAA, the Department of Commerce, and other governmental agencies will have the right of first

refusal of any property offered for disposal. The Administrator may solicit applications, by publication of a notice in the **Federal Register**, from qualified persons, institutions, and organizations who are interested in obtaining the property being offered. Such notice will contain a statement as to the availability of specific property for which transferees are being sought, and instructions on how and where to make application. Applications will be granted in the following order: other offices of NMFS, NOAA, and the Department of Commerce; U.S. Fish and Wildlife Service; other Federal agencies; other governmental agencies; scientific, educational, or other public or private institutions; and private individuals.

(4) *Loan agreement.* Property will be transferred under a loan agreement executed by the Administrator and the borrower. Any attempt on the part of the borrower to retransfer property, even to another institution for related purposes, will violate and invalidate the loan agreement, and entitle the United States to immediate repossession of the property, unless the prior approval of the Administrator has been obtained under § 904.510(d)(5). Violation of the loan agreement may also subject the violator to the civil penalties provided by the laws governing possession and transfer of the property.

(5) *Temporary reloans; documents to accompany property.* Temporary reloans by the borrower to another qualified borrower (as for temporary exhibition) may be made if the Administrator is advised in advance by the borrowers. Temporary loans for more than thirty days must be approved in advance in writing by the Administrator. A copy of the original loan agreement, and a copy of the written approval for reloan, if any, must accompany the property whenever it is temporarily reloaned or is shipped or transported across state or international boundaries.

(f) *Sale.* (1) Any fish, wildlife, parts or products thereof, and other property which has been voluntarily forfeited by abandonment to NOAA may be sold or offered for sale, with the exception of any species or property which is otherwise prohibited from being sold at the time it is to be sold or offered for sale.

(2) Property will be sold in accordance with current Federal Property Management Regulations (41 CFR chapter 101) or U.S. Customs laws and regulations, except that NOAA may:

(i) Sell at fair market value perishable fish pursuant to the summary sales provisions of 15 CFR 904.505; and

(ii) Sell, destroy, or otherwise dispose of property for which it is determined the expense of keeping it is disproportionate to the value thereof.

(3) The proceeds of sale may be used to reimburse NOAA for any costs which by law NOAA is authorized to recover or to pay any rewards which by law may be paid from sums that NOAA receives.

(g) *Destruction.* (1) Property not otherwise disposed of may be destroyed.

(2) Destruction will be accomplished in accordance with the requirements of 41 CFR parts 101 through 145.

(3) When destroyed, the fact, manner, and date of destruction and the type and quantity destroyed must be certified by the official actually destroying the property.

(4) No duly authorized officer of NOAA shall be liable for the destruction or other disposition of property made pursuant to this section.

(h) *Recordkeeping.* A disposal form will be completed each time property is disposed of pursuant to the policy and procedure established herein, and will be retained in the case file for the property. These forms will be available to the public.

#### **§ 904.510 Return of seized property.**

(a) *Return.* In cases where NOAA, in its sole discretion, determines that forfeiture of seized property would not be in the best interest of the U.S. Government, NOAA will make a reasonable attempt to determine the party that the facts of record indicate has a predominant ownership interest in the seized property and, provided such a determination can be made, will arrange for return of the seized property to that party by appropriate means.

(b) *Notice.* NOAA will serve a Notice of the Return of property as provided by § 904.3, to the owner, consignee, or other party the facts of record indicate has an interest in the seized property. The Notice will describe the seized property, state the time, place, and reason for the seizure and return, and will identify the owner or consignee, and if appropriate, the bailee of the seized property. The Notice of the return also will state that the party to whom the property is being returned is responsible for any distribution of the property to any party who holds a valid claim, right, title or interest in receiving the property, in whole or in part. The Notice also will provide that on presentation of the Notice and proper identification, and the signing of a receipt provided by NOAA, the seized property is authorized to be released.

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