

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Office of the Secretary

#### 7 CFR Part 11

RIN 0503-AA38

#### National Appeals Division Rules of Procedure; Applicability of Equal Access to Justice Act and Administrative Procedure Act

**AGENCY:** Office of the Secretary, National Appeals Division, USDA.

**ACTION:** Final rule.

**SUMMARY:** This document amends the National Appeals Division rules of procedure to reflect recent judicial rulings regarding the applicability of the Equal Access to Justice Act and the Administrative Procedure Act to National Appeals Division administrative proceedings. The rules of procedure are amended to provide that the provisions of the Administrative Procedure Act generally applicable to agency adjudications, and the Equal Access to Justice Act and its implementing regulations, shall apply to National Appeals Division hearings.

**DATES:** *Effective Date:* November 6, 2009.

**FOR FURTHER INFORMATION CONTACT:** Adam J. Hermann, Attorney-Advisor, General Law Division, Office of the General Counsel, United States Department of Agriculture, STOP 1415, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720-5565.

**SUPPLEMENTARY INFORMATION:** USDA is amending the National Appeals Division (“NAD”) rules of procedure in 7 CFR part 11, subpart A, to reflect judicial rulings in four Circuits regarding the applicability of the Equal Access to Justice Act (“EAJA”), 5 U.S.C. 504, and by extension, the Administrative Procedure Act (“APA”), to NAD proceedings.

Prior to publication of this final rule, the position of USDA was that EAJA (5 U.S.C. 504) and the provisions of the APA applicable to formal adjudicative proceedings (5 U.S.C. 554-557) did not apply to NAD proceedings except where required by judicial ruling. See 64 FR 33367, 33368 (June 23, 1999). At that time, only one U.S. Circuit Court of Appeals—the 8th—had issued a decision holding that EAJA applies to NAD proceedings. See *Lane v. USDA*, 120 F.3d 106 (8th Cir. 1997).

Since then, the 7th and 9th Circuits also have issued decisions holding that EAJA applies to NAD proceedings. See *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121 (7th Cir. 2008); *Aageson Grain & Cattle v. USDA*, 500 F.3d 1038 (9th Cir. 2007). Additionally, on May 1, 2009, a U.S. District Court in the 5th Circuit entered a decision following the 7th, 8th, and 9th Circuits. See *Rosenbaum v. USDA*, No. 07-02808 (S.D. Tex. May 1, 2009) (final judgment).

In light of the decisions in these four Circuits, USDA is no longer maintaining the position that the APA and EAJA do not apply to NAD proceedings except where required by judicial ruling. Effective immediately, EAJA and USDA’s implementing regulations at 7 CFR part 1, subpart J, will apply universally to NAD proceedings regardless of the judicial Circuit in which the proceeding arises. While the four decisions cited above addressed only the issue of whether EAJA applies to NAD proceedings, the applicability of EAJA is derivative of the applicability of the APA and thus, by extension, the court rulings apply to the applicability of the APA as well. Therefore, the provisions of the APA generally applicable to agency adjudications (5 U.S.C. 554-557) also will apply generally to NAD proceedings regardless of the judicial Circuit in which the proceeding arises. However, it is the position of USDA that the applicability of the APA does not require any changes to existing NAD administrative procedures.

This final rule applies to proceedings conducted under 7 CFR part 11, except for proceedings under § 11.5 (USDA agency informal reviews of adverse decisions) and § 11.6(a) (NAD Director reviews of USDA agency determinations of appealability).

### Classification

This rule relates to internal agency management. Accordingly, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity for comment are not required, and this rule may be made effective less than 30 days after publication in the **Federal Register**. This rule also is exempt from the provisions of Executive Order 12866. This action is not a rule as defined by the Regulatory Flexibility Act, Public Law 96-354, and the Small Business Regulatory Fairness Enforcement Act, 5 U.S.C. 801 *et seq.*, and thus is exempt from the provisions of those Acts. This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

### List of Subjects in 7 CFR Part 11

Administrative practice and procedure, Agriculture, Agricultural commodities, Crop insurance, Ex parte communications, Farmers, Federal aid programs, Guaranteed loans, Insured loans, Loan programs, Price support programs, Soil conservation.

■ Accordingly, Title 7 of the Code of Federal Regulations is amended as set forth below:

### PART 11—NATIONAL APPEALS DIVISION

■ 1. The authority for part 11 continues to read as follows:

**Authority:** 5 U.S.C. 301; Title II, Subtitle H, Public Law 103-354, 108 Stat. 3228 (7 U.S.C. 6991 *et seq.*); Reorganization Plan No. 2 of 1953 (5 U.S.C. App.).

#### Subpart A—National Appeals Division Rules of Procedure

■ 2. Amend § 11.4 by revising the section heading and adding paragraph (a), to read as follows:

#### § 11.4 Other laws and regulations.

(a) The provisions of the Administrative Procedure Act generally applicable to agency adjudications (5 U.S.C. 554-557), and the Equal Access to Justice Act (5 U.S.C. 504) and its implementing regulations at 7 CFR part 1, subpart J, shall apply to proceedings under this part except for proceedings under § 11.5 and § 11.6(a).

\* \* \* \* \*

Done at Washington, DC, this 2nd day of November 2009.

**Thomas J. Vilsack,**

*Secretary of Agriculture.*

[FR Doc. E9-26747 Filed 11-5-09; 8:45 am]

BILLING CODE 3410-90-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2009-1024; Directorate Identifier 2009-NM-182-AD; Amendment 39-16083; AD 2008-05-18 R1]

RIN 2120-AA64

#### Airworthiness Directives; Fokker Model F.27 Mark 050, 200, 300, 400, 500, 600, and 700 Airplanes

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

**ACTION:** Final rule; request for comments.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above that would revise an existing AD. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Subsequent to accidents involving Fuel Tank System explosions in flight \* \* \* and on ground, \* \* \* Special Federal Aviation Regulation 88 (SFAR88) \* \* \* required a safety review of the aircraft Fuel Tank System \* \* \*.

\* \* \* \* \*

Fuel Airworthiness Limitations are items arising from a systems safety analysis that have been shown to have failure mode(s) associated with an 'unsafe condition' \* \* \*. These are identified in Failure Conditions for which an unacceptable probability of ignition risk could exist if specific tasks and/or practices are not performed in accordance with the manufacturers' requirements.

This AD requires actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** This AD becomes effective November 23, 2009.

On April 16, 2008 (73 FR 13071, March 12, 2008), the Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD.

We must receive comments on this AD by December 21, 2009.

**ADDRESSES:** You may send comments by any of the following methods:

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

- *Fax:* (202) 493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands; telephone +31 (0)252-627-350; fax +31 (0)252-627-211; e-mail [technicalservices.fokkerservices@stork.com](mailto:technicalservices.fokkerservices@stork.com); Internet <http://www.myfokkerfleet.com>.

#### Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Tom Rodriguez, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1137; fax (425) 227-1149.

#### SUPPLEMENTARY INFORMATION:

##### Discussion

On February 28, 2008, we issued AD 2008-05-18, Amendment 39-15412 (73 FR 13071, March 12, 2008). That AD applied to certain Fokker Model F.27 Mark 050, 200, 300, 400, 500, 600, and 700 airplanes. That AD required revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness to incorporate new limitations for fuel tank systems.

Critical design configuration control limitations (CDCCLs) are limitation requirements to preserve a critical ignition source prevention feature of the fuel tank system design that is necessary to prevent the occurrence of an unsafe condition. The purpose of a CDCCL is to provide instruction to retain the

critical ignition source prevention feature during configuration change that may be caused by alterations, repairs, or maintenance actions. A CDCCL is not a periodic inspection.

Since we issued that AD, we have determined that it is necessary to clarify the AD's intended effect on spare and on-airplane fuel tank system components, regarding the use of maintenance manuals and instructions for continued airworthiness.

Section 91.403(c) of the Federal Aviation Regulations (14 CFR 91.403(c)) specifies the following:

No person may operate an aircraft for which a manufacturer's maintenance manual or instructions for continued airworthiness has been issued that contains an airworthiness limitation section unless the mandatory \* \* \* procedures \* \* \* have been complied with.

Some operators have questioned whether existing components affected by the new CDCCLs must be reworked. We did not intend for the AD to retroactively require rework of components that had been maintained using acceptable methods before the effective date of the AD. Owners and operators of the affected airplanes therefore are not required to rework affected components identified as airworthy or installed on the affected airplanes before the required revisions of the ALS. But once the CDCCLs are incorporated into the ALS, future maintenance actions on components must be done in accordance with those CDCCLs.

#### FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. This new AD retains the requirements of the existing AD, and adds a new note to clarify the intended effect of the AD on spare and on-airplane fuel tank system components. We have renumbered subsequent notes accordingly.

#### Explanation of Additional Change to AD

AD 2008-05-18 allowed the use of alternative inspections, inspection intervals, or CDCCLs if they are part of a later revision of a Fokker 50/60 Fuel Airworthiness Limitation Items (ALI) and CDCCL Report SE-671, Issue 2, dated December 1, 2006; or Fokker Service Bulletin SBF27-28-070, Revision 1, dated January 8, 2008. That provision has been removed from this AD. Allowing the use of "a later revision" of a specific service document violates Office of the Federal Register policies for approving materials that are