

# Proposed Rules

Federal Register

Vol. 60, No. 98

Monday, May 22, 1995

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Office of the Secretary

#### 7 CFR Part 11

#### National Appeals Division Rules of Procedure

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

**ACTION:** Proposed rule.

**SUMMARY:** The National Appeals Division (NAD) in the Office of the Secretary proposes to add a new rule to implement Title II, Subtitle H, of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 by setting forth procedures for program participant appeals of adverse decisions by United States Department of Agriculture (USDA) agency officials to the National Appeals Division (NAD). This action also defines those appeals over which NAD has jurisdiction.

**DATES:** Written comments via letter, facsimile, or Internet are invited from interested individuals and organizations and must be received on or before June 21, 1995.

**ADDRESSES:** Comments should be sent to L. Benjamin Young, Jr., Office of the General Counsel, Research and Operations Division, AgBox 1415, United States Department of Agriculture, Washington, D.C. 20250-1415; fax number: 202/720-5837; Internet: hqdomain.lawpo.young@sies.wsc.ag.gov.

**FOR FURTHER INFORMATION CONTACT:** L. Benjamin Young, Jr. at the above address or 202/690-1979.

#### SUPPLEMENTARY INFORMATION:

##### Classification

This proposed rule has been reviewed under E.O. 12866, and it has been determined that it is not a "significant regulatory action" rule because it will not have an annual effect on the economy of \$100 million or more or adversely and materially affect a sector

of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule will not create any serious inconsistencies or otherwise interfere with actions taken or planned by another agency. It will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof, and does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in E.O. 12866.

#### Regulatory Flexibility Act

The Department certifies that this proposed rule will not have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Pub. L. 96-534, as amended (5 U.S.C. 601, *et seq.*).

#### Background and Purpose

On December 27, 1994 (see 59 FR 66,517), the Secretary of Agriculture noticed that the NAD was established pursuant to Title II, Subtitle H of Pub. L. 103-354, the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994. NAD was assigned responsibility for all administrative appeals formerly performed by the National Appeals Division of the former Agricultural Stabilization and Conservation Service and by the National Appeals Staff of the former Farmers Home Administration, appeals arising from decisions of the Federal Crop Insurance Corporation and the former Soil Conservation Service, appeals arising from decisions of the successor agencies to the foregoing agencies established by the Secretary, and such other administrative appeals arising from decisions of agencies and offices of USDA as may in the future be assigned by the Secretary. Conforming changes to the regulations of the affected agencies will be published with the final rule.

This proposed part sets forth the jurisdiction of the NAD and the procedures appellants and agencies must follow upon appeal of adverse decisions by covered USDA program "participants" as defined in detail in the proposed part.

The proposed part defines "adverse decisions" to include denial of equitable relief to a program participant by an

officer, employee, or committee of an agency or the failure of an officer, employee, or committee of an agency to issue a decision or otherwise act on the request or right of the participant, but to exclude decisions over which the Agriculture Board of Contract Appeals would have jurisdiction. "Agency" includes the Consolidated Farm Service Agency, the Commodity Credit Corporation, the Farmers Home Administration, the Federal Crop Insurance Corporation, the Rural Business and Cooperative Development Service, the Rural Development Administration, the Rural Housing and Community Development Service, the Natural Resources and Conservation Service, a State, county, or area committee established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)(5)), any successor agency to the above-named agencies, and any other agency or office of the Department that the Secretary may designate. Designation of other agencies or offices by the Secretary shall be accomplished by virtue of a delegation of authority to NAD by the Secretary, or by future amendment of these rules by the Secretary.

These rules would apply to any adverse decision issued by any agency on or after October 20, 1994, and to any appeals or requests pending before an agency, including any predecessor agency, prior to October 20, 1994.

The proposed part would be applicable to adverse decisions with respect to: (1) Denial of participation in any program of an agency; (2) compliance with program requirements; and (3) the making or amount of payments or other program benefits to a participant in any program of an agency.

The proposed part preserves participants' rights to avail themselves of certain informal agency review processes prior to instituting an appeal under the proposed part.

The proposed part states that the Administrative Procedure Act, the Equal Access to Justice Act, and the Federal Rules of Evidence do not apply to proceedings under the proposed part.

The proposed part provides filing requirements and deadlines, evidentiary hearing procedures for appeals of adverse decisions (including rules applicable to the issuance of subpoenas), procedures for NAD

Director review of an agency determination that a decision is not appealable, and procedures for NAD Director review of hearing officer determinations.

The proposed part provides for judicial review of final determinations of NAD.

#### List of Subjects in 7 CFR Part 11

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

For the reasons set out in the preamble, Title 7, Subtitle A, of the Code of Federal Regulations is amended by adding Part 11 to read as follows:

### PART 11—NATIONAL APPEALS DIVISION RULES OF PROCEDURE

Sec.

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

#### § 11.1 Definitions.

For purposes of this part:

*Adverse decision* means an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant. The term includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program regulations. The term does not include a decision over which the Board of Contract Appeals has jurisdiction.

*Agency* means:

- (1) The Consolidated Farm Service Agency;
- (2) The Commodity Credit Corporation;
- (3) The Farmers Home Administration;
- (4) The Federal Crop Insurance Corporation;

- (5) The Rural Business and Cooperative Development Service;
- (6) The Rural Development Administration;
- (7) The Rural Housing and Community Development Service;
- (8) The Natural Resources Conservation Service;
- (9) A State, county, or area committee established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)(5)); and
- (10) Any successor agency to the above-named agencies, and any other agency or office of the Department which the Secretary may designate.

*Agency record* means all the materials maintained by an agency related to an adverse decision which are submitted to the Division by an agency for consideration in connection with an appeal under this part, but shall not include records or information not directly related to the adverse decision at issue. All materials contained in the agency record submitted to the Division shall be deemed admitted as evidence for purposes of a hearing or a record review under § 11.7.

*Agency representative* means any person, whether or not an attorney, who is authorized to represent the agency in an administrative appeal under this part.

*Appeal* means a written request by a participant asking for review by the National Appeals Division of an adverse decision under this part.

*Appellant* means any participant who appeals an adverse decision in accordance with this part. Unless separately set forth in this part, the term "appellant" includes an authorized representative.

*Authorized representative* means any person, whether or not an attorney, who is authorized in writing by a participant, consistent with § 11.6(a), to act for the participant in an administrative appeal under this part. The authorized representative may act on behalf of the participant except when the provisions of this part require action by the participant or appellant personally.

*Case record* means all the materials maintained by the Secretary related to an adverse decision. The case record includes both the agency record and the hearing record.

*Days* means calendar days unless otherwise specified.

*Department* means the United States Department of Agriculture.

*Director* means the Director of the Division or a designee of the Director.

*Division* means the National Appeals Division established by this part.

*Equitable relief* means relief which is authorized under section 326 of the Food and Agriculture Act of 1962 (7 U.S.C. 1339a) and other laws administered by the agency.

*Ex parte communication* means an oral or written communication not contained in the hearing record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding connected with the appeal involved.

*Hearing* except with respect to § 11.5, means a proceeding before the Division to afford a participant the opportunity to present testimony or documentary evidence or both in order to have a previous determination reversed and to show why an adverse determination was not proper.

*Hearing Officer* means an individual employed by the Division who conducts the hearing and determines appeals of adverse decisions by any agency.

*Hearing record* means all documents, evidence, and other materials generated in relation to a hearing under § 11.7.

*Implement* means the taking of action by an agency of the Department in order fully and promptly to effectuate a final determination of the Division.

*Participant* means any individual or entity whose right to participate in or receive a payment, loan, loan guarantee, or other benefit in accordance with any program of an agency to which these regulations apply is affected by a decision of such agency, including a decision by a reinsured company which is authorized by the Federal Crop Insurance Corporation to issue insurance policies. The term does not include:

(1) Participants in programs subject to adjudicatory proceedings under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes, 7 CFR Part 1, Subpart H;

(2) Participants in programs governed by Federal contracting laws and regulations (appealable under other rules and to other forums, including to the Department's Board of Contract Appeals under 7 CFR part 24);

(3) Appellants from decisions to deny the release of information sought by members of the public under the Freedom of Information Act (appealable under 7 CFR Part 1, Subpart A);

(4) Participants in suspension and debarment disputes, including, but not limited to, those falling within the scope of 7 CFR Parts 1407 and 3017;

(5) Participants in export programs administered by the Commodity Credit Corporation;

(6) Reinsured companies engaged in disputes with the Federal Crop Insurance Corporation;

(7) Tenants prosecuting grievances or appeals pursuant to the provisions of 7 CFR Part 1944, Subpart L, under the multi-family housing program carried out by the Rural Housing and Community Development Service;

(8) Persons having personnel, equal employment opportunity, and other similar disputes with any agency or office of the Department which arise out of the employment relationship;

(9) Persons pursuing claims against the United States arising under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, or the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. 3721; or

(10) Program participants pursuing claims under the nondiscrimination regulations at 7 CFR parts 15, 15a, 15b, and 15e.

*Record review* means an appeal considered by the Hearing Officer in which the Hearing Officer's determination is based on the agency record and other information submitted by the appellant and the agency, including information submitted by affidavit or declaration.

*Secretary* means the Secretary of Agriculture.

#### § 11.2 General statement.

This part sets forth procedures for proceedings before the National Appeals Division within the Department. The Division is an organization within the Department which is independent from all other agencies and offices of the Department, including Department officials at the state and local level. The Director of the Division reports directly to the Secretary of Agriculture. The authority of the Hearing Officers and the Director of the Division, and the administrative appeal procedures which must be followed by program participants who desire to appeal an adverse decision and by the agency which issued the adverse decision, are included in this part.

#### § 11.3 Applicability.

(a) *Subject matter.* The regulations contained in this part are applicable to adverse decisions made by an agency, including, for example, those with respect to:

(1) Denial of participation in, or receipt of benefits under, any program of an agency;

(2) Compliance with program requirements; and

(3) The making or amount of payments of other program benefits to a participant in any program of an agency.

(b) *Effective date.* This part is applicable to:

(1) Any adverse decision issued by any agency on or after October 20, 1994; and

(2) All appeals or requests for reconsideration which were pending before any agency, including any predecessor agency abolished by the Secretary pursuant to the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. 103-354, 108 Stat. 3178, prior to October 20, 1994.

#### § 11.4 Inapplicability of other laws and regulations.

The provisions of the Administrative Procedure Act, as amended, 5 U.S.C. 551, *et seq.*, are not applicable to proceedings under this part. The Equal Access to Justice Act, as amended, 5 U.S.C. 504, does not apply to these proceedings. The Federal Rules of Evidence, 28 U.S.C. App., shall not apply to these proceedings.

#### § 11.5 Informal agency hearings and exhaustion.

(a) *Required exhaustion of informal hearing options.* No administrative decision issued at the field service office level by an officer or employee of the Consolidated Farm Service Agency, or by any employee of a county or area committee established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590h(b)(5), shall be considered to be an adverse decision for purposes of the provisions of this part until a program participant has perfected an informal appeal to and received a decision thereon from the county or area committee with responsibility for the administrative decision at issue, and any program participant shall be required to exhaust his or her right to informal review by such county or area committee prior to seeking review by the Division under the provisions of this part.

(b) *Optional informal hearings.* If an officer or employee of an agency of the Department makes an adverse decision, at the request of the participant the agency shall hold an informal hearing on or conduct an informal review of the decision. A participant is encouraged to utilize an agency's informal review process initially, and may do so without prejudice to the participant's right subsequently to appeal the agency's decision to the Division. A participant shall also have the right to utilize any available alternative dispute resolution or mediation program, including any mediation program available under title V of the Agriculture Credit Act of 1987,

7 U.S.C. 5101 *et seq.*, in order to seek an informal review of any adverse decision prior to any appeal of such decision to the Division in accordance with this part.

#### § 11.6 Right of participants to division hearing or Director review of agency determination of appealability.

(a) *Right of participants.* A participant has the right to appeal an adverse decision to the Division for an evidentiary hearing by a Hearing Officer consistent with § 11.7. If an officer, employee, or committee of an agency determines that an agency decision is not applicable, the participant may request a review of that determination by the Director pursuant to paragraph (b) of this section. If a participant is represented by an unauthorized representative, the authorized representative must file a declaration with NAD, executed in accordance with 28 U.S.C. 1746, stating that the participant has duly authorized the declarant in writing to represent the participant for purposes of a specified adverse decision or decisions, and attach a copy of the written authorization to the declaration.

(b) *Director review of agency determination of appealability.* (1) Not later than 30 days after the date on which a participant receives a determination from an agency that an agency decision is not appealable, the participant must submit a written request to the Director to review the determination in order to be entitled to such review by the Director.

(2) The Director will conduct a review of a determination that an agency decision is not appealable using any information the Director determines is necessary. Based on such review, the Director will issue a final determination notice that upholds or reverses the determination of the agency. This final determination is not appealable. If the Director will notify the participant and the agency of that decision and inform the participant of his or her right to proceed with an appeal.

(3) The Director may delegate his or her authority to conduct a review under this subsection to any Deputy or Associate Directors of the Division. In any case in which such review is conducted by a Deputy or Associate Director under authority delegated by the Director, the Deputy or Associate Director's determination shall be considered to be the determination of the Director and shall be final and not appealable.

(c) *Appeals of adverse decisions.* (1) To be entitled to a hearing under § 11.7, a participant personally must request

such hearing not later than 30 days after the date on which the participant first received notice of the adverse decision. In the case of the failure of an agency to act on the request or right of a recipient, a participant personally must request such hearing not later than 30 days after the participant knew or should have known that the agency had not acted within the timeframes specified by agency program regulations, or, where such regulations specify no timeframes, not later than 30 days after the participant reasonably should have known of the agency's failure to act.

(2) A request for a hearing shall be in writing and personally signed by the participant, and shall include a copy of the adverse decision to be reviewed, if available, along with a brief statement of the participant's reasons for believing that the decision, or the agency's failure to act, was wrong. Instead of a hearing, the participant may request a record review.

#### § 11.7 Division hearings.

(a) *General rules.* (1) The Director, the Hearing Officer, and the appellant shall have access to the agency record or any adverse decision appealed to the Division for a hearing.

(2) The Director and Hearing Officer shall have the authority to administer oaths and affirmations, and to require, by subpoena, the attendance of witnesses and the production of evidence.

(i) A subpoena requiring the production of evidence may be requested and issued at any time while the case is pending before the Division.

(ii) An appellant or an agency, acting through any appropriate official, may request issuance of a subpoena requiring the attendance of a witness by submitting such a request in writing at least 14 days before the scheduled date of a hearing.

(iii) A subpoena shall be issued only if the Director or a Hearing Officer determines that:

(A) For a subpoena of documents, the appellant or the agency has established that production of documentary evidence is necessary and is reasonably calculated to lead to information which would affect the final determination or is necessary to fully present the case before the Division; or

(B) For a subpoena of a witness, the appellant or the agency has established that either a representative of the Department or a private individual possesses information that is pertinent and necessary for disclosure of all relevant facts which could impact the final determination, that the information

cannot be obtained except through testimony of the person, and that the testimony cannot be obtained absent issuance of a subpoena.

(iv) The party requesting issuance of a subpoena shall arrange for service. Service of a subpoena upon a person named therein may be made by registered or certified mail, or in person. Personal service shall be made by personal delivery of a copy of the subpoena to the person named therein by any person who is not a party and who is not less than 18 years of age. Proof of service shall be made by filing with the Hearing Officer or Director who issued the subpoena a statement of the data and manner of service and of the names of the persons served, certified by the person who made the service in person or by return receipts for certified or registered mail.

(v) The party at whose instance a subpoena is issued shall be responsible for the payment of any travel and subsistence costs incurred by the witness in connection with his or her appearance and any fees of a person who serves the subpoena in person. The Department shall pay the costs associated with the appearance of Department employees regardless of the party requesting the subpoena. The failure to make payment of such charges on demand may be deemed by the Hearing Officer or Director as sufficient ground for striking the testimony of the witness and the evidence the witness has produced.

(vi) If a person refuses to obey a subpoena, the Director, acting through the Office of General Counsel of the Department and the Department of the Justice, may apply to the United States District Court in the jurisdiction where that person resides to have the subpoena enforced as provided in the Federal Rules of Civil Procedure (28 U.S.C. App.).

(3) Testimony required by subpoena pursuant to paragraph (a)(2) of this section may, at the discretion of the Director or a Hearing Officer, be presented at the hearing either in person or telephonically.

(4) *Ex parte* communication. (i)(A) At no time between the filing of an appeal and the issuance of a final determination by the Director shall the Hearing Officer or the Director engage in *ex parte* communications regarding the merits of the appeal with any person having any interest in the appeal pending before the Division, including any person in an advocacy or investigative capacity. This prohibition does not apply to:

(1) Discussion of procedural matters related to an appeal; or

(2) Discussions of the merits of the appeal with such a person by the Hearing Officer or the Director where all parties to the appeal have been given notice and an opportunity to participate.

(B) In the case of a communication described in paragraph (a)(4)(i)(A)(2) of this section, a memorandum of any such discussion shall be included in the hearing record.

(ii) No interested person shall make or knowingly cause to be made to the Hearing Officer or the Director an *ex parte* communications relevant to the merits of the appeal.

(iii) If the Hearing Officer or Director receives an *ex parte* communication in violation of this section, the one who receives the communication shall place in the hearing record:

(A) All such written communications;

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

(C) All written responses to such communications, and memoranda stating the substance of any oral responses thereto, made by the Hearing Officer or Director.

(iv) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section the Hearing Officer or Director may, to the extent consistent with the interests of justice and the policy of the underlying program, require the party to show cause why such party's claim or interest in the appeal should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(b) *Hearing procedures applicable to both record review and hearings.* (1) Upon the filing of an appeal under this part of an adverse decision by any agency, the agency promptly shall provide the Division with a copy of the agency record. If requested by the appellant prior to the hearing, a copy of such agency record shall be provided promptly to the appellant by the agency.

(2) The Director shall assign the appeal to a Hearing Officer and shall notify the appellant and agency of such assignment. The notice also shall advise the appellant and the agency of the documents required to be submitted under paragraph (c)(2), of this section and notify the appellant of the option of having a hearing by telephone.

(3) The Hearing Officer will receive evidence into the hearing record without regard to whether the evidence was known to the agency officer, employee, or committee making the adverse decision at the time the adverse decision was made.

(c) *Procedures applicable only to hearings.* (1) Upon a timely request for a hearing under § 11.61(c), an appellant

has the right to have a hearing by the Division on any adverse decision within 45 days after the date of receipt of the request for the hearing by the Division.

(2) The Hearing Officer shall set a deadline for submission of the following documents not less than 28 days prior to the hearing:

(i) By the appellant:

(A) A short statement of why the decision is wrong;

(B) A copy of our list of documents the appellant anticipates introducing at the hearing; and

(C) A list of anticipated witnesses, or instead, brief descriptions of the evidence the appellant's witnesses will offer.

(ii) By the agency:

(A) A copy of the adverse decision challenged by the appellant;

(B) A written explanation of the agency's position, including the regulatory or statutory basis therefor;

(C) A copy of or list of documents the agency anticipates introducing at the hearing; and

(D) A list of anticipated witnesses, or instead, brief descriptions of the evidence the appellant's witnesses will offer.

(3) Not less than 21 days prior to the hearing, the Division must provide the appellant, the authorized representative, and the agency a notice of hearing identifying the time, date, and place of the hearing. The hearing will be held in the State of residence of the appellant, as determined by the Hearing Officer, or at a location that is otherwise convenient to the appellant and the Division. The notice also shall notify the appellant of the right to obtain a transcript of the hearing and the procedures for obtaining such transcript.

(4) Conduct of the hearing. (i) A hearing before a Hearing Officer will be in person unless the appellant agrees to a hearing by telephone.

(ii) The hearing will be conducted by the Hearing Officer in the manner determined by the Division most likely to obtain the facts relevant to the matter or matters at issue. The Hearing Officer will allow the presentation of evidence at the hearing without regard to whether the evidence was known to the agency officer, employee, or committee making the adverse decision at the time the adverse decision was made. The Hearing Officer may confine the presentation of facts and evidence to pertinent matters and exclude irrelevant, immaterial, or unduly repetitious evidence, information, or questions. The Hearing Officer may request or permit individuals other than those appearing on behalf of the

appellant to present information or evidence at such hearing. The appellant shall have the opportunity to present oral and documentary evidence, oral testimony of witnesses, and arguments in support of the appellant's appeal; controvert evidence relied on by the agency; and question all witnesses. When appropriate, agency witnesses requested by the appellant will be made available at the hearing. Any evidence may be received by the Hearing Officer without regard to whether that evidence could be admitted in judicial proceedings.

(iii)(A) Official recording of the hearing in the form of a verbatim transcript may be made if:

(1) The appellant or the agency requests the Hearing Officer to arrange for such a transcript at least 14 days prior to the hearing and agrees to pay the expenses of the transcription service; or

(2) The Director determines that such a transcript is appropriate.

(B) In cases in which the appellant requests the transcript, the Hearing Officer will provide the appellant and the authorized representative with the name of the transcription service and an estimate of the cost of such service. After receiving an estimate of such cost, the appellant may withdraw the request for transcription services prior to the hearing, but, in such cases, the appellant will be responsible for all costs to the Division associated with the cancellation of such service. Unofficial recording of a hearing by a voice recorder or the use of an unauthorized transcription service may be permitted but such recording shall not be an official recording of the hearing and will not be made part of either the hearing record or the case record.

(5) Absence of parties. (i) If at the time scheduled for the hearing either the appellant or the agency representative is absent, and no appearance is made on behalf of such absent party, or no arrangements have been made for rescheduling the hearing, the Hearing Officer has the option to cancel the hearing, in which case the Hearing Officer will:

(A) Treat the appeal as a record review and issue a determination based on the agency record as submitted by the agency and the hearing record developed prior to the hearing date;

(B) Accept evidence into the hearing record submitted by other persons present at the hearing, and then issue a determination; or

(C) Dismiss the appeal.

(ii) In appropriate cases, the Hearing Officer will add any additional evidence to the hearing record, provide a copy of

such evidence to the absent party or parties, and allow the absent party or parties 10 days to provide a response to such additional evidence for inclusion in the hearing record.

(6) Post-hearing procedure. The Hearing Officer will leave the hearing record open after the hearing for 10 days, or for such other period of time as the Hearing Officer shall establish, to allow the submission of information by the appellant or the agency, to the extent necessary to respond to new facts, information, arguments, or evidence presented or raised at the hearing. Any such new information will be added by the Hearing Officer to the hearing record and sent to the other party or parties by the submitter of the information. The Hearing Officer, in his or her discretion, may permit the other party or parties to respond to this post-hearing submission.

(d) *Interlocutory review.* Interlocutory review by the Director of rulings of a Hearing Officer are not permitted under the procedures of this part.

(e) *Burden of proof.* The appellant has the burden of proving that the adverse decision of the agency was erroneous by a preponderance of the evidence.

(f) *Timing of issuance of determination.* The Hearing Officer will issue a notice of the determination on the appeal to the appellant, personally, the authorized representative, and the agency not later than 30 days after a hearing or the closing date of the hearing record in cases in which the Hearing Officer receives additional evidence from the agency or appellant after a hearing. In the case of a record review, the Hearing Officer will issue a notice of determination within 45 days of receipt of the appellant's request for a record review. Upon the Hearing Officer's request, the Director may establish an earlier or later deadline. If the determination is not appealed to the Director for review under § 11.8, the notice provided by the Hearing Officer shall be considered to be an notice of a final determination under this part.

#### § 11.8 Director review of determinations of Hearing Officers.

(a) *Requests for Director review.* (1) Not later than 30 days after the date on which an appellant receives the determination of a Hearing Officer under § 11.7, the appellant must submit a written request, signed personally by the appellant, to the Director to review the determination in order to be entitled to such review by the Director.

(2) Not later than 15 business days after the date on which an agency receives the determination of a Hearing Officer under § 11.7, the head of the

agency may make a written request that the Director review the determination. Any such request may be made by the head of an agency only, or by a person acting in such capacity, but not by any subordinate officer of such agency.

(b) *Notification of parties.* The Director promptly shall notify all parties of receipt of a request for review.

(c) *Determination of Director.* (1) The Director will conduct a review of the determination of the Hearing Officer using the agency record, the hearing record, the request for review, and such other arguments or information as may be accepted by the Director. Based on such review, the Director will issue a final determination notice that upholds, reverses, or modifies the determination of the Hearing Officer. The Director's determination upon review of a Hearing Officer's decision shall be considered to be the final determination under this part and shall not be appealable.

However, if the Director determines that the hearing record is inadequate, the Director may remind all or a portion of the determination to the Hearing Officer for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing.

(2) The Director will complete the review and either issue a final determination or remand the determination not later than—

(i) 10 business days after receipt of the request for review, in the case of a request by the head of an agency; or

(ii) 30 business days after receipt of the request for review, in the case of a request by an appellant.

(3) In any case or any category of cases, the Director may delegate his or her authority to conduct a review under this section to any Deputy or Associate Directors of the Division. In any case in which such review is conducted by a Deputy or Associate Director under authority delegated by the Director, the Deputy or Associate Director's determination shall be considered to be the determination of the Director under this part and shall be final and not appealable.

(d) *Equitable relief.* In reaching a decision on an appeal, the Director shall have the authority to grant equitable relief under this part in the same manner and to the same extent as such authority is provided an agency under applicable laws and regulations.

#### § 11.9 Bases for determinations.

(a) The Hearing Officers and the Director are not bound by previous findings of facts by the agency in making a determination.

(b) In making a determination on the appeal, Hearing Officers and the

Director shall ensure that the decision is consistent with the laws and regulations of the agency, and with the generally applicable interpretations of such laws and regulations.

(c) All determinations of the Hearing Officers and the Director must be based on information from the case record, laws applicable to the matter at issue, and applicable regulations published in the **Federal Register** and in effect on the date of the adverse decision or the date on which the acts that gave rise to the adverse decision occurred, whichever date is appropriate under the applicable agency program laws and regulations.

#### § 11.10 Effective date and implementation of final determinations of the Division.

(a) On the return of a case to an agency pursuant to the final determination of the Division, the head of the agency shall implement the final determination not later than 30 days after the effective date of the notice of the final determination.

(b) A final determination will be effective as of the date of filing of an application, the date of the transaction or event in question, or the date of the original adverse decision, whichever is applicable under the applicable agency program statutes or regulations.

#### § 11.11 Judicial review.

(a) A final determination of the Division shall be reviewable and enforceable by any United States District Court of competent jurisdiction in accordance with chapter 7 of title 5, United States Code.

(b) An appellant may not seek judicial review of any agency adverse decision appealable under this part without receiving a final determination from the Division pursuant to the procedures of this part.

#### § 11.12 Filing of appeals and computation of time.

(a) An appeal, a request for Director review, or any other document will be considered "filed" when delivered in writing to the Division, when postmarked, or when a complete facsimile copy is received by the Division.

(b) Whenever the final date for any requirement of this part falls on a Saturday, Sunday, Federal holiday, or other day on which the Division is not open for the transaction of business during normal working hours, the time for filing will be extended to the close of business on the next working day.

(c) The time for filing an appeal, a request for Director review, or any other document, with the Division expires at 5:00 p.m. Eastern Standard Time or

Eastern Daylight Savings time as applicable on the last day on which such filing may be made.

Done at Washington, D.C., this 12 day of May, 1995.

**Dan Glickman,**

*Secretary of Agriculture.*

[FR Doc. 95-12261 Filed 5-19-95; 8:45 am]

BILLING CODE 3410-01-M

## Animal and Plant Health Inspection Service

### 9 CFR Part 3

[Docket No. 93-076-3]

#### Marine Mammal Negotiated Rulemaking Advisory Committee; Establishment

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

**ACTION:** Notice of intent to establish a committee.

**SUMMARY:** The Department of Agriculture announces its intent to establish an advisory committee to develop a recommended rulemaking proposal to revise the regulations governing the handling, care, treatment, and transportation of marine mammals in captivity. This committee, called the Marine Mammal Negotiated Rulemaking Advisory Committee, will be comprised of representatives with a definable stake in the outcome of the proposed rule.

**DATES:** Consideration will be given only to comments received on or before June 21, 1995.

**ADDRESSES:** Please send an original and three copies of your comments to Docket No. 93-076-3, Animal and Plant Health Inspection Service, Policy and Programs Development, Regulatory Analysis and Development, 4700 River Road Unit 118, Riverdale, MD 20737-1228. Please state that your comments refer to Docket No. 93-076-3.

Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue, SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690-2817 to facilitate entry into the comment reading room.

#### FOR FURTHER INFORMATION CONTACT:

Dr. Barbara Kohn, Senior Staff Veterinarian, Animal and Plant Health Inspection Service, Regulatory Enforcement and Animal Care, Animal Care, 4700 River Road Unit 84, Riverdale, MD 20737-1228, (301) 734-8699.