**FOR FURTHER INFORMATION CONTACT:**

Robert Child, Policy Analyst, Office of Policy Development and Risk Control, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4498, TDD (703) 883–4444; or

Richard Katz, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TDD (703) 883–4444.

**SUPPLEMENTARY INFORMATION:** DCIA [1] amended the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990 [2] (FCMPIA Act) to require every Federal agency to enact regulations that adjust each CMP [3] provided by law under its jurisdiction by the rate of inflation pursuant to the inflation adjustment formula in section 5(b) of the FCMPIA Act. Each Federal agency is required to issue these implementing regulations by October 23, 1996, which is 180 days after the date that DCIA was enacted, and at least once every 4 years thereafter. Section 7 of the amended FCMPIA Act specifies that only CMPs for violations that occur after October 23, 1996, will be adjusted for inflation.

The inflation adjustment is based on the percentage increase in the Consumer Price Index (CPI) [4] for the period from June of the calendar year when the CMP was last set until June of the calendar year preceding the adjustment.

Furthermore, each CMP that has been adjusted for inflation must be rounded to a number prescribed by section 5(a) of the FCMPIA Act.[5] Another provision of the DCIA limits the first adjustment of a CMP to an amount not in excess of 10 percent of the original penalty. The amount of increase in the final regulation would have been more if this limit did not exist.

Two provisions of section 5.32(a) of the Farm Credit Act of 1971, as amended (Act) authorize the FCA to impose CMPs on Farm Credit System (FCS) institutions and their related parties. First, section 5.32(a) specifies that any FCS institution or any officer, director, employee, agent, or other person participating in the conduct of the affairs of an institution who violates the terms of a temporary or permanent cease and desist order that has become final shall forfeit not more than $1,000 per day for each day during which such violation continues. This same statutory provision also states that ''[a]ny such institution or person who violates any provision of this Act or any regulation issued under this Act shall forfeit and pay a civil penalty of not more than $500 per day for each day during which such violation continues.''

After the adjustment for inflation, the maximum penalty that the FCA can impose under section 5.32(a) of the Act for the violation of a cease and desist order is $1,100 per day. When the same inflation adjustment formula is applied to the CMP that section 5.32(a) imposes on FCS institutions and their affiliated parties for violations of the Act or regulation, the new maximum penalty amount is $550 per day. The FCA now adopts final § 622.61 which adjusts these two CMPs to the rate of inflation, as required by the DCIA.

DCIA provides Federal agencies with no discretion in the adjustment of CMPs to the rate of inflation, and it also requires the new regulation to take effect on October 23, 1996. Moreover, the regulation that the FCA adopts today to implement DCIA is ministerial, minor, technical, and noncontroversial. For these reasons, the FCA finds good cause to determine that public notice and comment for this new regulation is unnecessary, impractical, and contrary to the public interest, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 553(a)(3)(B). These same reasons also provide the FCA with good cause to adopt an effective date for this regulation that is less than 30 days after the date of publication in the Federal Register. Furthermore, the FCA determines that pursuant to the requirements of section 5.17(c)(2) of the Act this regulation shall take effect prior to the expiration of the 30-day Congressional waiting period for final FCA regulatory action due to the Congressionally mandated effective date of October 23, 1996.

List of Subjects in 12 CFR Part 622

Administrative practice and procedure, Crime, Investigations, Penalties.

For the reasons stated in the preamble, part 622 of chapter VI, title 12 of the Code of Federal Regulations are amended to read as follows:

## PART 622—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 622 is revised to read as follows:

Authority: Secs. 5.9, 5.10, 5.17, 5.25–5.37 of the Farm Credit Act (12 U.S.C. 2243, 2244, 2252, 2261–2273); Pub. L. 104–134, sec. 31001(s), 110 Stat. 1321–358.

### Subpart B—Rules and Procedures for Assessment and Collection of Civil Money Penalties

2. Subpart B is amended by adding a new § 622.61 to read as follows:

**§ 622.61 Adjustment of civil money penalties by the rate of inflation pursuant to section 31001(s) of the Debt Collection Improvement Act of 1996.**

(a) A civil money penalty imposed pursuant to section 5.32 of the Act for a violation occurring after October 23, 1996 of a final cease and desist order issued under section 5.25 or 5.26 of the Act shall not exceed $1,100 per day for each day the violation continues.

(b) A civil money penalty imposed pursuant to section 5.32 of the Act for a violation occurring after October 23, 1996 of any provision of the Act or any regulation issued under the Act shall not exceed $550 per day for each day the violation continues.

Dated: October 17, 1996.

Floyd Fithian,

*Secretary, Farm Credit Administration Board.*

[FR Doc. 96–27057 Filed 10–21–96; 8:45 am]

BILLING CODE 6705–01–P

[1] Pub. L. 104–134, section 31001(s), 110 Stat. 1321–358, (Apr. 26, 1996). This provision is codified at 28 U.S.C. 2461 *note.*

[2] Pub. L. 101–410, 104 Stat. 890, (Oct. 5, 1990).

[3] Section 3(2) of the amended FCMPIA Act defines a CMP as any penalty, fine, or other sanction that: (1) Either is for a specific monetary amount as provided by Federal law or has a maximum amount provided for by Federal law; (2) is assessed or enforced by an agency pursuant to Federal law; and (3) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

[4] The CPI is published by the Department of Labor, Bureau of Statistics.

[5] For example, an increase that is less than a hundred dollars would be rounded to the nearest multiple of $10, and an increase over $100 but less than $1,000 would be rounded to the nearest multiple of $100.

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 15 CFR Part 904

**[Docket No. 961004279–6279–01; I.D. 111695A]**

**RIN 0648–AI53**

## Civil Enforcement Proceedings: Opportunity for an In-Person Hearing

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NOAA is amending procedural regulations that govern civil administrative enforcement proceedings that it conducts. Necessitated by the Oceans Act of 1992, these regulatory amendments ensure the opportunity for an in-person hearing in administrative enforcement proceedings conducted by NOAA.

**EFFECTIVE DATE:** October 22, 1996.

**FOR FURTHER INFORMATION CONTACT:** Joel La Bissonniere, (301) 427–2202.

**SUPPLEMENTARY INFORMATION:**

## Background

The Secretary of Commerce (Secretary), through NOAA, is responsible for enforcing a broad array of Federal statutes that protect living marine resources, including the Magnuson Fishery Conservation and Management Act, the Endangered Species Act (ESA), and the Marine Mammal Protection Act. In addition to criminal and forfeiture provisions, these statutes authorize NOAA to administratively assess civil penalties, including monetary fines and permit sanctions.

Under each of these statutes, entities that are accused of violations (respondents) are afforded the opportunity for a hearing. At this hearing, the respondent may challenge either the violations alleged or the penalty assessed.

NOAA has implemented extensive procedural regulations that govern these administrative hearings (see 15 CFR part 904). Under these regulations, once a violation has been documented, NOAA may issue a Notice of Violation and Assessment (NOVA) (see 15 CFR 904.101). This charging document identifies the respondent, the violation committed, and the penalty assessed. Once charged, a respondent may request an administrative hearing on the NOVA. This hearing, which ordinarily is held in-person before an administrative law judge (Judge), allows a respondent to present evidence challenging either the charges alleged or the penalty assessed.

Under the existing regulatory scheme, the opportunity for an in-person administrative hearing is qualified. The Judge may dispense with an in-person hearing if the Judge believes that it is more appropriate to resolve the proceeding by summary decision (see 15 CFR 904.210), or through the submission of affidavits and other written materials (see 15 CFR 904.250(c)). Additionally, the Judge may deny the opportunity for an administrative hearing as a sanction for failing to prosecute or defend a case in a timely manner, (see 15 CFR 904.212), or for failing to obey an order concerning discovery (see 15 CFR 904.240(f)(5)-(6)).

Congress has voiced concerns over whether Judges have used these procedural regulations wrongfully to deny in-person hearings to respondents. Concerns were based upon past administrative enforcement proceedings involving shrimp fishermen accused of failing to use a turtle excluder device in violation of the ESA. Believing that some of these cases were appropriate for summary decision under 15 CFR 904.210, a Judge refused to provide an in-person hearing, unless the respondent was able to show a genuine dispute as to a material fact. In the view of Congress, failure to provide an in-person hearing may violate the ESA and a respondent's due process rights under the Fifth Amendment of the U.S. Constitution.

Congress addressed these concerns in the Oceans Act of 1992, Pubic Law No. 102–587, Section 5218, 106 Stat. 5039 (Oceans Act). Under this section of the Oceans Act, Congress directed the Coast Guard and the Secretary to enter into a Memorandum of Agreement (MOA) regarding fisheries enforcement practices and procedures that provides, at a minimum, ''for the opportunity, if timely requested, to appear in person to respond to charges of violation of law or regulation when the opportunity for a hearing is granted by statute.''

By enacting this provision, Congress called upon NOAA to establish procedures that ''facilitate the appearance of individuals at hearings rather than setting up barriers to these appearances.'' H.R. Rep. No. 564, 102nd Cong., 19 (1992). To that end, a hearing request should be construed as a request for an in-person hearing, not simply a request to have the record reviewed by a Judge. Even in the absence of disputed facts, an in-person hearing should be provided so that a respondent may present his side of the story and any extenuating circumstances that properly relate to the proposed penalty. *Id*.

In compliance with this statutory mandate, NOAA and the Coast Guard executed a MOA in July 1993. This MOA is an addendum to an existing interagency agreement relating to joint fisheries enforcement practices and procedures. The MOA provides that individuals charged with violating Federal fisheries laws shall be informed of their rights when their case is processed. These rights include the opportunity, if timely requested, to an in-person hearing when the opportunity for a hearing is provided for by statute.

In addition to developing this MOA, and consistent with the intent of Congress, NOAA is now amending agency procedural regulations that govern administrative enforcement proceedings. With these amendments, NOAA seeks to ensure that respondents who file a timely request are provided with the opportunity for an in-person hearing.

## Summary Decision

Under the current regulatory scheme, respondents may involuntarily lose their opportunity for an in-person hearing if the proceeding is resolved by summary decision. Section 904.210 presently authorizes the Judge to render a decision without a hearing if there is no genuine issue as to a material fact and a party is entitled to a summary decision as a matter of law. A summary decision may be requested by any party to the proceeding, or ordered by the Judge if deemed appropriate. The decision to dispose of a case by way of summary disposition rests exclusively with the discretion of the Judge.

In response to concerns expressed by Congress, NOAA is amending this provision. As amended, the Judge may dispose of all or part of a proceeding by way of summary decision only if each and every party to the proceeding concurs. If any party to the proceeding objects, summary decision is unavailable, notwithstanding the absence of any genuine issue concerning any material fact. By requiring unanimous concurrence, the opportunity for an in-person hearing cannot be lost, unless voluntarily waived by a respondent.

## Dismissal for Failure to Defend

Respondents also may lose their opportunity for an in-person hearing if they fail to proceed properly with their defense (see 15 CFR 904.212). Failure to defend may occur if a respondent fails to file documents, fails to comply with orders issued by the Judge, or indicates in any other manner an intention to terminate participation in the proceeding. In such instances, the Judge is authorized to issue any order that will facilitate resolution of the case, including dismissing the case or rendering a final decision adverse to the respondent.

In light of the Oceans Act, NOAA is amending this provision. As amended, if a respondent fails to participate as required by these regulations, the Judge may issue any order that will facilitate resolution, except an order which dismisses the case. This amendment prevents the Judge from denying a respondent an in-person hearing for failing to timely defend, or otherwise comply with any order issued by the Judge.

Notwithstanding this amendment, NOAA recognizes that justice is poorly served unless respondents properly pursue their claims. Respondents that timely request a hearing, but subsequently fail to file documents, comply with judicial orders, or advance

their defense in any way, squander valuable and limited agency resources, and frustrate implicit statutory goals. The administration of justice necessitates regulations that vest judges with the authority to secure compliance with procedural requirements, and the authority to expeditiously conclude proceedings that are abandoned by a respondent.

Accordingly, as amended, § 904.212 permits the Judge to fashion any order, short of dismissal, that may be appropriate in the event a party fails to participate as required by these regulations. Such order may include, but is not limited to, sanctions consistent with those set forth in § 904.240(f).

Discovery Sanctions

Under § 904.240(f), the opportunity for a hearing also may be forfeited if a respondent fails to comply with discovery that is ordered by the Judge. Separate and apart from the authority found at § 904.212, the Judge may impose a wide array of sanctions for failure to obey any subpoena or order concerning discovery. Sanctions include striking all or part of a pleading (including a hearing request) (see 15 CFR 904.240(f)(5)), and rendering a decision of the proceeding against a party (see 15 CFR 904.240(f)(6)).

Consistent with the intent of Congress as set forth in the Oceans Act, NOAA is amending this provision. Under this amendment, the Judge may strike any pleading (except a hearing request), motion, or other submission concerning any matter covered by a subpoena or order defied by a respondent. Section 904.240(f)(6) is deleted entirely. The effect of these changes is that a respondent cannot be denied an in-person hearing as a sanction for failing to comply with a subpoena or order concerning discovery.

As with respondents who fail to pursue their claims, NOAA understands the need for effective sanctions that will ensure compliance with prehearing discovery requirements. To that end, all other sanctions set forth in § 904.240(f) remain in effect and may be used to penalize respondents that either fail or refuse to obey subpoenas or orders concerning discovery.

Submission of Written Materials

Finally, respondents also may lose the opportunity for an in-person hearing if the Judge believes that the filing of written submissions obviates the need for oral hearing. Pursuant to § 904.250, a Judge may order that all or part of a proceeding be heard on submissions or affidavits, if it appears that all issues of material fact may be resolved by means of written submissions, without the need of oral testimony. Unlike § 904.210, which applies to summary decisions, the Judge may forego an in-person hearing even if material facts are genuinely in dispute. The decision to proceed by way of written submissions rests exclusively with the Judge.

Consistent with the intent of Congress, NOAA is amending this provision. As amended, the Judge may hear a proceeding by way of written submissions only if acceptable to each party to the proceeding. By requiring the unanimous concurrence of each party to the proceeding, the opportunity for an in-person hearing will not be lost, unless voluntarily waived by a respondent.

Classification

This final rule is a rule of agency procedure, which amends regulations governing civil administrative enforcement proceedings. As such, NOAA finds that pursuant to 5 U.S.C. 553(b)(A), prior notice and opportunity for public comment are not required. Additionally, because notice and opportunity for comment are not required under 5 U.S.C. 553 or any other law, there is no need to comply with the provisions of the Regulatory Flexibility Act. 5 U.S.C. 601 *et seq.*

Because this is not a substantive rule, it is not subject to the 30-day delay in effective date required by 5 U.S.C. 553(d).

List of Subjects in 15 CFR Part 904

Fisheries, Enforcement.

Dated: October 8, 1996.

Terry D. Garcia,

*General Counsel, National Oceanic and Atmospheric Administration.*

For the reasons set out in the preamble, 15 CFR part 904 is amended as follows:

## PART 904—CIVIL PROCEDURES

1. The authority citation for part 904 is revised to read as follows:

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. 1021–1032; 16 U.S.C. 3631–3644; 42 U.S.C. 9101 *et seq.*; 30 U.S.C. 1401 *et seq.*; 16 U.S.C. 971–971i; 16 U.S.C. 781 *et seq.*; 16 U.S.C. 2401–2412; 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. 4201 *et seq.*; Pub. L. 102–587, 106 Stat. 5039.

2. Section 904.210 is revised to read as follows:

**§ 904.210 Summary decision.**

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

(a) Jointly requested by every party to the 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.

3. Section 904.212 is revised to read as follows:

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

Whenever the record discloses the failure of either party to file documents, respond to orders or notices from the Judge, or otherwise indicates an intention on the part of either party not to participate further in the proceeding, the Judge may issue any order, except dismissal, that is necessary for the just and expeditious resolution of the case.

4. Section 904.240 is amended by revising paragraph (f)(5) and removing paragraph (f)(6):

**§ 904.240 Discovery generally.**

* * * * *

(f) * * *

(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.

5. Section 904.250 is amended by revising paragraph (c) to read as follows:

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

* * * * *

(c) Upon the consent of each party to the proceeding, the Judge may order that all or part of a proceeding be heard on submissions or affidavits if it appears that substantially all important issues may be resolved by means of written materials and that efficient disposition of the proceeding can be made without an in-person hearing. For good cause, the Judge may, in his sole discretion, order that the testimony of witnesses be taken by telephone.

[FR Doc. 96–26944 Filed 10–21–96; 8:45 am]

BILLING CODE 3510–22–F

## COMMODITY FUTURES TRADING COMMISSION

## 17 CFR Part 4

## Interpretation Regarding Use of Electronic Media by Commodity Pool Operators and Commodity Trading Advisors

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Extension of comment period and effective date of interpretation.