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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 1

RIN 0503-AA25

Appeal of Oral Decisions Under the Rules of Practice

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: The Office of the Secretary is amending the rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes. This final rule amends the rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes to provide that any appeal to the Judicial Officer from an oral decision of an administrative law judge must be filed within 30 days after the oral decision is issued. The Office of the Secretary is also making a number of minor, nonsubstantive changes to the rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes.

EFFECTIVE DATE: February 7, 2003.

FOR FURTHER INFORMATION CONTACT:

Patrice Harps, Deputy Assistant General Counsel, Trade Practices Division, Office of the General Counsel, USDA, Room 2309, South Building, 1400 Independence Avenue, SW., Washington, DC 20250, (202) 720-5293.

SUPPLEMENTARY INFORMATION:

Background

Appeal to the Judicial Officer

The rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes (7 CFR 1.130 through 1.151) (referred to as the "uniform rules" below) provide that an administrative law judge may issue an oral or written decision. Current 7

CFR 1.142(c)(2) provides that if an administrative law judge orally announces a decision, a copy of the decision shall be furnished to the parties by the Hearing Clerk. Irrespective of the date a copy of the decision is mailed, the issuance date of the oral decision is the date the decision is orally announced. Current 7 CFR 1.145(a) provides that a party who disagrees with an administrative law judge's decision may appeal to the Judicial Officer within 30 days after receiving service of the administrative law judge's decision.

The Judicial Officer has held that an appeal from an oral decision must be filed within 30 days after the date the administrative law judge orally announces the decision. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (order denying late appeal); *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351 (2000) (order denying petition for reconsideration). On appeal, the United States Court of Appeals for the District of Columbia Circuit held that current 7 CFR 1.142(c)(2) and 7 CFR 1.145(a) are ambiguous because the Secretary of Agriculture did not give fair notice that the uniform rules require an appeal to be filed within 30 days after the administrative law judge orally announces a decision. *PMD Produce Brokerage Corp. v. U.S. Department of Agriculture*, 234 F.3d 48 (D.C. Cir. 2000).

The Office of the Secretary is amending 7 CFR 1.145(a) to eliminate the ambiguity found by the United States Court of Appeals for the District of Columbia Circuit. Specifically, the Office of the Secretary is amending 7 CFR 1.145(a) to provide that any appeal to the Judicial Officer from an oral decision issued by an administrative law judge must be filed within 30 days after the administrative law judge issues the oral decision.

Miscellaneous Changes

The Office of the Secretary is also making a number of minor, nonsubstantive changes.

The uniform rules are applicable to adjudicatory proceedings under the statutory provisions listed in 7 CFR 1.131(a). One of the statutory provisions listed in current 7 CFR 1.131(a) is the "Packers and Stockyards Act, 1921, as supplemented, sections 203, 312, 401, 502(b), and 505 of the Act, and section 1, 57 Stat. 422, as amended by section

4, 90 Stat. 1249 (7 U.S.C. 193, 204, 213, 218a, 218d, 221)." Sections 502 and 505 of the Packers and Stockyards Act were repealed by section 10 of the Poultry Producers Financial Protection Act of 1987. Therefore, in order to reflect the 1987 amendment to the Packers and Stockyards Act, the Office of the Secretary is amending the reference in 7 CFR 1.131(a) to the Packers and Stockyards Act to read "Packers and Stockyards Act, 1921, as supplemented, sections 203, 312, and 401 of the Act, and section 1, 57 Stat. 422, as amended by section 4, 90 Stat. 1249 (7 U.S.C. 193, 204, 213, 221)."

Current 7 CFR 1.131(a) also lists the "Perishable Agricultural Commodities Act, 1930, sections 1(9), 3(c), 4(d), 6(c), 8(a), 8(b), 8(c), 9 and 13(a), (7 U.S.C. 499c(c), 499d(d), 499f(c), 499h(a), 499h(b), 499h(c), 499i, 499m(a))." The Perishable Agricultural Commodities Act was amended by the Perishable Agricultural Commodities Act Amendments of 1995 on November 15, 1995. Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 added section 8(e) to the Perishable Agricultural Commodities Act which provides for the assessment of civil penalties for violations of the Perishable Agricultural Commodities Act after an adjudicatory proceeding conducted by the Secretary. These proceedings are currently conducted in accordance with the uniform rules. Therefore, in order to reflect the 1995 amendment to the Perishable Agricultural Commodities Act, the Office of the Secretary is amending the reference in 7 CFR 1.131(a) to the Perishable Agricultural Commodities Act by adding a reference to section 8(e) and to the section in the United States Code in which section 8(e) is codified, 7 U.S.C. 499h(e). The Office of the Secretary is also correcting the reference to section "1(9)" to read "1(b)(9)" and adding a reference to the section in the United States Code in which section 1(b)(9) of the Perishable Agricultural Commodities Act is codified, 7 U.S.C. 499a(b)(9).

Current 7 CFR 1.131(a) also lists the "United States Grain Standards Act, sections 7(g)(3), 9, (footnote 2) 10, and 17A(d) (7 U.S.C. 79(g)(3), 85, 86)." Footnote 2 states: "[t]he rules of practice in this subpart are applicable to formal proceedings under section 9 of the United States Grain Standards Act for

refusal to renew, or for suspension or revocation of a license if the respondent requests that such proceeding be subject to the administrative procedure provisions in 5 U.S.C. 554, 556, and 557. If such a request is not made, the rules of practice in 7 CFR part 26, subpart C shall apply.” Title 7 CFR part 26, subpart C, was deleted, effective April 11, 1980 (45 FR 15873). Therefore, the Office of the Secretary is removing footnote 2 and the reference to footnote 2 in 7 CFR 1.131(a). The Office of the Secretary is also adding a reference to the section in the United States Code in which section 17A(d) of the United States Grain Standards Act is codified, 7 U.S.C. 87f–1(d).

The Office of the Secretary is also: (1) Correcting cross-references to regulations and statutes in 7 CFR 1.132, 7 CFR 1.133(b)(2), 7 CFR 1.136(c), 7 CFR 1.137(b), 7 CFR 1.141(e)(2), and 7 CFR 1.144(c); (2) making editorial changes in 7 CFR 1.131(b), 7 CFR 1.141(b)(1) (redesignated footnote 2), 7 CFR 1.142(c)(4), 7 CFR 1.143(d), 7 CFR 1.144(c)(13), 7 CFR 1.147(h), and 7 CFR 1.148(a)(3) for clarity and to correct typographical errors; and (3) eliminating gender-specific references in 7 CFR 1.141(e)(2).

5 U.S.C. 553, 601, and 804

This rule amends provisions of the rules of practice governing the conduct of certain adjudicatory proceedings before the Secretary of Agriculture. Therefore, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity for comment are not required for this rule, and this rule may be made effective less than 30 days after publication in the **Federal Register**. In addition, under 5 U.S.C. 804, this rule is not subject to congressional review under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104–121. Finally, this rule is exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Executive Order 12866 and 12988

This rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by OMB.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative proceedings which must be exhausted before parties may file suit in court challenging this rule.

Paperwork Reduction Act

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 1

Administrative practice and procedure, Agriculture, Antitrust, Blind, Claims, Concessions, Cooperatives, Equal access to justice, Federal buildings and facilities, Freedom of information, Lawyers, Privacy.

Accordingly, 7 CFR part 1 is amended as follows:

PART 1—ADMINISTRATIVE REGULATIONS

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

Authority: 5 U.S.C. 301, unless otherwise noted.

Subpart H—Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes

§ 1.131 [Amended]

2. Section 1.131 is amended as follows:

a. In paragraph (a), the reference to “Packers and Stockyards Act, 1921, as supplemented, sections 203, 312, 401, 502(b), and 505 of the Act, and section 1, 57 Stat. 422, as amended by section 4, 90 Stat. 1249 (7 U.S.C. 193, 204, 213, 218a, 218d, 221)” is removed and “Packers and Stockyards Act, 1921, as supplemented, sections 203, 312, and 401 of the Act, and section 1, 57 Stat. 422, as amended by section 4, 90 Stat. 1249 (7 U.S.C. 193, 204, 213, 221)” is added in its place.

b. In paragraph (a), the reference to “Perishable Agricultural Commodities Act, 1930, sections 1(9), 3(c), 4(d), 6(c), 8(a), 8(b), 8(c), 9 and 13(a), (7 U.S.C. 499c(c), 499d(d), 499f(c), 499h(a), 499h(b), 499h(c), 499i, 499m(a))” is removed and “Perishable Agricultural Commodities Act, 1930, sections 1(b)(9), 3(c), 4(d), 6(c), 8(a), 8(b), 8(c), 8(e), 9, and 13(a) (7 U.S.C. 499a(b)(9), 499c(c), 499d(d), 499f(c), 499h(a), 499h(b), 499h(c), 499h(e), 499i, 499m(a))” is added in its place.

c. In paragraph (a), footnote 2 and the reference to footnote 2 are removed.

d. In paragraph (a), the reference to “(7 U.S.C. 79(g)(3), 85, 86)” is removed and “(7 U.S.C. 79(g)(3), 85, 86, 87f–1(d))” is added in its place.

e. In paragraph (b)(1), the period is removed immediately after the word “service” and a semicolon is added in its place.

f. In paragraph (b)(2), the period is removed immediately after the reference to “(9 CFR parts 160, 161)” and a semicolon is added in its place.

§ 1.132 [Amended]

3. In § 1.132 the definition of “Petitioner” is amended by removing the reference to “7 U.S.C. 499a(9)” and adding “7 U.S.C. 499a(b)(9)” in its place.

§ 1.133 [Amended]

4. In § 1.133, paragraph (b)(2) is amended by removing the reference to “7 CFR 47.47–47.68” and adding a reference to “§§ 47.47–47.49 of this title” in its place; and by removing the reference to “7 U.S.C. 499a(9)” and adding a reference to “7 U.S.C. 499a(b)(9)” in its place.

§ 1.136 [Amended]

5. In § 1.136, paragraph (c), the reference to “§ 1.136(a)” is removed and the words “paragraph (a) of this section” are added in its place.

§ 1.137 [Amended]

6. In § 1.137, paragraph (b) is amended by removing the reference to “7 U.S.C. 499a(9)” and adding a reference to “7 U.S.C. 499a(b)(9)” in its place.

§ 1.141 [Amended]

7. Section 1.141 is amended as follows:

a. In paragraph (b)(1), footnote 3 is redesignated as footnote 2 and is amended by removing the letter “z” immediately after the period at the end of the footnote.

b. In paragraph (e)(2), the reference to “7 U.S.C. 499a(9)” is removed and “7 U.S.C. 499a(b)(9)” is added in its place; and the word “his” is removed both times it appears and the word “the” is added in its place.

§ 1.142 [Amended]

8. In § 1.142, paragraph (c)(4) is amended by adding the words “final and” immediately before the word “effective”.

§ 1.143 [Amended]

9. In § 1.143, paragraph (d) is amended by removing the word “their” and adding the words “the Judge’s or Judicial Officer’s” in its place.

§ 1.144 [Amended]

10. Section 1.144 is amended as follows:

a. In paragraph (c), the introductory text is amended by removing the word “elsewhere”; and by removing the word

“part” and adding the word “subpart” in its place.

b. Paragraph (c)(13) is amended by adding the word “and” immediately after the semicolon.

11. In § 1.145, paragraph (a) is revised to read as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge’s decision, if the decision is a written decision, or within 30 days after issuance of the Judge’s decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

* * * * *

§ 1.147 [Amended]

12. In § 1.147, paragraph (h), the word “extened” is removed and the word “extended” is added in its place.

§ 1.148 [Amended]

13. In § 1.148, paragraph (a)(3), the word “leat” is removed and the word “least” is added in its place.

14. In § 1.149 footnote 4 is redesignated as footnote 3.

Done in Washington, DC this 31st day of January, 2003.

Ann M. Veneman,

Secretary of Agriculture.

[FR Doc. 03-3059 Filed 2-6-03; 8:45 am]

BILLING CODE 3410-01-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Parts 330 and 354

9 CFR Parts 4, 11, 12, 49, 50, 51, 52, 53, 54, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 85, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99, 122, 123, 124, 130, 145, 147, 160, 161, 162, 166

[Docket No. 02-076-1]

Animal Health Protection Act; Revisions to Authority Citations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations in title 7, chapter III, and title 9, chapter I, to reflect the enactment of the Animal Health Protection Act (Pub. L. 107-171, 116 Stat. 494, 7 U.S.C. 8301 *et seq.*) in our lists of legal authorities. We are also removing or revising citations and references to animal health statutes that were repealed by the Animal Health Protection Act. In addition, we are updating the authority citations throughout our regulations in titles 7 and 9, where appropriate, to remove duplicative or outdated citations and are making other nonsubstantive editorial changes in the regulations for the sake of clarity.

EFFECTIVE DATE: February 7, 2003.

FOR FURTHER INFORMATION CONTACT: Ms. Cynthia Howard, Chief, Regulatory Analysis and Development, PPD, APHIS, Suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737-1238, (301) 734-5957.

SUPPLEMENTARY INFORMATION:

Background

In a memorandum titled “Delegations of Authority Farm Security and Rural Investment Act of 2002 (FSRIA),” dated July 10, 2002, the Secretary of Agriculture delegated to the Animal and Plant Health Inspection Service (APHIS) the authority to carry out Subtitle E of FSRIA, known as the Animal Health Protection Act (AHPA) (Subtitle E, Pub. L. 107-171, 116 Stat. 494, 7 U.S.C. 8301 *et seq.*). In this document, we are amending titles 7 and 9 of the Code of Federal Regulations (referred to below as the regulations) to reflect the AHPA in our lists of legal authorities, update authority citations, and remove references to statutes that were repealed by the AHPA.

The AHPA repealed the following statutes:

1. Pub. L. 97-46 (7 U.S.C. 147b);
 2. Section 101(b) of the Act of September 21, 1944 (7 U.S.C. 429);
 3. The Act of August 28, 1950 (7 U.S.C. 2260);
 4. Section 919 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 2260a);
 5. Section 306 of the Tariff Act of 1930 (19 U.S.C. 1306);
 6. Sections 6 through 8 and 10 of the Act of August 30, 1890 (21 U.S.C. 102 through 105);
 7. The Act of February 2, 1903 (21 U.S.C. 111, 120 through 122);
 8. Sections 2 through 9, 11, and 13 of the Act of May 29, 1884 (21 U.S.C. 112, 113, 114, 114a, 114a-1, 115 through 120, 130);
 9. The first section and sections 2, 3, and 5 of the Act of February 28, 1947 (21 U.S.C. 114b, 114c, 114d, 114d-1);
 10. The Act of June 16, 1948 (21 U.S.C. 114e, 114f);
 11. Pub. L. 87-209 (21 U.S.C. 114g, 114h);
 12. The third and fourth provisos of the fourth paragraph under the heading “Bureau of Animal Industry” of the Act of May 31, 1920 (21 U.S.C. 116);
 13. The first section and sections 2, 3, 4, and 6 of the Act of March 3, 1905 (21 U.S.C. 123 through 127);
 14. The first proviso under the heading “General expenses, Bureau of Animal Industry” under the heading “BUREAU OF ANIMAL INDUSTRY” of the Act of June 30, 1914 (21 U.S.C. 128);
 15. The fourth proviso under the heading “Salaries and Expenses” under the heading “Animal and Plant Health Inspection Service” of title I of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001 (21 U.S.C. 129);
 16. The third paragraph under the heading “MISCELLANEOUS” of the Act of May 26, 1910 (21 U.S.C. 131);
 17. The first section and sections 2 through 6 and 11 through 13 of Pub. L. 87-518 (21 U.S.C. 134 through 134h);
 18. Pub. L. 91-239 (21 U.S.C. 135 through 135b);
 19. Sections 12 through 14 of the Federal Meat Inspection Act (21 U.S.C. 612 through 614); and
 20. Chapter 39 of title 46, United States Code.
- In this document we are also making other changes to the regulations, not related to enactment of the AHPA. We are:
1. Updating or removing from the regulations several outdated or extraneous authority citations;
 2. Correcting several erroneous or outdated specific references to material in the U.S. Code and Code of Federal Regulations; and