

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

[Docket No. 040902252-4252-01; I.D. 092804C]

**RIN 0648-AS54****Civil Procedures**

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

**ACTION:** Proposed rule.

**SUMMARY:** NOAA is proposing amendments and technical refinements to its Civil Procedures which govern NOAA's administrative proceedings for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property.

**DATES:** Submit comments on or before December 13, 2004.

**ADDRESSES:** Comments should be submitted in writing to Meggan Engelke-Ros, Enforcement Attorney, Office of General Counsel for Enforcement and Litigation, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Meggan Engelke-Ros or Susan S. Beresford, 301-427-2202.

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

NOAA is proposing to amend the civil procedure rules that apply to its administrative proceedings as described below. NOAA is proposing the changes described herein to: (1) Conform the civil procedure rules to changes in applicable federal laws and regulations; (2) improve the efficiency and fairness of administrative proceedings; (3) clarify any ambiguities or inconsistencies in the existing civil procedure rules; (4) eliminate redundant language and correct language errors; and (5) conform the civil procedure rules to current agency practice.

**II. Proposed Revisions***Subpart A—General***1. Purpose and Scope**

Section 904.1: This section would be amended to add new statutory references: American Fisheries Act of 1998; Anadromous Fish Products Act; Antarctic Protection Act; Atlantic Coastal Fisheries Cooperative Management Act; Dolphin Protection

Consumer Information Act; Driftnet Impact Monitoring, Assessment, and Control Act; Fish and Seafood Promotion Act of 1986; Fisherman's Protective Act of 1967; High Seas Fishing Compliance Act; North Pacific Anadromous Stocks Convention Act of 1992; Northwest Atlantic Fisheries Convention Act of 1995; Shark Finning Prohibition Act; South Pacific Tuna Act of 1988; and the Weather Modification Reporting Act. These additions would reflect statutes passed or amended since the last revision of these procedural regulations as well as statutes inadvertently left out of the current regulations. These statutes authorize NOAA to assess civil penalties and conduct seizures of property subject to forfeiture and, therefore, are subject to the application of this chapter of the Code of Federal Regulations.

Reference to the North Pacific Fisheries Act of 1954 was deleted because the statute is no longer in effect.

The proposed revision would also change "Magnuson Fishery Conservation and Management Act" to "Magnuson-Stevens Fishery Conservation and Management Act" to reflect the amendment to the title of that statute. (For consistency, references to "Magnuson Act" have been amended to "Magnuson-Stevens Act" throughout these regulations.) Likewise, the proposed revision would change "National Marine Protection, Research, and Sanctuaries Act" to "National Marine Sanctuaries Act".

**2. Definitions**

Section 904.2: The term "ALJ Docketing Center" is proposed for addition to the definitions section. The term "authorized officer" is proposed for addition to the definitions section. The definition of "decision" would be amended to coincide with the existing definitions of "initial decision" and "final administrative decision". A definition of the acronym "NIDP" would be added for clarity. A definition of the acronym "NMFS" would be added for clarity. A definition of the acronym "NOPS" would be added for clarity. A definition of the acronym "PPIP" would be added for clarity. The term "settlement agreement" would be added to the definitions section, and includes agreements providing for payment of civil penalties, eliminating the need for a separate definition of the term "payment agreement", which is deleted. A definition of the acronym "USCG" would be added for clarity. The term "vessel owner" would be revised to improve accuracy.

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

Section 904.3: This section heading would be amended from "Filing and service of documents" to "Filing and service of notices, documents and other papers", to consolidate and distinguish procedures for service and filing of notices (NOVAs, NOPS, NIDPs) and other documents. (See § 904.202). During the review process, GCEL will be reviewing the technological issues related to the feasibility of e-transmission of documents. If the technology and procedures for e-transmission have developed to a point where they can be effectively utilized for notices and documents, GCEL will include the authority to permit e-transmission, which may include the further development of specific language to address the unique issues associated with e-transmission. Any comments on the viability of e-transmission for documents related to litigation are welcome.

**4. Computation of Time Periods**

Section 904.4: A new section, § 904.4, "computation of time periods", would be created from the present § 904.3(d) to explain the rules relating to computation of time periods that apply to notices and to other types of documents which are filed and served. The proposed rules relating to computation of time periods comport with those established by the Federal Rules of Civil Procedure.

**5. Appearances**

Section 904.5: A new section, § 904.5, "Appearances", would be created, replacing § 904.203, "Appearances", which would be eliminated. The new section would include the existing language of § 904.203, and add a new requirement that any attorney or other representative enter a written notice of appearance when representing a person regarding an Agency enforcement matter, or when representing a party in any civil administrative hearing.

*Subpart B—Civil Penalties***1. Notice of Violation Assessment (NOVA)**

Section 904.101: Paragraph (a) would be amended to delete redundant language in the first sentence pertaining to service of the NOVA, as this would be fully covered by the operative provisions of proposed § 904.3. The second sentence of § 904.101(a)(4) would be modified and designated as a new § 904.101(a)(5). No substantive change is intended by this revision.

## 2. Procedures Upon Receipt of a NOVA

Section 904.102: Paragraph (a)(3) would be amended for internal consistency to specify the appropriate cross-reference to the section of the rule concerning hearing requests.

Paragraph (a)(5) would be amended to clarify that, if a respondent takes no action, the NOVA would become a final administrative decision, in accordance with § 904.104.

In paragraphs (b) and (c), the phrase “permit holder or vessel owner” would be deleted, so that only the respondent has legal standing to seek amendment or modification of the NOVA, or to request an extension of time in which to respond to the NOVA. The sentence in paragraph (a)(5), allowing permit holders and vessel owners to respond to NOVAs, would be deleted so that only respondents may respond.

Paragraphs (e) through (g) would be deleted, as they would be fully covered by the proposed new and amended § 904.201(a)-(c).

## 3. Hearing and Administrative Review

Section 904.103: Paragraph (a) would be amended for internal consistency to specify the appropriate cross-reference to the section of the rule regarding the right to request a hearing upon receipt of a NOVA, § 904.102(a)(3).

The first sentence of paragraph (b) would be deleted as the requirement for an initial decision would be covered under amended § 904.271. The second sentence of paragraph (b) would be deleted to remove reference to the discretionary review process currently described in § 904.273, which would be deleted so that the Judge’s decision (after consideration of any petition for reconsideration) would become the agency’s final decision.

## 4. Final Administrative Decision

Section 904.104: Paragraphs (a) and (b) would be amended for internal consistency to specify the appropriate cross-reference to the section of the rule regarding submitting hearing requests, § 904.201(a).

## 5. Payment of Final Assessment

Section 904.105: Paragraph (a) would be amended to substitute “Department of Commerce/NOAA” for “Treasurer of the United States” to clarify that civil penalties are to be deposited to the Department of Commerce/NOAA account in the United States Treasury. Paragraph (b) would be amended to add the phrase “or may commence any other lawful action” to clarify that NOAA may pursue all lawful options for collecting an unpaid final civil penalty assessment. For example, NOAA may

sanction a permit if the permit holder fails to pay a final assessment, pursuant to § 904.310, or the matter may be referred to a collection agency, or both. No substantive change is intended by this revision.

## 6. Compromise of Civil Penalty

Section 904.106: In paragraph (b) unnecessary language pertaining to the penalty compromise authority of NOAA would be deleted. For editorial consistency, the reference to the “alleged violator” would be changed to “respondent”.

## 7. Joint and Several Respondents

Section 904.107: Paragraph (a) would be amended to clarify the extent of liability for civil penalties assessed against joint and several respondents.

Paragraph (b) would be amended to clarify and emphasize how a hearing request by a joint and several respondent would be processed.

Paragraph (d) would be added to specify that where Agency counsel has negotiated a settlement with one joint and severally liable respondent for less than the full amount of the proposed penalties and/or sanctions, then the remaining joint and several respondents would remain liable for the unsatisfied portion of the proposed penalties and sanctions.

## 8. Factors Considered in Assessing Penalties

Section 904.108: Paragraph (a) would be amended to reflect that NOAA will take into account a respondent’s ability to pay when assessing a civil penalty for a violation of a statute NOAA administers, when the statute in question so requires.

Paragraph (e) would be amended to establish the appropriate time period for submission, to NOAA, of financial information on ability to pay. Proposed paragraph (e) would provide that the information should be provided within 60 days of the receipt of a Notice of Violation and Assessment. Paragraph (e) would also amend the deadline for submitting verifiable financial information when the respondent has requested an administrative hearing, and would like ability to pay to be considered by the administrative law judge. Under this paragraph, if a respondent produces financial information relating to ability to pay for the first time at hearing, then Agency counsel would have 30 days following the conclusion of the hearing to review and respond to the respondent’s information.

Two minor editorial changes would be made in paragraph (g). No

substantive change is intended by these revisions.

Changes proposed for paragraph (h) would clarify that the Agency is required to submit information to the Judge regarding the respondent’s ability to pay only in those cases where the respondent has requested a hearing under a statute that requires NOAA to take into consideration a respondent’s ability to pay when assessing a penalty.

## *Subpart C—Hearings and Appeal Procedures*

Subpart C governs the procedures for hearings and appeals, including case docketing, the filing of documents, the duties and powers of judges, evidentiary matters, discovery, post-hearing matters, and the process for filing administrative appeals.

### General

#### 1. Scope and Applicability

Section 904.200: Paragraph (a) would be amended to substitute “final administrative decisions” for “final decisions” to reflect the proposed amended definition of “Decision” in § 904.2.

Paragraph (b) would be amended to delegate authority to the Judges to make initial and final decisions, and to take other actions related to the conduct of hearings, without that authority being subject to the administrative direction of the Chief Administrative Law Judge. This paragraph would also be amended to substitute “final administrative decisions” for “final decisions” to reflect the proposed amended definition of “decision” in § 904.2.

#### 2. Hearing Requests and Case Docketing

Section 904.201: The heading would be amended to include reference to hearing requests. For clarity and brevity, paragraph (a) would be added to incorporate the language currently found at § 904.102(e) and would apply the procedures for requesting a hearing on a NOVAs, NIDPs and NOPSSs. “Notice” would be substituted for “NOVA” for consistency with this revision.

Paragraph (b) would be added to incorporate and revise the language currently found at § 904.3(e) and § 904.102(f), which have been proposed for deletion. Under the proposed addition, the 10-day period following the deadline for filing hearing requests and other documents would no longer apply to all filings, but only to hearing requests. Further, under the proposed addition, all hearing requests filed within this 10-day period would be considered timely filed. Hearing requests filed after the 10-day period

would be forwarded to the Office of Administrative Law Judges, where they would be deemed untimely. The applicant would be notified in writing that the hearing request was untimely. The proposed revision would eliminate the Administrative Law Judge's authority to grant requests to extend the time for hearing requests and Agency counsel's discretion to deny hearing requests within the 10-day period.

Paragraph (c) would be added to incorporate the language of existing paragraph 904.102(g), which is proposed for deletion. This paragraph has been revised to allow any written communication from a respondent to be treated as a request for a hearing, at Agency counsel's discretion.

Paragraph (d) would be added to incorporate the language of existing § 904.201, with no revisions.

### 3. Filing of Documents

Section 904.202: Paragraph (a) would be amended to remove reference to the discretionary review process currently described in § 904.273, which would be deleted so that the Judge's decision (after consideration of any petition for reconsideration) would become the agency's final decision.

### 4. Appearances

Section 904.203: This section is proposed for deletion. A new section, "Appearances", is proposed at § 904.5.

### 5. Duties and Powers of Judge

Section 904.204: The introductory paragraph would be amended to substitute "render" for "make the", for consistency with the language of § 904.271.

Paragraphs (b)-(o) would be redesignated as paragraphs (c)-(p). New paragraph (a) would be added to authorize the Judge to rule on the timeliness of hearing requests pursuant to proposed amended § 904.201(b).

New paragraph (q) would be added to authorize the Judge to impose sanctions on any party, or a party's representative, for failure to comply with this part, or any order issued under this part. Sanctions may only be issued if the failure to comply materially injures or prejudices another party; is a clear and unexcused violation of this part, or any order issued under this part; or unduly delays the proceeding. Sanctions may be imposed upon the motion of any party or *sua sponte*.

Paragraph (q)(3) would provide that notice and an opportunity to be heard will be provided prior to the imposition of all sanctions, other than refusal to accept late filings.

Paragraph (q)(4) would provide that imposition of sanctions is subject to interlocutory review under § 904.254.

These amendments are intended to improve the fairness and efficiency of adjudicatory proceedings and comport with the civil procedures of other federal agencies.

### 6. Pleadings, Motions, and Service

Section 904.206: Paragraph (a) would be amended to substitute "Judge" for "Office of Administrative Law Judges", and to add "ALJ Docketing Center". This proposed revision would promote efficiency because it would eliminate the need for the ALJ Docketing Center to forward pleadings to the Judges assigned to cases. A technical revision would also be made for internal consistency to specify the appropriate cross-reference to the new section of the rule, which would be § 904.3(b).

### 7. Amendment of Pleading or Record

Section 904.207: This section would be amended to create new paragraph (a) which would allow parties to amend their pleadings until 20 days prior to a hearing without receiving permission from a Judge, thus easing the hardship associated with amending a pleading. Within 20 days of a hearing, parties could amend a pleading only by leave of a Judge, or with the written consent of the adverse party, thereby facilitating non-contested amendments. The proposed revision would require that Judges provide leave to amend pleadings when justice so requires. Under the proposed revision, parties could also file responsive pleadings within the time that remains for responding to the original pleading, or within 10 days after service of the amended pleading, whichever time period is longer, unless otherwise ordered by a Judge.

Paragraph (b) would be added based on language currently found in § 904.207, with a proposed amendment to remove the Judge's discretion to permit a party to amend a pleading to make a more definite statement upon conditions fair to both parties. The Judge's authority to permit an amendment of the pleadings for any reason, including to make a more definite statement, would be governed by revised § 904.207(a).

Paragraph (c) would be created from language currently found in existing § 904.207, with a proposed amendment to emphasize that the Judge has broad discretion to allow corrections of harmless errors in pleadings and elsewhere in the record.

### 8. Expedited Proceedings

Section 904.209: This section would be amended to allow expedited hearings to be scheduled no earlier than five business days, rather than three days, after notice that an expedited hearing is granted, unless all parties consent to an earlier date. This proposed amendment would allow parties more time to prepare their cases for hearing than the current rule provides, although both the current and proposed rule allow the parties to agree to an earlier hearing date.

### 9. Failure to Appear

Section 904.211: Paragraph (a) would be amended to reflect the fact that, when a party appears at the hearing and no party appears for the opposing side, the Judge is authorized to dismiss the case or to find the facts as alleged in the NOVA and enter a default judgment against the non-appearing party. By authorizing the Judge to enter a default judgment when a party has failed to appear, the proposed amendments would create a disincentive for a party to fail to appear at a hearing once one has been requested and avoid the attendant expenses associated with putting on such hearings.

A new paragraph (b) would be added to allow a party to petition the Judge for reconsideration of a default judgment in accordance with § 904.272. Only petitions citing reasons for non-appearance will be considered.

Existing paragraphs (b) and (c) would be redesignated as (c) and (d).

A new paragraph (e) would be added to clarify that failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision.

### 10. Failure to Prosecute or Defend

Section 904.212: This section would be amended to describe certain orders that the Judge may issue to bring about the efficient resolution of a case. Specifically, the amendments would clarify that the Judge may, whenever the record indicates that either party does not intend to participate further in the proceeding, issue an order requiring the party to show why the case should not be disposed of adversely to that party's interests or to certify the party's intention to appear at a scheduled hearing.

### 11. Settlements

Section 904.213: This section would be amended to require the Judge to remove a case from the docket upon notification by the Agency that a settlement has been reached, if settlement is reached before the record

is certified. The proposed revision would clarify that Judges do not have the authority to approve or disapprove settlement agreements reached by the parties.

## 12. Prehearing Conferences

Section 904.216: Paragraph (a) would be amended to require Judges to give the parties at least twenty-four hours notice prior to requiring the parties to appear for a conference or to participate in a telephone conference, and would require that all conferences be recorded. Paragraph (a)(7) would be amended to emphasize that the Judge may hold a conference to discuss the status of any settlement discussions.

Paragraph (b) would be amended to require Judges to provide a transcript of pre-hearing conferences upon the request of the parties. The proposed amendment would provide the parties with accurate records of issues raised and matters decided during such conferences.

## Discovery

### 1. Discovery Generally

Section 904.240: Paragraph (a) would amend the PPIP content and filing requirements. This section would list the information required to be submitted in a PPIP, and would include a new requirement that Respondents must list all defenses, together with a summary of all facts and law in support of each defense. This section would require the signature of the party and any attorney retained, and would require that copies of any exhibits listed be sent to the other parties. As the PPIP is the main tool of discovery in NOAA administrative proceedings, these requirements would further the purposes and goals of discovery. This proposed revision would also make two technical changes. The first change would be to move the text concerning the consequences of failing to provide the required information in a PPIP to paragraph (f) and the second would be to eliminate the cross-reference to § 904.212.

### 2. Interrogatories

Section 904.242: The title of this section would be amended from “Interrogatories to parties” to “Interrogatories”. This change is proposed because the title was redundant.

Paragraph (b) would be amended to require the signature of a party on answers and the signature of a party or attorney on objections. This proposed amendment would bring the language more in line with language of the Federal Rules of Civil Procedure.

## Hearings

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

Section 904.250: Paragraph (a) would be amended to emphasize that the Judge is responsible for scheduling the hearing and giving proper notice to the parties. This proposed revision would also strike the words “except in extraordinary circumstances” in regards to having a hearing in less than 20 days after notice has been given, and add the words “unless the hearing is expedited as provided under § 904.250(c)”.

Paragraph (b) would be amended to delete language in the first sentence that would appear in proposed § 904.250(a). This paragraph would also be revised to clarify that the Judge has authority to change the date, time, or place of the hearing.

Paragraph (c) would be amended to eliminate provisions pertaining to telephonic testimony as those provisions would now appear at § 904.251(c).

New paragraph (d) would state the procedures for expedited hearings.

### 2. Evidence

Section 904.251: Paragraphs (a), (b) and (d) would be redesignated as subparagraphs (a)(1) through (a)(3).

New paragraph (b), “Objections and offers of proof”, would be added to specify the procedures for stating objections to the admission or exclusion of evidence.

New paragraph (c), “Testimony”, would be added to specify the general requirements for receiving testimony into evidence.

New paragraph (d) would be added to address procedures for processing exhibits and documents.

Former paragraphs (e) and (f) would be combined and incorporated in a new paragraph (i), covering issues and procedures pertaining to proof of foreign law.

Replacement paragraph (e)(1) would specify that photographs, videotapes, etc. may be substituted for physical evidence at the discretion of the Judge. Replacement paragraph (e)(2) would specify when physical evidence will be retained by NOAA after a hearing. Replacement paragraph (f) would govern admission of stipulations.

New paragraph (g) would specify procedures governing when and how the judge could take official notice of certain matters.

New paragraph (h) would establish procedures to be administered by the judge governing parties’ access to documents containing classified, confidential, or sensitive information.

### 3. Witnesses

Section 904.252: Paragraph (a), regarding the right to have personal counsel, would be redesignated as paragraph (b), with a new subheading but no substantive revisions.

Paragraph (b), concerning witness exclusion, would be redesignated as paragraph (c). The redesignated paragraph would allow an authorized officer to be considered a party for the purpose of applying the witness exclusion rule.

Paragraph (c) would be redesignated as paragraph (a) regarding witness fees and would be amended to clarify when and on what basis witness fees would be paid.

Paragraph (d) would be redesignated as paragraph (f). A new paragraph (d) “Oath or affirmation” would be added to specify that witnesses must testify under oath.

Paragraph (e) “Failure or refusal to testify” would be added to describe the actions the Judge may take in the event that a witness fails or refuses to testify.

Redesignated paragraph (f) was amended to clarify that the use of a court-certified interpreter is not mandatory, but is preferable.

### 4. Closing of Record

Section 904.253: This section would be redesignated as § 904.254, “Interlocutory review”.

A new § 904.253 would be added, entitled “Closing of record”. The new section would require that, once the Judge closes the record, the record may only be reopened for good cause shown and that any approved corrections to the transcript be reflected in the record.

### 5. Interlocutory Review

Section 904.254: Current § 904.254 would be redesignated as § 904.255 “Ex parte Communications”. Redesignated § 904.254 would be titled “Interlocutory Review”.

The redesignated § 904.254 would be amended to provide more specific procedures and expand the bases for granting interlocutory appeal. The party opposing interlocutory appeal would be granted 20 days to file its response, instead of 10 days.

### 6. Ex Parte Communications

Section 904.254: This section would be redesignated as § 904.255 and amended for clarity. New paragraph (e) would be added to allow the presiding judge to require any party who has made an *ex parte* communication to show cause why its claim should not be dismissed or otherwise adversely affected as a result of making the communication. New paragraph (f)

would be added to explain when the prohibitions of this rule shall apply.

#### Post-Hearing

##### *1. Recordation of Hearing*

Section 904.260: Paragraph (a) would be redesignated as paragraph (b) and would be amended to require that the Agency assume the cost of all hearing transcripts provided to both Agency and non-Agency parties. This proposed amendment would codify the Agency's current practice of providing Respondents with hearing transcripts at the Agency's expense.

Paragraph (b) would be redesignated as paragraph (c) with no substantive revisions.

New paragraph (a) would clarify that all hearings must be recorded.

##### *2. Post-Hearing Briefs*

Section 904.261: Paragraph (a) has been amended for clarity and reorganized into paragraphs (a) and (b).

Existing paragraph (b) would be redesignated as new paragraph (c), and amended to state that a party may request that proposed findings and conclusions, and reasons in support, be presented orally at the close of the hearing. This proposed revision would promote prompt decisions by the Judges, and the reduction of post-hearing costs to the parties in administrative cases.

##### *3. Documents, Copies and Exhibits*

Section 904.262: This section would be deleted. However, many of its provisions would be retained in the proposed revision to § 904.251.

#### Decision

##### *1. Record of Decision*

Section 904.270(c) would be amended and redesignated as § 904.253, entitled "Closing of record".

##### *2. Initial Decision*

Section 904.271: The title of this section would be changed from "Decision" to "Initial Decision" to conform with the new definition of "Initial Decision" in amended § 904.2.

Paragraph (a)(1) would be amended by striking a redundant and unnecessary reference to proposed findings or conclusions presented by the parties.

Paragraph (a)(2) would be amended to delete a requirement that the Initial Decision must contain a statement of the facts noticed or relied upon in the decision. The requirement is already covered under paragraph (a)(1), which requires that the decision include findings and conclusions "on all material issues of fact".

Paragraph (a)(3) would be amended to delete the catch-all requirement that the Initial Decision include "[s]uch other matters as the Judge considers appropriate" and substitute a new, specific requirement that the decision set forth the date upon which the decision will become effective.

New paragraph (a)(4) would be added to require that the Initial Decision include a statement of the further right of appeal.

Paragraph (d) would be reorganized and amended for clarity. In addition, this paragraph would be amended to remove reference to the discretionary review process currently described in § 904.273, which would be deleted so that the Judge's decision (after consideration of any petition for reconsideration) would become the agency's final decision.

##### *3. Petition for Reconsideration*

Section 904.272(a): This paragraph would be amended to allow the Judge to specify in an initial decision that a party may not file a petition for reconsideration of an order or initial decision. The proposed revision substitutes "initial decision" for "decision" throughout this section to comport with the new definition of "initial decision" in amended § 904.2. Under the proposed revision, petitions must state with particularity the alleged errors and relief sought. The proposed revision would provide that the filing of a petition for reconsideration will operate as a stay of an order or initial decision, or its date of effectiveness, unless ordered by the Judge. This revision is intended to avoid petitions for reconsideration becoming moot and, where appropriate, avoid permit sanctions and/or civil penalties going into effect prior to the Judge's ruling on a petition for reconsideration.

Section 904.272(d): This paragraph would be amended to remove reference to the discretionary review process currently described in § 904.273, which would be deleted so that the Judge's decision (after consideration of any petition for reconsideration) would become the agency's final decision.

##### *4. Administrative Review of Decision*

Section 904.273: This section would be deleted so that the Judge's decision (after consideration of any petition for reconsideration) would become the agency's final decision. Currently, this section provides an opportunity to petition the Administrator for review of the Judge's decision. Review by the Administrator is discretionary and only available in four limited circumstances. See 15 CFR 904.273(b). Therefore, the

Administrator must make the preliminary determination that the necessary circumstances exist before reaching any decision on the merits of the petition. During the five-year period ending September 30, 2003, the Administrator found that one petition for review met the regulatory criteria. When granted, discretionary review is conducted on the record, without any opportunity for oral argument. In contrast, appeals to Federal District Court can provide a Respondent with increased opportunities to bring and present their case. Respondents currently have the option of appealing a Judge's decision directly to Federal District Court; that option was employed twice during this five-year period. Requiring all appeals to proceed directly to Federal District Court would bring cases to resolution in a more timely manner, while preserving the Respondent's opportunity for appeal.

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

##### General

###### *1. Scope and Applicability*

Section 904.300: Paragraph (a) would be amended to delete the list of reasons for suspension, revocation, modification, and denial of permits, because these reasons are specified in § 904.301.

Paragraph (b) would be amended to eliminate reference to regulations that have been repealed.

###### *2. Bases for Sanctions or Denials*

Section 904.301: Paragraph (a) would be amended to clarify that additional bases for sanctioning or denying permits may be authorized by statute. Paragraphs (a)(2) and (a)(3) would receive minor editorial revisions. New paragraph (a)(4) would be added to clarify that failure to comply with the terms of a settlement agreement can constitute grounds for a permit sanction. This amendment is intended to promote compliance with settlement agreements.

Paragraph (b) would be amended for clarity, including by specifying that a permit sanction may apply to a successor in interest to the permit, as authorized by statute. The term "fishery conservation zone" would be amended to "Exclusive Economic Zone".

Paragraph (c) would be amended for clarity. The sanction of a vessel permit is not extinguished by sale or transfer of the vessel, or change in ownership of the vessel, and remains in effect until lifted by NOAA.

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

Section 904.302: Paragraph (a) would be amended to delete reference to service of a NOPS by registered mail. A NOPS must be served personally or by certified mail, return receipt requested.

**4. Notice of Intent to Deny Permit (NIDP)**

Section 904.303: This section would be amended to describe the bases for denying permits.

**5. Opportunity for Hearing**

Section 904.304: Paragraphs (a) would be amended to provide the appropriate cross-reference to § 904.201, Hearings. The provisions of paragraph (c) have been incorporated into new § 904.305(a) and (b) and § 904.201(a). Paragraph (d) would be deleted as it was determined to be unnecessary.

**Sanctions for Noncompliance**

The heading would be amended to accurately describe the section.

**6. Nature of Sanctions**

Section 904.310: Paragraph (a) would be amended to clarify that NOAA may also “modify, or deny” a permit. Paragraph (a)(1) would be revised to provide that permits may be suspended for noncompliance with any term of a settlement agreement, including failure to pay a civil penalty, until the respondent comes into compliance.

Paragraph (b) would be revised to add “Stevens” in order to correctly identify the Magnuson-Stevens Fishery Conservation and Management Act.

**7. Compliance**

Section 904.311: Paragraph (b) would be amended to delete unnecessary language.

**Sanctions for Violations****8. Nature of Sanctions**

Section 904.320: Paragraph (c) would be revised to add “Stevens” in the second sentence in order to correctly identify the Magnuson-Stevens Fishery Conservation and Management Act.

**9. Reinstatement of Permit**

Section 904.321: Paragraph (b) would be revised to delete unnecessary language.

**Subpart E—Written Warnings****1. Procedures**

Section 904.402: Paragraph (e) of this section would be eliminated, to conform to current agency practice. The requirement that enforcement officers note written warnings for certain violations on the permits of vessels used

in those violations was found to be impractical. Service of a written warning upon a violator, in accordance with the regulations set out in subpart A, of these regulations is the most commonly used procedure and best ensures compliance with due process interests.

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

Section 904.403: This section would be revised to delete the current provisions of § 904.403. Currently, the provisions of § 904.403(a) provide that persons who receive written warnings from enforcement agents may seek review of the written warning within 90 days by the appropriate NOAA Regional Attorney. Under current § 904.403(b), if a person receives a written warning from a Regional Attorney or staff attorney, or receives a decision from a Regional Attorney affirming a written warning, an appeal of the written warning or decision may be filed with the NOAA Assistant General Counsel for Enforcement and Litigation within 30 days of receipt of the written warning or Regional Attorney’s decision. The current provisions of § 904.403 provide that appeals of written warnings issued by enforcement agents must be in writing and must explain or deny the violation described in the warning.

In the proposed revision, the term “enforcement agent” would be replaced by “authorized officer”, a term defined at amended § 904.2, to accurately describe all persons, other than Agency counsel, who may issue written warnings. The proposed revisions provide that persons receiving written warnings issued by authorized officers may seek review by Agency counsel and must file the request for review within 60 days of receipt of the written warning with the Assistant General Counsel for Enforcement and Litigation. The proposed revisions also provide that written warnings issued by Agency counsel, and determinations from Agency counsel affirming written warnings issued by an authorized officer, must be filed with the NOAA Deputy General Counsel within 60 days of receiving the written warning or affirmation of the written warning. The addresses for the Assistant General Counsel and the Deputy General Counsel are provided in the proposed revision. The proposed revisions specify that the requirement for filing a written explanation or denial when appealing or requesting review of a written warning applies both to written warnings issued by authorized officers and those issued by Agency counsel. For purposes of accuracy, the proposed revisions would

allow the reviewing or appellate authority to “vacate”, rather than “expunge”, a written warning.

The proposed process for appealing written warnings reflects the reorganization of the management structure of NOAA’s Office of the General Counsel. Prior to the reorganization, the staff attorneys in NOAA’s regional offices who handled enforcement cases were supervised by Regional Attorneys. Currently, the Assistant General Counsel for Enforcement and Litigation (AGCEL) supervises all enforcement attorneys nationwide. The AGCEL is supervised by the NOAA Deputy General Counsel. The proposed revision would also result in a more uniform process for written warnings. Under the proposed rule, the period of time for appealing or seeking review of written warnings would be changed from 90 days for a written warning issued by an authorized officer, and 30 days from a written warning issued by Agency counsel, to a uniform 60-day period.

**Subpart F—Seizure and Forfeiture Procedures****1. Purpose and Scope**

Section 904.500: Paragraph (a) would be amended to add “abandonment”, “remission of forfeiture”, and “return” to the list of procedures governed by this provision. These changes would be made to more accurately reflect the activities governed by this section.

**2. Notice of Seizure**

Section 904.501: This section would be amended to comport with the new notice requirements dictated by the Civil Asset Forfeiture Reform Act of 2000 (Public Law 106-185 enacted August 23, 2000; 18 U.S.C. 981 *et seq.*). The proposed new language reflects the CAFRA requirement that a federal government agency seizing property must notify, within 60 days from the date of the seizure, all parties who may have an interest in the seized property of their right to file a claim to that property. Such notice shall be by registered or certified mail. In cases where the property is seized by a state or local law enforcement agency, notice is required to be given in the above manner within 90 days from the date of the seizure. The notice must describe the seized property and state the time, place and reason for the seizure, including the provisions of law alleged to have been violated. The notice must inform each interested party of four options: a) file a claim to the seized property; b) consent to delay the timely institution of judicial or administrative

forfeiture proceedings; c) apply for remission of the forfeiture; or d) voluntarily forfeit the property by abandonment. The notice may be combined with a notice of the sale of perishable fish issued under § 904.505. If a claim is filed, the case will be referred promptly to the U.S. Attorney for institution of judicial proceedings. The U.S. Attorney will then have 90 days from the date the claim is filed to institute forfeiture proceedings.

### 3. Bonded Release of Seized Property

Section 904.502: This section would incorporate provisions currently found in § 904.506 and eliminate cross-references to § 904.506 since they would now be consolidated herein. The proposed revision would consolidate all of the provisions relating to the release of seized property. The proposed revision would also clarify that not all applicable statutes authorize bonded release of seized property.

### 4. Administrative Forfeiture Proceedings

Section 904.504: In accordance with 16 U.S.C. 1607(a)(1), this section would be amended to change the threshold amount for administrative forfeitures from \$100,000 to \$500,000.

Paragraph (b) would be amended to comport with the Civil Asset Forfeiture Reform Act of 2000 (Public Law 106-185 enacted August 23, 2000; 18 U.S.C. 981 *et seq.*) and for clarity. Paragraph (b)(3) would be amended to eliminate the requirement of providing a cost bond. Paragraph (b)(2) would be amended to specify that the notice of proposed forfeiture will include the provisions of law allegedly violated. Provisions currently found in § 904.506 would be consolidated into this section at (b)(4) to the procedures for a declaration of forfeiture, including the notice required for a declaration of forfeiture. The new language would more closely comport with language used in the regulations promulgated by the U.S. Fish and Wildlife Service.

### 5. Summary Sale

Section 904.505: Paragraph (d) would be amended to correct a typographical error that existed in the regulations and eliminate cross-references to other sections that have been modified or deleted.

### 6. Remission of Forfeiture and Restoration of Proceeds of Sale

The heading of this section would be amended to more accurately reflect the contents of this section.

Section 904.506: This section would be amended to incorporate the

procedures of current § 904.507. The language in current §§ 904.506 and 904.507, pertaining to the release of seized property, would be moved to § 904.502 because release of seized property is addressed in that section. Current § 904.507 would be incorporated into § 904.506 to avoid duplication of common provisions. The proposed revisions would include amendments to clarify the time period and format requirements for petitions for relief from forfeiture, and the addition of the address where petitions for relief from forfeiture are to be filed.

### 7. Petition for Restoration of Proceeds

Section 904.507: This section would be incorporated into § 904.506 as described in the preceding paragraph.

### 8. Recovery of Certain Storage Costs

Section 904.508: This section would be redesignated as § 904.507. This section would be revised to add "Stevens" in the second sentence in order to correctly identify the Magnuson-Stevens Fishery Conservation and Management Act.

### 9. Abandonment

Section 904.509: The heading would be changed from "Abandonment" to "Voluntary forfeiture by abandonment" and this section would be redesignated as § 904.508. The section would also be amended to more clearly explain the means by which property may be abandoned. This section would add that property will be deemed abandoned when the owner fails to respond within 90 days of service of any certified or registered notice regarding a return of seized property.

### 10. Disposal of Forfeited or Abandoned Items

Section 904.510: The heading would be changed from "Disposal of forfeited or abandoned items" to "Disposal of forfeited property" and this section would be redesignated as § 904.509. This section would also be amended for accuracy to substitute the word "property" in place of "items" wherever that term appears.

Paragraphs (b), (f), and (g) addressing disposal, sale and destruction of property, would be amended to more explicitly specify the manner in which those activities may be carried out. These means of disposal are authorized by the Fish and Wildlife Improvement Act, 16 U.S.C. 7421(c) and comply with General Services Administration (GSA) regulations relating to the handling of government property.

### 11. Return of Seized Property

Section 904.510: This new section would be added in order to address the issue of returning seized property. In those instances where the Agency decides to return seized property, paragraph (b) describes the proper notice and procedures for release of the property.

## III. Invitation of Public Comment

NOAA invites comments on all aspects of the revisions proposed to part 904. For the convenience of the reader only, NOAA is publishing, in its entirety, part 904 as it would be amended. NOAA is not proposing to readopt those portions of part 904 which would remain unchanged. This Notice of Proposed Rulemaking is limited to those changes from the existing regulations described in this Notice.

Information on the time period for submission of comments and directions for their submission may be found in the **DATES** and **ADDRESSES** section of this document.

## IV. Administrative Requirements

### A. The Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601-612, whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small entities, i.e., small business, small organizations, and small governmental jurisdictions. The analysis is not required, however, where the Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities.

This regulation will impose no significant costs on any small entities, because it creates no new regulatory requirements, but instead simplifies existing procedural rules. The overall economic impact on small entities is therefore believed to be nominal, if any at all. Accordingly, I hereby certify that this proposed regulation will not have a significant impact on a substantial number of small entities.

### B. Executive Order 12866

Under Executive Order 12866, (58 FR 51,735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

#### C. Paperwork Reduction Act

This proposed rule contains no information collection activities and, therefore, no information collection request (ICR) will be submitted to the Office of Management and Budget (OMB) for review in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

#### List of Subjects in 15 CFR Part 904

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

Dated: September 29, 2004.

**James R. Walpole,**

General Counsel, National Oceanic and Atmospheric Administration.

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

## PART 904—CIVIL PROCEDURES

### Subpart A—General

Sec.

904.1 Purpose and scope.

904.2 Definitions and acronyms.

904.3 Filing and service of notices, documents and other papers.

904.4 Computation of time periods.

904.5 Appearances.

### Subpart B—Civil Penalties

904.100 General.

904.101 Notice of violation and assessment (NOVA).

904.102 Procedures upon receipt of a NOVA.

904.103 Hearing.

904.104 Final administrative decision.

904.105 Payment of final assessment.

904.106 Compromise of civil penalty.

904.107 Joint and several respondents.

904.108 Factors considered in assessing penalties.

### Subpart C—Hearing and Appeal Procedures

#### GENERAL

904.200 Scope and applicability.

904.201 Hearing requests and case docketing.

904.202 Filing of documents.

904.203 [Reserved]

904.204 Duties and powers of Judge.

904.205 Disqualification of Judge.

904.206 Pleadings, motions, and service.

904.207 Amendment of pleading or record.

904.208 Extensions of time.

904.209 Expedited proceedings.

904.210 Summary decision.

904.211 Failure to appear.

904.212 Failure to prosecute or defend.

904.213 Settlements.

904.214 Stipulations.

904.215 Consolidation.

904.216 Prehearing conferences.

#### DISCOVERY

904.240 Discovery generally.

904.241 Depositions.

904.242 Interrogatories.

904.243 Admissions.

904.244 Production of documents and inspection.

904.245 Subpoenas.

#### HEARINGS

904.250 Notice of time and place of hearing.

904.251 Evidence.

904.252 Witnesses.

904.253 Closing of record.

904.254 Interlocutory review.

904.255 *Ex parte* communications.

POST-HEARING

904.260 Recordation of hearing.

904.261 Post-hearing briefs.

#### DECISION

904.270 Record of decision.

904.271 Initial decision.

904.272 Petition for reconsideration.

### Subpart D—Permit Sanctions and Denials

#### GENERAL

904.300 Scope and applicability.

904.301 Bases for sanctions or denials.

904.302 Notice of permit sanction (NOPS).

904.303 Notice of intent to deny permit (NIDP).

904.304 Opportunity for hearing.

904.305 Final administrative decision.

#### SANCTIONS FOR NONCOMPLIANCE

904.310 Nature of sanctions.

904.311 Compliance.

#### SANCTIONS FOR VIOLATIONS

904.320 Nature of sanctions.

904.321 Reinstatement of permit.

904.322 Interim Action.

### Subpart E—Written Warnings

904.400 Purpose and scope.

904.401 Written warning as a prior offense.

904.402 Procedures.

904.403 Review and appeal of a written warning.

### Subpart F—Seizure and Forfeiture Procedures

904.500 Purpose and scope.

904.501 Notice of seizure.

904.502 Bonded release of seized property.

904.503 Appraisement.

904.504 Administrative forfeiture proceedings.

904.505 Summary sale.

904.506 Remission of forfeiture and restoration of proceeds of sale.

904.507 Recovery of certain storage costs.

904.508 Voluntary forfeiture by abandonment.

904.509 Disposal of forfeited property.

904.510 Return of seized property.

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

### Subpart A—General

#### § 904.1 Purpose and scope.

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

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

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

(1) American Fisheries Act of 1998, Pub. Law 105–277;

(2) Anadromous Fish Products Act, 16 U.S.C. 1822 note, Section 801(f);

(3) Antarctic Conservation Act of 1978, 16 U.S.C. 2401–2413;

(4) Antarctic Marine Living Resources Convention Act of 1984, 16 U.S.C. 2431–2444;

(5) Antarctic Protection Act of 1990, 16 U.S.C. 2465(a);

(6) Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. 5103(b);

(7) Atlantic Salmon Convention Act of 1982, 16 U.S.C. 3601–3608;  
 (8) Atlantic Striped Bass Conservation Act, 16 U.S.C. 1851 note;  
 (9) Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971–971k;  
 (10) Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1401 *et seq.*;  
 (11) Dolphin Protection Consumer Information Act, 16 U.S.C. 1385 *et seq.*;  
 (12) Driftnet Impact Monitoring, Assessment, and Control Act, 16 U.S.C. 1822 note (Section 4006);  
 (13) Eastern Pacific Tuna Licensing Act of 1984, 16 U.S.C. 972–972h;  
 (14) Endangered Species Act of 1973, 16 U.S.C. 1531–1543;  
 (15) Fish and Seafood Promotion Act of 1986, 16 U.S.C. 4001–4017;  
 (16) Fisherman's Protective Act of 1967, 22 U.S.C. 1980(g);  
 (17) Fur Seal Act Amendments of 1983, 16 U.S.C. 1151–1175;  
 (18) High Seas Fishing Compliance Act, 16 U.S.C. 5506(a);  
 (19) Lacey Act Amendments of 1981, 16 U.S.C. 3371–3378;  
 (20) Land Remote-Sensing Policy Act of 1992, 15 U.S.C. 5601 *et seq.*;  
 (21) Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801–1882;  
 (22) Marine Mammal Protection Act of 1972, 16 U.S.C. 1361–1407;  
 (23) National Marine Sanctuaries Act, 16 U.S.C. 1431–1439;  
 (24) North Pacific Anadromous Stocks Convention Act of 1992, 16 U.S.C. 5001–5012;  
 (25) Northern Pacific Halibut Act of 1982, 16 U.S.C. 773–773k;  
 (26) Northwest Atlantic Fisheries Convention Act of 1995, 16 U.S.C. 5601–5612;  
 (27) Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. 9101 *et seq.*;  
 (28) Pacific Salmon Treaty Act of 1985, 16 U.S.C. 3631–3644;  
 (29) Shark Finning Prohibition Act, 16 U.S.C. 1822;  
 (30) South Pacific Tuna Act of 1988, 16 U.S.C. 973–973(r);  
 (31) Sponge Act, 16 U.S.C. 781 *et seq.*;  
 (32) Tuna Conventions Act of 1950, 16 U.S.C. 951–961;  
 (33) Weather Modification Reporting Act, 15 U.S.C. 330 - 330e; and  
 (34) Whaling Convention Act of 1949, 16 U.S.C. 916–916l.  
 (d) The procedures set forth in this part are intended to apply to administrative proceedings under these and any other statutes administered by NOAA.

#### § 904.2 Definitions and acronyms.

Unless the context otherwise requires, or as otherwise noted, terms in this part

have the meanings prescribed in the applicable statute or regulation. In addition, the following definitions apply:

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

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

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

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

*Applicant* means any person who applies or is expected to apply for a permit.

*Authorized officer* means:

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

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

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

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

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

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

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

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

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

*Initial decision* means a decision of the Judge which, under applicable statute and regulation, is subject to review by the Administrator, but which becomes the final administrative decision in the absence of such review.

*Judge* means Administrative Law Judge.

*NIDP* means Notice of Intent to Deny Permit.

*NMFS* means the National Marine Fisheries Service.

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

*NOPS* means Notice of Permit Sanction.

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

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

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

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

*PPP* means Preliminary Position on Issues and Procedures.

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

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

*USCG* means the United States Coast Guard.

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

*Written warning* means a notice in writing to a person that a violation of a minor or technical nature has been documented against the person or against the vessel which is owned or operated by the person.

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

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

(b) Service of documents and papers other than notices, as described in paragraph (a) of this section, may be made by first class mail (postage

prepaid), facsimile, electronic transmission, or third party commercial carrier, to an addressee's last known address or by personal delivery. Service of documents and papers will be considered effective upon mailing, facsimile transmission, delivery to third party commercial carrier, electronic transmission or upon personal delivery.

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

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

- (1) By the person or persons filing the same,
- (2) By an officer thereof if a corporation,
- (3) By an officer or authorized employee if a government instrumentality, or
- (4) By an attorney or other person having authority to sign.

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

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

(b) *Additional time after service by mail.* Whenever a person has the right or is required to do some act or take some proceedings within a prescribed period after the service of a Notice,

document or paper upon the person and the document or paper is served upon the party by mail, 3 calendar days shall be added to the prescribed period.

#### **§ 904.5 Appearances.**

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

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

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

### **Subpart B—Civil Penalties**

#### **§ 904.100 General.**

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

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

(a) A NOVA will be issued by NOAA and served upon the person alleged to be subject to a civil penalty (the respondent). The NOVA will contain:

- (1) A concise statement of the facts believed to show a violation;
- (2) A specific reference to the provisions of the Act, regulation, license, permit, agreement, or order allegedly violated;
- (3) The findings and conclusions upon which NOAA bases the assessment;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **§ 904.103 Hearing.**

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

(b) [Reserved]

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

(a) If no request for hearing is timely filed as provided in § 904.201(a), the NOVA becomes effective as the final

administrative decision and order of NOAA on the 30th day after service of the NOVA or on the last day of any delay period granted.

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

**§ 904.105 Payment of final assessment.**

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

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

**§ 904.106 Compromise of civil penalty.**

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

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

(c) Neither the existence of the compromise authority of NOAA under this section nor NOAA's exercise thereof at any time changes the date upon which an assessment is final or payable.

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

**§ 904.107 Joint and several respondents.**

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

(b) A hearing request by one joint and several respondent is not considered a request by the other joint and several respondents. If no request for hearing is timely filed by a joint and several respondent as provided in § 904.201(a), the NOVA becomes effective as the final administrative decision and order of NOAA against the non-requesting joint and several respondent on the 30th day after service of the NOVA or on the last day of any delay period granted.

(c) A settlement with one joint and several respondent shall not affect the liability of other joint and several respondent(s) for any remaining penalties and sanctions.

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

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

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

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

(d) Financial information relevant to a respondent's ability to pay includes, but

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

(e) Financial information regarding respondent's ability to pay should be submitted to Agency counsel within sixty (60) days of the receipt of the NOVA. If a respondent has requested a hearing on the offense alleged in the NOVA and wants his or her inability to pay considered in the initial decision of the Judge, verifiable financial information must be submitted to Agency counsel at least thirty (30) days in advance of the hearing. If a respondent submits financial information at the hearing and has not submitted such information to Agency counsel at least 30 days in advance of the hearing, Agency counsel will have 30 days after the hearing in which to respond to the submission. In deciding whether to submit such information, the respondent should keep in mind that the Judge may assess *de novo* a civil penalty either greater or smaller than that assessed in the NOVA.

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

(g) Whenever a statute requires NOAA to take into consideration a respondent's ability to pay when assessing a penalty, NOAA will take into consideration information available to it concerning a respondent's ability to pay. In such case, the NOVA will advise, in accordance with § 904.102, that respondent may seek to have the penalty amount modified by Agency counsel on the basis that he or she does not have the ability to pay the penalty assessed. A request to have the penalty amount modified on this basis must be made in accordance with § 904.102 and should be accompanied by supporting financial information. Agency counsel may request the respondent to submit such additional verifiable financial information as Agency counsel determines is necessary to evaluate the

respondent's financial condition (such as by responding to a financial information request form or written interrogatories, or by authorizing independent verification of respondent's financial condition). A respondent's failure to provide the requested information may serve as the basis for inferring that such information would not have supported the respondent's assertion of inability to pay the penalty assessed in the NOVA.

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

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

#### **GENERAL**

##### **§ 904.200 Scope and applicability.**

(a) This subpart sets forth the procedures governing the conduct of hearings and the issuance of initial and final administrative decisions of NOAA in administrative proceedings involving alleged violations of the laws cited in § 904.1(c) and regulations implementing these laws, including civil penalty assessments and permit sanctions and denials. By separate regulation, these rules may be applied to other proceedings.

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

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

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

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

(b) If a written application is made to NOAA within ten (10) days after the expiration of a time period established in this part for the required filing of hearing requests, Agency counsel will promptly forward the request for hearing to the Office of Administrative Law Judges for a determination on whether such request shall be considered timely filed. A written application for a hearing filed more than ten (10) days after the expiration of a time period established in this part for the required filing of hearing requests, will be promptly forwarded to the Office of Administrative Law Judges by Agency counsel, and shall be deemed untimely filed by the Office of Administrative Law Judges. Determinations regarding untimely hearing requests under this section shall be in writing.

(c) Agency counsel may, in his or her discretion, treat any written communication from a respondent as a request for a hearing under paragraph (a) of this section.

(d) Each request for hearing promptly upon its receipt for filing in the Office of Administrative Law Judges will be assigned a docket number and thereafter the proceeding will be referred to by such number. Written notice of the assignment of hearing to a Judge will promptly be given to the parties.

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

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

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

##### **§ 904.203 [Reserved]**

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

The Judge has all powers and responsibilities necessary to preside over the parties and the proceeding, to hold prehearing conferences, to conduct the hearing, and to render decisions in

accordance with these regulations and 5 U.S.C. 554 through 557, including, but not limited to, the authority and duty to do the following:

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

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

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

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

(e) Administer oaths and affirmations to witnesses;

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

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

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

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

(j) Rule on requests for appearance of witnesses or production of documents and take appropriate action upon failure of a party to effect the appearance or production of a witness or document ruled relevant and necessary to the proceeding; as authorized by law, issue subpoenas for the appearance of witnesses or production of documents;

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

(l) Take official notice of any matter not appearing in evidence that is among traditional matters of judicial notice; or of technical or scientific facts within the general or specialized knowledge of the Department of Commerce as an expert body; or of a non-privileged document required by law or regulation to be filed with or published by a duly constituted government body; or of any reasonably available public document; *Provided*, that the parties will be advised of the matter noticed and given reasonable opportunity to show the contrary;

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

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

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

(p) Grant preliminary or interim relief;

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

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

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

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

(iii) Unduly delays the proceeding.

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

(i) Issuing an order against the party;

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

(iii) Expelling the party from the proceedings;

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

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

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

(vii) Taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation, deemed appropriate by the Judge.

(3) No sanction authorized by this section, other than refusal to accept late filings, shall be imposed without prior notice to all parties and an opportunity for any party against whom sanctions

would be imposed to be heard. Such opportunity to be heard may be on such notice, and the response may be in such form as the Judge directs and may be limited to an opportunity for a party or a party's representative to respond orally immediately after the act or inaction is noted by the Judge.

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

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

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

(a) The Judge may withdraw voluntarily from a particular case when the Judge deems himself/herself disqualified.

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

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

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

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

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

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

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

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

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

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

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

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

If appropriate and justified, and as provided in § 904.201(b), the Judge may grant any request for an extension of time. Requests for extensions of time must, except in extraordinary circumstances, be made in writing.

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

In the interests of justice and administrative efficiency, the Judge, on his or her own initiative or upon the application of any party, may expedite

the proceeding. A motion of a party to expedite the proceeding may, in the discretion of the Judge, be made orally or in writing with concurrent actual notice to all parties. If a motion for an expedited hearing is granted, the hearing on the merits may not be scheduled with less than five business days' notice, unless all parties consent to an earlier hearing.

**§ 904.210 Summary decision.**

The Judge may render a summary decision disposing of all or part of the 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.

**§ 904.211 Failure to appear.**

(a) If, after proper service of notice, a party appears at the hearing and no party appears for the opposing side, the Judge is authorized to dismiss the case or to find the facts as alleged in the NOVA and enter a default judgment containing such findings and conclusions as are appropriate.

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

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

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

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

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

(a) 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:

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

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

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

(b) [Reserved]

**§ 904.213 Settlements.**

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

**§ 904.214 Stipulations.**

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

**§ 904.215 Consolidation.**

The Judge may order two or more proceedings that involve substantially the same parties or the same issues consolidated and/or heard together.

**§ 904.216 Prehearing conferences.**

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

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

(2) The possibility of obtaining stipulations, admissions, agreements, and rulings on

admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

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

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

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

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

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

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

**DISCOVERY**

**§ 904.240 Discovery generally.**

(a) *Preliminary position on issues and procedures.* Prior to hearing the Judge

will ordinarily require the parties to submit a written Preliminary Position on Issues and Procedures (PPIP). Except for information regarding a respondent's ability to pay an assessed penalty, this PPIP will normally obviate the need for further discovery.

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

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

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

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

(c) *Time limits.* Motions for depositions, interrogatories, admissions, or production of documents or things may not be filed within 20 days of hearing except on order of the Judge for good cause shown. Oppositions to a discovery motion must be filed within 10 days of service unless otherwise provided in these rules or by the Judge.

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

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

(1) *In general.* As allowed under paragraph (b) of this section, parties

may obtain discovery of any matter, not privileged, that is relevant to the allegations of the charging document, to the proposed relief, or to the defenses of any respondent, or that appears reasonably calculated to lead to the discovery of admissible evidence.

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

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

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

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

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

(3) Rule that the party may not introduce into evidence or otherwise rely upon, in support of any claim or defense, testimony by such party, officer, or agent, or the documents or other evidence;

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

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

#### **§ 904.241 Depositions.**

(a) *Notice.* If a motion for deposition is granted, and unless otherwise ordered by the Judge, the party taking the

deposition of any person must serve on that person, and each other party, written notice at least 15 days before the deposition would be taken (or 25 days if the deposition is to be taken outside the United States). The notice must state the name and address of each person to be examined, the time and place where the examination would be held, the name and mailing address of the person before whom the deposition would be taken, and the subject matter about which each person would be examined.

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

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

(d) *Use of depositions at hearing.* (1) At hearing any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then testifying, may be used against any party who was present or represented at the taking of the deposition, or had reasonable notice.

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

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

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

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

#### **§ 904.242 Interrogatories.**

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

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

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

#### **§ 904.243 Admissions.**

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

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

(c) *Effect of admission.* Any matter admitted is conclusively established unless the Judge on motion permits withdrawal or amendment of it for good cause shown.

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

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

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

(1) The items to be produced or inspected by item or by category,

described with reasonable particularity, and

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

#### **§ 904.245 Subpoenas.**

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

(b) *Timing.* Applications for subpoenas must be submitted at least 10 days before the scheduled hearing or deposition.

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

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

#### **HEARINGS**

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

(a) The Judge shall be responsible for scheduling the hearing. With due regard for the convenience of the parties, their representatives, or witnesses, the Judge shall fix the time, place and date for the hearing and shall notify all parties of the same. The Judge will promptly serve on the parties notice of the time and place of hearing. The hearing will not be held less than 20 days after service of the notice of hearing unless the hearing is expedited as provided under § 904.250(c).

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

(c) Upon the consent of each party to the 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.

(d) At any time after commencement of the proceeding, any party may move

to expedite the scheduling of a proceeding.

(1) A party moving to expedite a proceeding shall describe the circumstances justifying expedition, and provide affidavits supporting any representations of fact.

(2) Upon granting a motion to expedite the scheduling of a proceeding, the Judge may expedite pleading schedules, prehearing conferences and the hearing, as appropriate.

#### **§ 904.251 Evidence.**

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

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

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

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

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

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

(i) Oral presentation; and

(ii) Subject to the discretion of the Judge, written affidavit, telephone, or video or other electronic media.

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

(d) *Exhibits and documents.* (1) All exhibits shall be numbered and marked with a designation identifying the sponsor. To prove the content of an exhibit, the original writing, recording or photograph is required except that a duplicate or copy is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or, given the

circumstances, it would be unfair to admit the duplicate in lieu of the original. The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if the original is lost or destroyed, not obtainable, in the possession of the opponent, or not closely related to a controlling issue. Each exhibit offered in evidence or marked for identification shall be filed and retained in the record of decision, unless the Judge permits the substitution of copies for the original document.

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

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

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

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

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

(h) *Confidential and sensitive information.* (1) The Judge may limit introduction of evidence or issue protective orders that are required to prevent undue disclosure of classified, confidential, or sensitive matters, which include, but are not limited to, matters of a national security, business, personal, or proprietary nature. Where the Judge determines that information in documents containing classified, confidential, or sensitive matters should be made available to another party, the Judge may direct the offering party to

prepare an unclassified or non-sensitive summary or extract of the original. The summary or extract may be admitted as evidence in the record.

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

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

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

#### **§ 904.252 Witnesses.**

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

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

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

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

(e) *Failure or refusal to testify.* If a witness fails or refuses to testify, the failure or refusal to answer any question found by the Judge to be proper may be grounds for striking all or part of the testimony given by the witness, or any other action deemed appropriate by the Judge.

(f) *Testimony in a foreign language.* If a witness is expected to testify in a language other than the English language, the party sponsoring the witness must provide for the services of an interpreter and advise opposing counsel 10 days prior to the hearing

concerning the extent to which interpreters are to be used. When available, the interpreter should be court certified under 28 U.S.C. 1827.

#### **§ 904.253 Closing of record.**

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

#### **§ 904.254 Interlocutory review.**

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

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

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

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

(b) Any application for interlocutory review shall:

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

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

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

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

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

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

#### **§ 904.255 Ex parte communications.**

(a) Except to the extent required for disposition of *ex parte* matters as authorized by law, the Judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless there has been notice and opportunity for all parties to participate.

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

(1) No interested person outside the Agency shall make or knowingly cause

to be made to the Judge, the Administrator, or any Agency employee who is or may reasonably be expected to be involved in the decisional process of the adjudication an *ex parte* communication relevant to the merits of the adjudication; and

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

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

(1) All such written communications;

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

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

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

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

(e) Upon receipt of a communication made, or knowingly caused to be made, by a party in violation of this section the Judge may, to the extent consistent with the interests of justice, national security, the policy of underlying statutes, require the party to show cause why its claim or interest in the adjudication should not be dismissed, denied, disregarded, or otherwise adversely affected by reason of such violation.

(f) The prohibitions of this rule shall apply beginning after issuance of a NOVA, NOPS or NIDP and until a final administrative decision is rendered, but in no event shall they begin to apply

later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of her/his acquisition of such knowledge.

#### POST-HEARING

##### § 904.260 Recordation of Hearing.

(a) All hearings shall be recorded. (b) The official transcript of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith, will be filed with the Office of Administrative Law Judges. Transcripts of testimony will be available in any proceeding and will be supplied to the parties at the cost of the Agency.

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

##### § 904.261 Post-hearing briefs.

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

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

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

#### DECISION

##### § 904.270 Record of decision.

(a) The exclusive record of decision consists of the official transcript of testimony and proceedings; exhibits admitted into evidence; briefs, pleadings, and other documents filed in the proceeding; and descriptions or copies of matters, facts, or documents officially noticed in the proceeding. Any other exhibits and records of any *ex parte* communications will accompany the record of decision.

(b) The Judge will arrange for appropriate storage of the records of any proceeding, which place of storage need not necessarily be located physically within the Office of Administrative Law Judges.

##### § 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

(c) The Judge will serve the written decision on each of the parties by registered or certified mail, return receipt requested and will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 30 days after service, unless:

(1) Otherwise provided by statute or regulations; or

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

##### § 904.272 Petition for reconsideration.

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

#### Subpart D—Permit Sanctions and Denials

##### GENERAL

##### § 904.300 Scope and applicability.

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

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

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

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

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

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

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

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

(b) A sanction may be imposed, or a permit denied, under this subpart with respect to the particular permit pertaining to the offense or nonpayment, and may also be applied to any NOAA permit held or sought by the permit holder or successor in interest to the permit, including permits for other activities or for other vessels. Examples of the application of this policy are the following:

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

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

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

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

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

(a) A NOPS will be served personally or by certified mail, return receipt requested, on the permit holder. When a foreign fishing vessel is involved, service will be made on the agent authorized to receive and respond to any legal process for vessels of that country.

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

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

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

(a) NOAA may issue a NIDP if the applicant has been charged with a violation of a statute, regulation, or permit administered by NOAA, for failure to pay a civil penalty, or for failure to comply with any term of a settlement agreement.

(b) The NIDP will set forth the basis for its issuance and any opportunity for a hearing, and will be served in accordance with § 904.302(a).

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

(d) A NIDP may be issued in conjunction with or independent of a NOPS. Nothing in this section should be interpreted to preclude NOAA from

initiating a permit sanction action following issuance of the permit, or from withholding a permit under § 904.310(c) or § 904.320.

#### **§ 904.304 Opportunity for hearing.**

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

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

#### **§ 904.305 Final administrative decision.**

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

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

### **SANCTIONS FOR NONCOMPLIANCE**

#### **§ 904.310 Nature of sanctions.**

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

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

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

(b) NOAA will suspend any permit issued to a foreign fishing vessel under section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act under the circumstances set forth in paragraph (a) of this section.

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

#### **§ 904.311 Compliance.**

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

(a) The suspension will not take effect;

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

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

### **SANCTIONS FOR VIOLATIONS**

#### **§ 904.320 Nature of sanctions.**

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

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

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

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

#### **§ 904.321 Reinstatement of permit.**

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

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

#### **§ 904.322 Interim action.**

(a) To protect marine resources during the pendency of an action under this subpart, in cases of willfulness, or as otherwise required in the interest of public health, welfare, or safety, an Administrative Law Judge may order immediate suspension, modification, or withholding of a permit until a decision is made on the action proposed in a NOPS or NIDP.

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

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

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

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

## Subpart E—Written Warnings

### § 904.400 Purpose and scope.

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

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

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

### § 904.402 Procedures.

(a) Any person authorized to enforce the laws listed in § 904.1(c) who finds a violation of one of the laws may issue a written warning to a violator in lieu of other law enforcement action that could be taken under the applicable statute.

(b) The written warning will:

- (1) State that it is a "written warning";
- (2) State the factual and statutory or regulatory basis for its issuance;
- (3) Advise the violator of its effect in the event of a future violation; and
- (4) Inform the violator of the right of review and appeal under § 904.403.

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

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

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

(a) If a person receives a written warning from an authorized officer, the person may seek review by Agency counsel. The request for review must be in writing and must present the facts and circumstances that explain or deny the violation described in the written warning. The request for review must be filed at the NOAA Office of the Assistant General Counsel for Enforcement and Litigation, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910, within 60 days of receipt of the written warning. Agency counsel may, in his or her discretion, affirm, vacate, or modify the written warning and will notify the person of his or her determination. The Agency counsel's determination constitutes the final agency action, unless it is appealed pursuant to § 904.403(b).

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

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

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

(c) The NOAA Deputy General Counsel may, in his or her discretion, affirm, vacate, or modify the written warning and will notify the person of

the determination. The NOAA Deputy General Counsel's determination constitutes the final agency action.

## Subpart F—Seizure and Forfeiture Procedures

### § 904.500 Purpose and scope.

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

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

### § 904.501 Notice of seizure.

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

### § 904.502 Bonded release of seized property.

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

bond will contain such conditions as NOAA deems appropriate.

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

- (1) Property in which NOAA is not satisfied that the petitioner has a substantial interest;
- (2) Property whose entry into the commerce of the United States is prohibited;
- (3) Live animals, except in the interest of the animals' welfare; or
- (4) Property whose release appears to NOAA not to be in the best interest of the United States or serve the purposes of the applicable statute.

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

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

- (1) A description of the property seized;
- (2) The date and place of the seizure;
- (3) The requester's interest in the property, supported as appropriate by bills of sale, contracts, mortgages, or other satisfactory evidence;
- (4) The facts and circumstances relied upon by the requester to justify the remission or mitigation;
- (5) An offer of payment to protect the United States' interest that requester makes in return for release;
- (6) The signature of the requester, his or her attorney, or other authorized agent; and
- (7) A request to defer administrative or judicial forfeiture proceedings until completion of all other related judicial or administrative proceedings (including any associated civil penalty or permit sanction proceedings).

#### **§ 904.503 Appraisal.**

NOAA will appraise seized property to determine its domestic value. Domestic value means the price at which such or similar property is offered for sale at the time and place of appraisal in the ordinary course of trade. If there is no market for the seized

property at the place of appraisal, the value in the principal market nearest the place of appraisal will be used. If the seized property may not lawfully be sold in the United States, its domestic value will be determined by other reasonable means.

#### **§ 904.504 Administrative forfeiture proceedings.**

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

(b) *Procedure.* (1) If seized property is appraised at a value of \$500,000 or less, instead of referring the matter to the United States Attorney, NOAA will publish a notice of proposed forfeiture once a week for at least three successive weeks in a newspaper of general circulation in the Federal judicial district in which the property was seized. However, if the value of the seized property does not exceed \$1,000, the notice may be published by posting for at least three successive weeks in a conspicuous place accessible to the public at the National Marine Fisheries Service Enforcement Office, United States District Court, or the United States Customs House nearest the place of seizure, with the date of posting indicated on the notice. In addition, a reasonable effort will be made to serve the notice personally, or by registered or certified mail, return receipt requested, on each person whose identity, address and interest in the property are known or easily ascertainable.

(2) The notice of proposed forfeiture will:

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

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

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

(3)(i) Except as provided in paragraph (b)(4) of this section, any person claiming the seized property may file a claim with NOAA, at the address indicated in the notice, within 30 days of the date the final notice was published or posted. The claim must state the claimant's interest in the property.

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

(iii) If the claim is filed timely in accordance with this section, NOAA will refer the matter to the Attorney General to institute forfeiture proceedings in the appropriate United States District Court.

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

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

#### **§ 904.505 Summary sale.**

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

(b) Any person purchasing fish subject to this section must deliver the proceeds of the sale to a person authorized to enforce a statute administered by NOAA immediately upon request of such authorized person. Anyone who does not so deliver the proceeds may be subject to penalties under the applicable statute or statutes.

(c) NOAA will give notice of the sale by registered or certified mail, return receipt requested, to the owner or consignee, if known or easily ascertainable, or to any other party that

the facts of record indicate has an interest in the seized fish, unless the owner or consignee or other interested party has otherwise been personally notified. Notice will be sent either prior to the sale, or as soon thereafter as practicable.

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

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

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

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

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

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

(4) If NOAA remits the forfeiture and the forfeited property has not been sold, then restoration may be conditioned upon payment of any applicable costs as defined in this subpart.

(b) *Petition for relief from forfeiture.* (1) Any person claiming an interest in any property which has been or may be administratively forfeited under the provisions of this section may, at any time after seizure of the property, but no

later than 90 days after the date of forfeiture, petition the Assistant General Counsel for Enforcement and Litigation, NOAA/GCEL, 8484 Georgia Avenue, Suite 400, Silver Spring, Maryland 20910, for a remission or mitigation of the forfeiture and restoration of the proceeds of such sale, or such part thereof as may be claimed by the petitioner.

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

(i) A description of the property seized;

(ii) The date and place of the seizure;

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

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

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

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

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

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

(d) *Determination of petition.* (1) After investigation under paragraph (c) of this section, NOAA will make a determination on the matter and notify the petitioner. NOAA may remit or mitigate the forfeiture, on such terms and conditions as are deemed reasonable and just under the applicable statute and the circumstances.

(2) Unless NOAA determines no valid purpose would be served, NOAA will

condition a determination to remit or mitigate a forfeiture upon the petitioner's submitting an agreement, in a form satisfactory to NOAA, to hold the United States and its officers or agents harmless from any and all claims based on loss of or damage to the seized property or that might result from grant of remission or mitigation and restoration of proceeds. If the petitioner is not the beneficial owner of the property, or if there are others with a proprietary interest in the property, NOAA may require the petitioner to submit such an agreement executed by the beneficial owner or other interested party. NOAA may also require that the property be promptly exported from the United States.

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

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

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

If any fish, wildlife, or evidentiary property is seized and forfeited under the Endangered Species Act, 16 U.S.C. 1531 through 1543, any person whose act or omission was the basis for the seizure may be charged a reasonable fee for expenses to the United States connected with the transfer, board, handling or storage of such property. If any fish or wildlife is seized in connection with a violation of the Lacey Act Amendments of 1981, 16 U.S.C. 3371 through 3378, or any property is seized in connection with a violation of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 through 1882, any person convicted thereof, or assessed a civil penalty therefor, may be assessed a reasonable fee for expenses of the United States connected with the storage, care and maintenance of such property. Within a reasonable time after forfeiture, NOAA will send to such

person by registered or certified mail, return receipt requested, a bill for such fee. The bill will contain an itemized statement of the applicable costs, and instructions on the time and manner of payment. Payment must be made in accordance with the bill. If the recipient of the bill objects to the reasonableness of the costs assessed he or she may, within 30 days of receipt, file written objections with NOAA at the address stated in the bill. NOAA will promptly review the written objections and within 30 days mail the final determination to the party who filed them. NOAA's determination will constitute final agency action on the matter.

**§ 904.508 Voluntary forfeiture by abandonment.**

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

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

**§ 904.509 Disposal of forfeited property.**

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

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

- (1) Return to the wild;
- (2) Use by NOAA or transfer to another government agency for official use;
- (3) Donation or loan;
- (4) Sale; or
- (5) Destruction.

(c) *Purposes of disposal.* Disposal procedures may be used to alleviate overcrowding of evidence storage facilities; to avoid the accumulation of

seized property where disposal is not otherwise accomplished by court order; to address the needs of governmental agencies and other institutions and organizations for such property for scientific, educational, and public display purposes; and for other valid reasons. In no case will property be used for personal purposes, either by loan recipients or government personnel.

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

(e) *Loans—(1) To institutions.*

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

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

(3) *Selection of loan recipients.*

Recipients of property will be chosen so as to assure a wide distribution of the property throughout the scientific, educational, public display and museum communities. Other branches of NMFS, NOAA, the Department of Commerce, and other governmental agencies will have the right of first refusal of any property offered for disposal. The Administrator may solicit applications, by publication of a notice in the **Federal Register**, from qualified persons, institutions, and organizations who are interested in obtaining the property being offered. Such notice will contain a statement as to the availability of specific property for which transferees are being sought, and

instructions on how and where to make application. Applications will be granted in the following order: other offices of NMFS, NOAA, and the Department of Commerce; U.S. Fish and Wildlife Service; other Federal agencies; other governmental agencies; scientific, educational, or other public or private institutions; and private individuals.

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

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

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

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

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

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

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

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

(2) Destruction will be accomplished in accordance with the requirements of 41 CFR Subpart 101-45.9.

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

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

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

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

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

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

[FR Doc. 04-22598 Filed 10-6-04; 1:20 am]

**BILLING CODE 3510-12-S**

## **DEPARTMENT OF HOMELAND SECURITY**

### **Coast Guard**

#### **33 CFR Part 110**

**[CGD05-03-036]**

**RIN 1625-AA01**

#### **Baltimore Harbor Anchorage Project**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Supplemental notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to amend the geographic coordinates and modify the regulated use of the anchorages in Baltimore Harbor, MD. Since publication of the previous supplemental notice of proposed rulemaking (SNPRM), the Coast Guard also proposes to change the requirements for visitors on board vessels carrying Certain Dangerous Cargoes (CDC) and to reinstate time restrictions, inadvertently excluded from the notice of proposed rulemaking (NPRM) and previous SNPRM, for vessels anchored in designated anchorage grounds. This supplemental notice of proposed rulemaking solicits comments for those changes plus all original changes in the NPRM and the two changes published in the first SNPRM. An explanation of the additional changes can be found in the "Discussion of Rule" section of this document.

**DATES:** Comments and related material must reach the Coast Guard on or before December 13, 2004.

**ADDRESSES:** Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket CGD05-03-036 and are available for inspection or copying at Commander, Fifth Coast Guard District (oan), 431 Crawford Street, Portsmouth, VA, 23704-5004 between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Junior Grade Timothy Martin, Fifth Coast Guard District Aids to Navigation and Waterways Management Branch, (757) 398-6285, email: [trmartin@lantd5.uscg.mil](mailto:trmartin@lantd5.uscg.mil).

#### **SUPPLEMENTARY INFORMATION:**

##### **Request for Comments**

The Coast Guard encourages you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the

docket number for this rulemaking (CGD05-03-036), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8 1/2 by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

#### **Regulatory Information**

On July 2, 2003, we published a notice of proposed rulemaking (NPRM) (68 FR 39503) entitled Baltimore Harbor Anchorage Project in the **Federal Register**. We received one phone call commenting on the NPRM. No public hearing was requested, and none was held.

On January 14, 2004 we published a supplemental notice of proposed rulemaking (SNPRM) (69 FR 2095) also entitled Baltimore Harbor Anchorage Project in the **Federal Register**. Since then some point coordinates outlining Anchorages 1, 2, 5, 6, and 7 have been refined through telephone and email correspondences with the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Army Corps of Engineers better aligning the new anchorages with the Federal Navigation project.

In the NPRM and previous SNPRM, with the exception of specific time limitations in three of the anchorages, the regulatory text omitted the language from the current regulation regarding the length of time a vessel may remain anchored in the general anchorages. The changes to this rule do not affect the time limitations set out in the current regulation and therefore, that language will be reinstated in the regulatory text in the final rule.

#### **Background and Purpose**

The U.S. Army Corps of Engineers received Congressional authorization for the Baltimore Harbor Anchorage project in September 2001. The objective of this project was to increase the project depths of Anchorages 3 and 4 to 42ft and 35ft respectively. The original Federal anchorage project for Baltimore Harbor was designed to accommodate cargo ships with maximum drafts of 33ft and lengths of 550ft. The new dimensions of the anchorages were changed to accommodate larger ships calling on the Port that routinely approach 1000ft length, with drafts of 36 to 38 feet or more. The new