PART 1—ADMINISTRATIVE REGULATIONS

Subpart A—Official Records

AUTHORITY: 5 U.S.C. 301; 7 U.S.C. 61, 87e, 228, 268, 499o, 608c(14), 1592, 1624(b), 1636b, 1638b, 2151, 2279e, 2621, 2714, 2908, 3812, 4610, 4815, 4910, 6009, 6107, 6207, 6307, 6411, 6519, 6520, 6808, 7107, 7734, 8313; 15 U.S.C. 1828; 16 U.S.C. 534, 620d, 1540(f), 3373; 21 U.S.C. 104, 111, 117, 120, 122, 127, 134e, 134f, 135a, 154, 463(b), 621, 1043; 30 U.S.C. 185(o)(1); 43 U.S.C. 1740; 7 CFR 2.27, 2.35.

SOURCE: 52 FR 49386, Dec. 31, 1987, unless otherwise noted.

Subpart B—Departmental Proceedings

Subpart C—Judicial Proceedings

Subpart D—Claims

Subpart E—Cooperative Production of Television Films

Subpart G—Privacy Act Regulations

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

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

Subpart A—Official Records

SOURCE: 84 FR 56100, Oct. 21, 2019, unless otherwise noted.

§ 1.1 General provisions.

(a) This subpart contains the rules that the United States Department of

Agriculture (USDA) and its components follow in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These rules should be read together with the FOIA, which provides additional information about access to records maintained by the USDA. Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, and 7 CFR Subpart G are also processed under this subpart.

(b) The terms ''component'' or ''components'' are used throughout this subpart and in appendix A of this subpart to include both USDA program agencies and staff offices.

(c) Unless otherwise stated, references to number of days indicates business days, excluding Saturdays, Sundays, and legal holidays.

(d) Supplemental regulations for FOIA requests and appeals relating to records of USDA's Office of Inspector General are set forth in 7 CFR part 2620.

§ 1.2 Public reading rooms.

(a) Components within the USDA maintain public reading rooms containing the records that the FOIA requires to be made regularly available for public inspection in an electronic format. Each component is responsible for determining which of its records are required to be made publicly available, as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. Each component shall ensure that its reading room and indices are reviewed and updated on an ongoing basis.

(b) A link to USDA Electronic Reading Rooms can be found on the USDA public FOIA website.

(c) In accordance with 5 U.S.C. 552(a)(2), each component within the Department shall make the following materials available for public inspection and copying (unless they are promptly published and copies offered for sale):

(1) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(2) Those statements of policy and interpretation which have been adopted by the agency and are not published in the FEDERAL REGISTER;

(3) Administrative staff manuals and instructions to staff that affect a member of the public;

(4) Copies of all records, regardless of form or format, which have been released to a person pursuant to a FOIA request under 5 U.S.C. 552(a)(3), and have been requested three or more times; and

(5) Copies of all records, regardless of form or format, which have been released to a person pursuant to a FOIA request under 5 U.S.C. 552(a)(3), and which because of the nature of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records. Components shall decide on a case by case basis whether records meet these requirements, based on the following factors:

(i) Previous experience with similar records;

(ii) The particular characteristics of the records involved, including their nature and the type of information contained in them; and

(iii) The identity and number of requesters and whether there is widespread media, historical, academic, or commercial interest in the records.

§ 1.3 Requirements for making a records request.

(a) *Where and how to submit a request.* (1) A requester may submit a request in writing and address the request to the designated component within the USDA that maintains the records requested. The Departmental FOIA Officer will maintain a list of contact information for component FOIA offices and make this list available on the USDA public FOIA website. Filing a FOIA request directly with the component that maintains the records will facilitate the processing of the request. If responsive records are likely to reside within more than one USDA component, the requester should submit the request to the USDA Departmental FOIA office.

(2) Alternatively, a requester may submit a request electronically via USDA's online web portal or via the

National FOIA portal. USDA components also accept requests submitted to the email addresses of component FOIA offices as listed on the USDA public FOIA website.

(3) If a requester cannot determine where within the USDA to send a request, he or she should consult the USDA public FOIA website to determine where the records might be maintained. Alternatively, he or she may send the request to the Departmental FOIA Officer, who will route the request to the component(s) believed most likely to maintain the records requested.

(4) To facilitate the processing of a request, a requester should place the phrase ''FOIA REQUEST'' in capital letters on the front of their envelope, the cover sheet of their facsimile transmittal, or the subject line of their email.

(b) *What to include in a request.* (1) A requester seeking access to USDA records should provide sufficient information about himself or herself to enable components to resolve, in a timely manner, any issues that might arise as to the subject and scope of the request, and to deliver the response and, if appropriate, any records released in response to the request. Generally, this includes the name of the requester, name of the institution on whose behalf the request is being made, a phone number at which the requester might be contacted, an email address and/or postal mailing address, and a statement indicating willingness to pay any applicable processing fees.

(2) A requester seeking access to USDA records must also provide a reasonable description of the records requested, as discussed in paragraph (c)(1) of this section.

(3) A requester who is making a request for records about himself or herself may receive greater access if the request is accompanied by a signed declaration of identity that is either notarized or includes a penalty of perjury statement pursuant to 28 U.S.C. 1746.

(4) Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased. As an exercise of administrative discretion, the component can require a requester to supply additional information if necessary, in order to verify that a particular individual has consented to disclosure.

(c) *How to describe the requested records.* (1) A FOIA request must reasonably describe the requested records. This means a request must be described in such a way as to enable component personnel familiar with the subject of the request to locate them with reasonable effort. In general, requesters should include as much detail as possible about the specific records or types of records that they are seeking. To the extent possible, supply specific information regarding dates, titles, names of individuals, names of offices, locations, names of agencies or other organizations, and contract or grant numbers that may help in identifying the records requested. If the request relates to pending litigation, the requester should identify the court and its location in addition to a case number.

(2) If a component determines that a request is incomplete, or that it does not reasonably describe the records sought, the component will inform the requester of this fact and advise as to what additional information is needed or why the request is otherwise insufficient.

§ 1.4 Requirements for responding to records requests.

(a) *In general.* Except for the instances described in paragraphs (c) and (d) of this section, the component that first receives a request for a record is responsible for responding to or referring the request.

(b) *Authority to grant or deny requests.* The head of a component or his or her designee is authorized to grant or to deny any requests for records originating with or maintained by that component.

(c) *Handling of misdirected requests.* When a component's FOIA office receives and determines that a request

was misdirected within the Department's components or should be directed to additional Department component(s), the receiving component's FOIA office will route the request to the FOIA office of the proper component(s).

(d) *Coordination of requests involving multiple components.* When a component becomes aware that a requester has sent a request for records to multiple USDA components, the component will notify the Departmental FOIA Officer to determine if some form of coordination is warranted.

(e) *Consultations and referrals in the process of records review.* (1) *Consultation.* When records originated with the component processing the request but contain within them information of interest to another USDA component or other Federal Government office, the component processing the request should consult with that other entity prior to making a release determination.

(2) *Referral.* When the component processing the request believes that another USDA component or Federal Government office is best able to determine whether to disclose the record, the component typically should refer the responsibility for responding to the request regarding that record to that USDA component or Federal Government office. Ordinarily, the component or agency that originated the record is presumed to be the best able to make the disclosure determination. However, if the component processing the request and the originating component or agency jointly agree that the former is in the best position to respond regarding the record, then the record may be handled as a consultation.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the component or agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement component or agency responding to a request for records on a living third party locates within its files records originating with a law enforcement component or agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if a component or agency locates within its file's material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the component that received the request should coordinate with the originating component or agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the component that originally received the request.

§ 1.5 Responses to records requests.

(a) *In general.* Components should, to the extent practicable, communicate with requesters having access to the internet by electronic means, such as email, in lieu of first-class U.S. mail.

(b) *Acknowledgements of requests.* On receipt of a request, the processing component will send an acknowledgement to the requester and provide an assigned request tracking number for further reference. Components should include in the acknowledgement a brief description of the records sought, or attach a copy of the request, to allow requesters to more easily keep track of their requests.

(c) *Grants of requests.* When a component makes a determination to grant a request in whole or in part, it will notify the requester in writing. The component will also inform the requester of any fees charged, pursuant to §1.12, in the processing of the request. Except in instances where advance payment of fees is required, components may issue bills for fees charged at the same time that they issue a determination. The component will include a statement advising the requester that he or she has the right to seek dispute resolution

services from the component's FOIA Public Liaison.

(d) *Specifying the format of records.* Generally, requesters may specify the preferred form or format (including electronic formats) for the records sought. Components will accommodate the request if the records are readily reproducible in that form or format.

(e) *Exemptions and discretionary release.* All component records, except those specifically exempted from mandatory disclosure by one or more provisions of 5 U.S.C. 552(a) and (b), will be made available to any person submitting a records request under this subpart. Components are authorized, in their sole discretion, to make discretionary releases of their records when such releases are not otherwise specifically prohibited by Executive Order, statute, or regulation.

(f) *Reasonable segregation of records.* If a requested record contains portions that are exempt from mandatory disclosure and other portions that are not exempt, the processing component will ensure that all reasonably segregable nonexempt portions are disclosed, and that all exempt portions are identified according to the specific exemption(s) that are applicable.

(g) *Adverse determinations of requests.* A component making an adverse determination denying a request in any respect will notify the requester of that determination in writing. The written communication to the requester will include the name and title of the person responsible for the adverse determination, if other than the official signing the letter; a brief statement of the reason(s) for the determination, including any exemption(s) applied in denying the request; an estimate of the volume of records or information withheld, such as the number of pages or some other reasonable form of estimation; a statement that the determination may be appealed, followed by a description of the requirements to file an appeal; and a statement advising the requester that he or she has the right to seek dispute resolution services from the component's FOIA Public Liaison or the Office of Government Information Services (''OGIS''). An adverse determination includes:

(1) A determination to withhold any requested record in whole or in part;

(2) A determination that a requested record does not exist or cannot be found, when no responsive records are located and released;

(3) A determination that a record is not readily reproducible in the format sought by the requester;

(4) A determination on any disputed fee matter; or

(5) A denial of a request for expedited treatment.

(h) Upon request, the component will provide an estimated date by which the agency expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the component may provide interim responses, releasing the records on a rolling basis.

§ 1.6 Timing of responses to perfected records requests.

(a) *In general.* Components ordinarily will respond to requests according to their order of receipt. In instances involving misdirected requests that are re-routed pursuant to §1.4(c), the response time will commence on the date that the request is received by the proper component's office that is designated to receive requests, but in any event not later than 10-working days after the request is first received by any component's office that is designated to receive requests.

(b) *Response time for responding to requests.* Components ordinarily will inform requesters of their determination concerning requests within 20 working days of the date of receipt of the requests, plus any extension authorized by paragraph (d) of this section.

(c) *Multitrack processing and how it affects requests.* All components must designate a specific track for requests that are granted expedited processing in accordance with the standards set forth in paragraph (f) of this section. A component also may designate additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. Among the factors a component may consider are the number of pages involved in processing

the request and the need for consultations or referrals. Upon request, components will advise requesters of the track into which their request falls and, when appropriate, will offer the requesters an opportunity to narrow their request so that it can be placed in a different processing track in order to decrease the processing time.

(d) *Circumstances for extending the response time.* Whenever the component cannot meet the statutory time limit for processing a request because of ''unusual circumstances,'' as defined in the FOIA, and the component extends the time limit on that basis, the component must, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which the component estimates processing of the request will be completed. Where the extension exceeds 10 working days, the component must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The component must make available its designated FOIA contact or its FOIA Public Liaison for this purpose. The component also must alert requesters to the availability of the OGIS to provide dispute resolution services.

(e) *Procedures for requesting expedited processing.* A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing.

(1) Requests and appeals will be processed on an expedited basis whenever it is determined by the component that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person who is primarily engaged in disseminating information.

(2) Requests for expedited processing may be made at any time. Requests based on paragraphs (e)(1)(i) or (ii) of this section must be submitted to the component that maintains the records requested. Components receiving requests for expedited processing will decide whether to grant them within 10 calendar days of their receipt of these requests and will notify the requesters accordingly. If a request for expedited treatment is granted, the request or appeal will be given priority, placed in the processing track for expedited requests or appeals, and will be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

§ 1.7 Records responsive to records requests.

(a) In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date that the component begins its search.

(b) A component is not required to create a new record in order to fulfill a request for records. The FOIA does not require agencies to do research, to analyze data, or to answer written questions in response to a request.

(c) Creation of records may be undertaken voluntarily.

(d) A component will provide a record in the format specified by a requester, if the record is readily reproducible by the component in the format requested.

§ 1.8 Requirements for processing records requests seeking business information.

(a) *In general.* Each component is responsible for making the final determination with regard to the disclosure or nondisclosure of business information in records submitted by an outside entity.

(b) *Definitions.* For purposes of this section:

(1) *Confidential commercial information* means commercial or financial information obtained by the USDA from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, or Tribe, but not

including another Federal Government entity, that provides confidential commercial information, either directly or indirectly, to the Federal Government.

(c) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good-faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(d) *When notice to the submitter is required.* (1) The component must promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the component determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The component has a reason to believe that the requested information may be protected from disclosure under Exemption 4 but has not yet determined whether the information is protected from disclosure.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the component may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(e) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) The component determines that the information is exempt under the FOIA and therefore will not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12,600.

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous. In such case, the component must give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(f) *Submitter's opportunity to object to disclosure.* (1) The component must specify a reasonable time period within which the submitter must respond to the notice referenced in paragraph (d) of this section.

(2) If a submitter objects to disclosure of any portion of the records, the submitter must provide the component with a detailed written statement that specifies all grounds for withholding the particular information. The submitter must show why the information is a trade secret or commercial or financial information that is privileged or confidential.

(3) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. The component is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose over submitter's objection.* If a component decides to disclose confidential commercial information over the objection of a submitter, the component will give the submitter written notice, which will include:

(1) A statement of the reason(s) why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed or copies of the records as the component intends to release them; and

(3) A disclosure date subsequent to the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to

compel the disclosure of confidential commercial information, the component will promptly notify the submitter.

(i) *Corresponding notice to requester.* The component must notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

§ 1.9 Administrative appeals.

(a) *Appeals of adverse determinations.* If a requester is dissatisfied with a component's response to his or her request, the requester may submit a written appeal of that component's adverse determination denying the request in any respect.

(b) *Deadline for submitting an appeal.* Requesters must make the appeal in writing. To be considered timely, the appeal must be postmarked, or in the case of electronic submissions transmitted, within 90 calendar days of the date of the adverse determination. Components adjudicating appeals will issue a decision on an appeal, within 20-working days of its date of receipt, plus any extension authorized by §1.6(d).

(c) *Appeals officials.* Each component will provide for review of appeals by an official different from the official who made the initial determination(s).

(d) *Components' responses to appeals.* The decision on an appeal will be made in writing.

(1) If the component grants the appeal in part or in whole, it will inform the requester of any conditions surrounding the granting of the request *(e.g.,* payment of fees). If the component grants only a portion of the appeal, it will treat the portion not granted as a denial.

(2) If the component denies the appeal, either in part or in whole, it will inform the requester of that decision and of the following:

(i) The reasons for denial, including any FOIA exemptions asserted;

(ii) The name and title or position of each official responsible for denial of the appeal;

(iii) The availability of mediation services offered by the OGIS of the National Archives and Records Administration as a non-exclusive alternative to litigation; and

(iv) The right to judicial review of the denial in accordance with 5 U.S.C. 552(a)(4)(B).

(e) *Legal sufficiency review of an appeal.* If a component makes the determination to deny an appeal in part or whole, that component will send a copy of all records to the Assistant General Counsel, General Law and Research Division, that the Office of the General Counsel (''OGC'') would need to examine to provide a legal sufficiency review of the component's decision.

(1) Frequently, these records will include a copy of the unredacted records requested, a copy of the records marked to indicate information the component proposes to withhold, all correspondence relating to the request, and a proposed determination letter. When the volume of records is so large as to make sending a copy impracticable, the component will enclose an informative summary and representative sample of those records. The component will not deny an appeal until it receives concurrence from the Assistant General Counsel.

(2) With regard to appeals involving records of OIG, the records in question will be referred to the OIG Office of Counsel, which will coordinate all necessary reviews.

(f) *Submission of an appeal before judicial review.* Before seeking review by a court of a component's adverse determination, a requester generally must first submit a timely administrative appeal.

§ 1.10 Authentication under Departmental Seal and certification of records.

(a) *In general.* Requests seeking either authenticated or certified copies of records will generally be processed under the FOIA. FOIA search, review, and duplication fees, where applicable, may also apply. However, because the costs for authenticated and certified copies are outside of the FOIA, the provisions of §1.12 that call for the automatic waiver of FOIA fees under $25.00 do not apply.

(b) *Authentication of records.* (1) Authentication provides confirmation by a USDA officer that a certified copy of a record is what it purports to be, an accurate duplicate of the original record.

(2) When a request is received for an authenticated copy of a record that the component determines may be made available, under the FOIA, each component will send an authentic (*i.e.*, correct) copy of the record to the Assistant General Counsel in the OGC Division responsible for the applicable component program or other designee of the Secretary of Agriculture. The Assistant General Counsel for the applicable component program or other designee of the Secretary of Agriculture will confirm the authenticity of the record and affix the seal of the USDA to it.

(3) The Hearing Clerk in the Office of Administrative Law Judges may authenticate copies of records for the Hearing Clerk. The Director of the National Appeals Division may authenticate copies of records for the National Appeals Division. The Inspector General is the official who authenticates copies of records for OIG.

(4) When any component determines that a record for which authentication is requested may be made available only in part, because certain portions of it are exempt from release under the FOIA, the component will process the record under the FOIA and make any needed redactions, including notations on the record as to the FOIA exemption(s) which require(s) the removal of the information redacted. In such an instance, the component will supply a copy of the record both in its unredacted state and in its redacted state to the party authorized to perform authentication, along with a copy of the proposed determination letter regarding the withholding of the information redacted.

(5) The cost for authentication of records is $10.00 each.

(c) *Certification of records.* (1) Certification is the procedure by which a USDA official confirms that a copy of a record is a true reproduction of the original.

(2) When a request is received for a certified copy of a record that the component determines may be made available under the FOIA, each component will prepare a correct copy and a statement attesting that the copy is a true and correct copy.

(3) When any component determines that a record for which a certified copy is requested may be made available only in part, because certain portions of it are exempt from release under the FOIA, the component will process the record under the FOIA and make any needed redactions, including notations on the record as to the FOIA exemption(s) which require(s) the removal of the information redacted.

(4) The cost for certification of records is $5.00 each.

§ 1.11 Preservation of records.

Components will preserve all correspondence and records relating to requests and appeals received under this subpart, as well as copies of all requested records, until disposition or destruction of such correspondence and records is authorized pursuant to title 44 of the United States Code or the General Records Schedule 4.2 of the NARA. Agency records will not be disposed of, or destroyed, while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 1.12 Fees and fee schedule.

(a) *Authorization to set FOIA fees.* The Chief Financial Officer is delegated authority to promulgate regulations providing for a uniform fee schedule applicable to all components of the USDA regarding requests for records under this subpart. The regulations providing for a uniform fee schedule are found in appendix A of this subpart.

(b) *In general.* Components will charge for processing requests under the FOIA in accordance with the provisions of appendix A of this subpart and the Uniform Freedom of Information Act Fee Schedule and Guidelines published by the Office of Management and Budget (''OMB Fee Guidelines'').

(c) *Guidance for lowering FOIA fees.* Components will ensure that searches, review, and duplication are conducted in the most efficient and least expensive manner practicable.

(d) *Communicating with requesters on fee issues.* In order to resolve any fee

issues that arise under this subpart, a component may contact a requester for additional information.

(e) *Notifying requesters of estimated fees.* When a component determines or estimates that the processing of a FOIA request will incur chargeable FOIA fees, in accordance with appendix A of this subpart and the OMB Fee Guidelines, the component will notify the requester in writing of the actual or estimated amount of the fees, including a breakdown of the fees for search, review, or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated.

(f) *Requester commitment to pay estimated fees.* In cases in which a requester has been notified that the processing of his or her request will incur chargeable FOIA fees, the component providing such notification will not begin processing the request until the requester commits in writing to pay the actual or estimated total fee, or designates the amount of fees that he or she is willing to pay, or in the case of a requester who has not yet been provided with his or her statutory entitlements, designates that he or she seeks only that which can be provided by these statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount he or she is willing to pay.

(g) *Tolling of request for fee issues.* If the requester has indicated a willingness to pay some designated amount of fees, but the component estimates that the total fee will exceed that amount, the component will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester is willing to pay. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(h) *Assisting requesters wishing to lower fees.* Components will make available their FOIA Public Liaison or other FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(i) *Timing of Bills for Collection.* Except in instances where advance payment is required, or where requesters have previously failed to pay a properly charged FOIA fee within 30 calendar days of the billing date, components may issue Bills for Collection for FOIA fees owed at the same time that they issue their responses to FOIA requests.

(j) *Advance payment of FOIA fees when estimated fees exceed $250.00.* When a component determines or estimates that a total fee to be charged for the processing of a FOIA request is likely to exceed $250.00, it may require the requester to make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. However, a component may elect to process a request prior to collecting fees exceeding $250.00 when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(k) *Special services.* For services not covered by the FOIA or by appendix A of this subpart, as described in §1.10, components may set their own fees in accordance with applicable law. Although components are not required to provide special services, such as providing multiple copies of the same record, or sending records by means other than first class mail, if a component chooses to do so as a matter of administrative discretion, the direct costs of these services will be charged.

(l) *Aggregating requests.* When a component reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the component may aggregate those requests and charge accordingly. Components may presume that multiple requests of this type made within a 30 calendar day period have been made in order to avoid fees. For requests separated by a longer period, components will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involves. Multiple requests involving unrelated matters will not be aggregated for fee purposes.

(m) *Payment of FOIA fees.* Requesters must pay FOIA fees by check or money order made payable to the Treasury of the United States. Components are not required to accept payments in installments.

(n) *Failure to pay properly charged fees.* When a requester has previously failed to pay a properly charged FOIA fee to any component within 30 calendar days of the billing date, a component may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the component may require that the requester make an advance payment of the full amount of any anticipated fee before the component begins to process a new request or continues to process a pending request or any pending appeal. Where a component has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(o) *Restrictions on charging fees.* (1) If a component fails to comply with the statutory time limits in which to respond to a request, as provided in §1.6(b), and if unusual circumstances, as that term is defined by the FOIA, apply to the processing of the request, as discussed in §1.6(d), it may not charge search fees for the processing of the request, or duplication fees for the processing of the request if the requester is classified as an educational institution requester, a noncommercial scientific institution requester, or a representative of the news media, as defined in appendix A of this subpart, unless:

(i) The component notifies the requester, in writing, within the statutory 20-working day time period, that unusual circumstances, as that term is defined by the FOIA, apply to the processing of the request;

(ii) More than 5,000 pages are necessary to respond to the request; and

(iii) The component has discussed with the requester by means of written mail, electronic mail, or by telephone (or has made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request.

(2) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(p) *Waivers of chargeable fees.* (1) *In general.* Records responsive to a request will be furnished without charge or at a reduced rate below that established in Table 1 of appendix A of this subpart, where a component determines, based on available evidence, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest as defined in paragraph (p)(3) of this section, because it is likely to contribute significantly to public understanding of the operations or activities of the government, and;

(ii) Disclosure of the information is not primarily in the commercial interest of the requester as defined in paragraph (p)(4) of this section.

(2) *Adjudication of fee waivers.* Each fee waiver request is judged on its own merit.

(3) *Factors for consideration of public interest.* In deciding whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, components will consider all four of the following factors:

(i) The subject of the request must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested records must be meaningfully informative about government operations or activities to be ''likely to contribute'' to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in

the subject, as opposed to the requester's individual understanding. A requester's expertise in the subject area as well as his or her ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media, as defined in appendix A of this subpart, will satisfy this consideration.

(iv) The public's understanding of the subject in question must be enhanced by the disclosure to a significant degree. However, components will not make value judgments about whether the information at issue is ''important'' enough to be made public.

(4) *Factors for consideration of commercial interest.* In deciding whether disclosure of the requested information is in the requester's commercial interest, components will consider the following two factors:

(i) Components will identify any commercial interest of the requester, as defined in appendix A of this subpart. Requesters may be given an opportunity to provide explanatory information regarding this consideration.

(ii) A waiver or reduction of fees is justified where the public interest is greater than any identified commercial interest in disclosure. Components ordinarily will presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(5) *Partial fee waivers.* Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver will be granted for those records only.

(6) *Timing of requests for fee waivers.* Requests for a waiver or reduction of fees should be made when the request is first submitted to the component and should address the criteria referenced in paragraph (p)(3) of this section. A requester may submit a fee waiver request later so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester will be required to pay any costs incurred up to the date the fee waiver request was received.

APPENDIX A TO SUBPART A OF PART 1—FEE SCHEDULE

Section 1. In General. This schedule sets forth fees to be charged for providing copies of records—including photographic reproductions, microfilm, maps and mosaics, and related services—requested under the Freedom of Information Act (''FOIA''). The fees set forth in this schedule are applicable to all components of the USDA. Further information about fees and fee waivers is provided in 7 CFR 1.12 Fees and Fee Waivers.

Section 2. Definitions.

(a) *Types of FOIA fees.* The FOIA defines the following types of FOIA fees that may be charged for responding to FOIA requests.

(1) *Search fees.*

(i) *Searching* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(ii) Search time is charged in quarter-hour increments within the USDA, and includes the *direct costs* incurred by a component in searching for records responsive to a request. It does not include overhead expenses such as the costs of space and heating or lighting of the facility in which the records are maintained.

(iii) Components may charge for time spent searching for requested records even if they do not locate any responsive records or if they determine that the records that they locate are entirely exempt from disclosure.

(iv) USDA components will charge for search time at the actual salary rate of the individual who conducts the search, plus 16 percent of the salary rate (to cover benefits). This rate was adopted for consistency with the Uniform Freedom of Information Act Fee Schedule and Guidelines (''OMB Fee Guidelines'') that state that agencies should charge fees that recoup the full allowable direct costs that they incur in searching for responsive records.

(v) Search time also includes the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. Components will notify requesters of the costs of creating such a program, and requesters must agree to pay the associated costs before these costs may be incurred.

(2) *Review fees.*

(i) *Reviewing* is the process of examining records located in response to a request in

order to determine whether any portion of the records is exempt from disclosure. The process of review also includes the process of preparing records for disclosure, for example, doing all that is necessary to redact them and prepare them for release. Review time also includes time spent considering any formal objection to disclosure of responsive records made by a business submitter as discussed in 7 CFR 1.8 Requirements for processing requests seeking business information. However, it does not include time spent resolving general legal or policy issues regarding the application of the nine FOIA exemptions.

(ii) Review time is charged in quarter-hour increments within the USDA, and includes the *direct costs* incurred by a component in preparing records responsive to a request for disclosure. It does not include overhead expenses such as the costs of space and heating or lighting of the facility in which the records are maintained.

(iii) USDA components may charge for time spent reviewing requested records even if they determine that the records reviewed are entirely exempt from disclosure.

(iv) USDA components will charge for review time at the actual salary rate of the individual who conducts the review, plus 16 percent of the salary rate (to cover benefits). This rate was adopted for consistency with the OMB Fee Guidelines that state that agencies should charge fees that recoup the full allowable direct costs that they incur in reviewing records for disclosure.

(v) Review time also includes the direct costs associated with the cost of computer programming designed to facilitate a manual review of the records, or to perform electronic redaction of responsive records, particularly when records are maintained in electronic form. Components will notify requesters of the costs performing such programming, and requesters must agree to pay the associated costs before these costs may be incurred.

(3) *Duplication fees.*

(i) *Duplicating* is the process of producing copies of records or information contained in records requested under the FOIA. Copies can take the form of paper, audiovisual materials, or electronic records, among other forms.

(ii) Duplication is generally charged on a per-unit basis. The duplication of paper records will be charged at a rate of $.05 per page within the USDA. The duplication of records maintained in other formats will include all *direct costs* incurred by a component in performing the duplication, including any costs associated in acquiring special media, such as CDs, disk drives, special mailers, and so forth, for transmitting the requested records or information. It does not include overhead expenses such as the costs of space and heating or lighting of the facility in which the records are maintained.

(iii) Duplication generally does not include the cost of the time of the individual making the copy. This time is generally factored into the per page cost of duplication. However, when duplication requires the handling of fragile records, or paper records that cannot be safely duplicated in high-speed copiers, components may also charge for the time spent duplicating these records. In such an instance, the cost of this time will be added to the per-page charge, and an explanation provided to the requester in the component's itemization of FOIA fees charges. Components may describe this time as time spent in duplicating fragile records.

(iv) USDA components will charge for time spent in duplicating fragile records at the actual salary rate of the individual who performs the duplication, plus 16 percent of the salary rate (to cover benefits). This rate was adopted for consistency with the OMB Fee Guidelines that state that agencies should charge fees that recoup the full allowable direct costs that they incur in duplicating requested records.

(v) Where paper records must be scanned in order to comply with a requester's preference to receive the records in an electronic format, duplication costs will also include the direct costs associated with scanning those materials, including the time spent by the individual performing the scanning. Components may describe this time as time spent in scanning paper records.

(vi) However, when components ordinarily scan paper records in order to review and/or redact them, the time required for scanning records will not be included in duplication fees, but in review fees, when these are applicable. When components that ordinarily scan paper records in order to review and/or redact them release records in an electronic format to requesters who are not to be charged review fees, duplication fees will not include the time spent in scanning paper records. In such instances, duplication fees may only include the direct costs of reproducing the scanned records. In such instances, components may not charge duplication fees on a per-page basis.

(b) *Categories of FOIA requesters for fee purposes.* The FOIA defines the following types of requests and requesters for the charging of FOIA fees.

(1) *Commercial use requests.*

(i) *Commercial use requests* are requests for information for a use or a purpose that furthers commercial, trade or profit interests, which can include furthering those interests through litigation. Components will determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request

itself or because a component has reasonable cause to doubt a requester's stated use, the component may provide the requester a reasonable opportunity to submit further clarification. A component's decision to place a request in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information.

(ii) Commercial requests will be charged applicable search fees, review, and duplication fees.

(iii) If a component fails to comply with the statutory time limits in which to respond to a commercial request, as provided in 7 CFR 1.6(b), and if no unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), it may not charge search fees for the processing of the request. It may, however, still charge applicable review and duplication fees.

(iv) If a component fails to comply with the statutory time limits in which to respond to a commercial request, as provided in 7 CFR 1.6(b), when unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), and the component notifies the requester, in writing, within the statutory 20-working day time period, that unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, more than 5,000 pages are necessary to respond to the request, and the component has discussed with the requester by means of written mail, electronic mail, or by telephone (or has made not less than three good faith attempts to do so) how the requester could effectively limit the scope of the request, the component may charge any search fees for the processing of the request, as well as any applicable review and duplication fees. Otherwise, it may only charge applicable review and duplication fees.

(2) *Educational institution requesters.*

(i) *Educational institution requesters* are requesters who are affiliated with a school that operates a program of scholarly research, such as a preschool, a public or private elementary or secondary school, an institution of undergraduate education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education. To be in this category, a requester must show that the request is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research. Records sought by students at an educational institution for use in fulfilling their degree requirements may qualify if the requester articulates a clear relationship to his or her coursework. Students must document how the records they are requesting will further the scholarly research aims of the institution in question.

(ii) Educational institution requesters are entitled to receive 100 pages of duplication without charge. Following the exhaustion of this entitlement, they will be charged fees for the duplicating of any additional pages of responsive records released. They may not be charged search or review fees.

(iii) If a component fails to comply with the statutory time limits in which to respond to an educational use request, as provided in 7 CFR 1.6(b), and if no unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), it may not charge duplication fees for the processing of the request.

(iv) If a component fails to comply with the statutory time limits in which to respond to an educational use request, as provided in 7 CFR 1.6(b), when unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), and the component notifies the requester, in writing, within the statutory 20-working day time period, that unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, more than 5,000 pages are necessary to respond to the request, and the component has discussed with the requester by means of written mail, electronic mail, or by telephone (or has made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request, the component may charge duplication for the processing of the request. Otherwise, it may not charge duplication fees.

(3) *Noncommercial scientific institution requesters.*

(i) *Noncommercial scientific institution requesters* are requesters who are affiliated with an institution that is not operated on a ''commercial'' basis, as that term is defined in paragraph (b)(1)(i) of this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

(ii) Noncommercial scientific institution requesters are entitled to receive 100 pages of duplication without charge. Following the exhaustion of this entitlement, they will be charged fees for the duplicating of any additional pages of responsive records released. They may not be charged search or review fees.

(iii) If a component fails to comply with the statutory time limits in which to respond to a noncommercial scientific institution request, as provided in 7 CFR 1.6(b), and if no unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), it may not charge duplication fees for the processing of the request.

(iv) If a component fails to comply with the statutory time limits in which to respond to a noncommercial scientific institution request, as provided in 7 CFR 1.6(b), when unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), and the component notifies the requester, in writing, within the statutory 20-working day time period, that unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, more than 5,000 pages are necessary to respond to the request, and the component has discussed with the requester by means of written mail, electronic mail, or by telephone (or has made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request, the component may charge duplication for the processing of the request. Otherwise, it may not charge duplication fees.

(4) *Representatives of the news media.*

(i) *Representative of the news media* is any person or entity that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include, but are not limited to, television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public, including news organizations that disseminate solely on the internet. For ''freelance'' journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but components will also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. However, a request for records supporting the news-dissemination function of the requester will not be considered of commercial use.

(ii) Representatives of the news media are entitled to receive 100 pages of duplication without charge. Following the exhaustion of this entitlement, they will be charged fees for the duplication of any additional pages of responsive records released. They may not be charged search or review fees.

(iii) If a component fails to comply with the statutory time limits in which to respond to a news-media use request, as provided in 7 CFR 1.6(b), and if no unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), it may not charge duplication fees for the processing of the request.

(iv) If a component fails to comply with the statutory time limits in which to respond to a news-media request, as provided in 7 CFR 1.6(b), when unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), and the component notifies the requester, in writing, within the statutory 20-working day time period, that unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, more than 5,000 pages are necessary to respond to the request, and the component has discussed with the requester by means of written mail, electronic mail, or by telephone (or has made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request, the component may charge duplication for the processing of the request. Otherwise, it may not charge duplication fees.

(5) *All other requesters.*

(i) *All other requesters* are individuals and entities who do not fall into any of the four categories described in Section 2(b) paragraphs (1), (2), (3) and (4) of this appendix. Requesters seeking information for personal use, public interest groups, and nonprofit organizations are examples of requesters who might fall into this group.

(ii) All other requesters are entitled to receive 100 pages of duplication without charge. Following the exhaustion of this entitlement, they will be charged fees for the duplicating of any additional pages of responsive records released. All other requesters are also entitled to receive 2 hours of search time without charge. Following the exhaustion of this entitlement, they may be charged search fees for any remaining search time required to locate the records requested. They may not be charged review fees.

(iii) If a component fails to comply with the statutory time limits in which to respond to an all-other request, as provided in 7 CFR 1.6(b), and if no unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), it may not charge search fees for the processing of the request.

(iv) If a component fails to comply with the statutory time limits in which to respond to an all-other request, as provided in 7 CFR 1.6(b), when unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), and the component notifies the requester, in writing, within the statutory 20-working day time period, that unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, more than 5,000 pages are necessary to respond to the request, and the component has discussed with the requester by means of written mail, electronic mail, or by telephone (or has made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request, the component may charge search fees for the processing of the request as well as any applicable duplication fees. Otherwise, it may only charge applicable duplication fees.

Section 3. Charging fees.

(a) *In general.* When responding to FOIA requests, components will charge all applicable FOIA fees that exceed the USDA charging threshold, as provided in paragraph (b) of this section, unless a waiver or reduction of fees has been granted under 7 CFR 1.12(p), or statutory time limits on processing are not met, and when unusual or exceptional circumstances apply, components do not meet all of the three conditions for charging as set forth in 7 CFR 1.12(o).

(b) *USDA fee charging threshold.* The OMB Fee Guidelines state that agencies will not charge FOIA fees if the cost of collecting the fee would be equal to or greater than the fee itself. This limitation applies to all requests, including those seeking records for commercial use. At the USDA, the cost of collecting a FOIA fee is currently established as $25.00. Therefore, when calculating FOIA fees, components will charge requesters all applicable FOIA fees when these fees equal or exceed $25.01.

(c) *Charging interest.* Components may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the component. Components will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(d) *NARA retrieval fees.* For requests that require the retrieval of records stored by a component at a Federal records center operated by the National Archives and Records Administration (''NARA''), additional costs will be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(e) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires a component to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the component will inform the requester of the contact information for that program.

(f) *Social Security Numbers and Tax Identification Numbers.* Components may not require requesters to provide Social Security Numbers or Tax Identification Numbers in order to pay FOIA fees due.

TABLE 1 TO APPENDIX A TO SUBPART A—FOIA FEE SCHEDULE

Type of request	Type of charge	Price
Commercial Requesters.	Duplication charges.	$0.05 per page.
		When the component has to copy fragile records, the charge is $0.05 per page plus the copying time involved, which includes the actual hourly salary rate of the employee involved, plus 16% of the hourly salary rate.
	Search charges	Actual hourly salary rate of employee involved, plus 16% of the hourly salary rate.
	Review charges	Actual hourly salary rate of employee involved, plus 16% of the hourly salary rate.
Educational or Non-Commercial Scientific Requesters.	Duplication charges.	No charge for first 100 pages, then $0.05 per page.
		When the component has to copy fragile records, the charge is $0.05 per page plus the copying time involved, which includes the actual hourly salary rate of the employee involved, plus 16% of the hourly salary rate.
	Search charges	Free.
	Review charges	Free.

TABLE 1 TO APPENDIX A TO SUBPART A—FOIA FEE SCHEDULE—Continued

Type of request	Type of charge	Price
Representatives of the News Media.	Duplication charges.	No charge for first 100 pages, then $0.05 per page When the component has to copy fragile records, the charge is $0.05 per page plus the copying time involved, which includes the actual hourly salary rate of the employee involved, plus 16% of the hourly salary rate.
	Search charges	Free.
	Review charges	Free.
All Other Requesters.	Duplication charges.	No charge for first 100 pages, then $0.05 per page. When the component has to copy fragile records, the charge is $0.05 per page plus the copying time involved, which includes the actual hourly salary rate of the employee involved, plus 16% of the hourly salary rate.
	Search charges	No charge for first two (2) hours of search time, then actual hourly salary rate of employee involved, plus 16% of the hourly salary rate.
	Review charges	Free.

Subpart B—Departmental Proceedings

§ 1.26 Representation before the Department of Agriculture.

(a) *Applicability*. This section applies to all hearings and other proceedings before the Department of Agriculture, except to the extent that any other regulation of the Department may specifically make this section, or any part of this section, inapplicable as to particular hearings or other proceedings.

(b) *Administrative provisions*. (1) In any hearing or other proceeding before the Department of Agriculture, the parties may appear in person or by counsel or other representative. Persons who appear as counsel or in a representative capacity in any hearing or proceeding must conform to the standards of ethical conduct required of practitioners before the U.S. District Court for the District of Columbia, and to any applicable standards of ethical conduct established by statutes, executive orders and regulations.

(2) Whenever the Secretary finds, after notice and opportunity for hearing, that a person who is acting or has acted as counsel or representative in any hearing or other proceeding before the Department has not conformed to any such standards of ethical conduct, the Secretary may order that such person be precluded from acting as counsel or representative in any hearing or other proceeding before the Department for such period of time as the Secretary deems warranted. Whenever the Secretary has probable cause to believe that any person who is acting or has acted as counsel or representative in any such hearing or other proceeding has not conformed to any such standards of ethical conduct, the Secretary may, by written notice to such person, suspend the person from acting as such a counsel or representative pending completion of the procedures specified in the preceding sentence.

(3) No employee or former employee of the Department shall be permitted to represent any person before the Department in connection with any particular matter as to which by reason of employment with the Department the employee or former employee acquired personal knowledge of such a nature that it would be improper, unethical, or contrary to the public interest for the employee or former employee so to act.

(4) This section shall not be construed to prevent an employee or former employee of the Department from appearing as a witness in any hearing or other proceeding before the Department.

(18 U.S.C. 203, 205, 207)

[32 FR 5458, Apr. 1, 1967, as amended at 60 FR 66480, Dec. 22, 1995]

§ 1.27 Rulemaking and other notice procedures.

(a) This section shall apply to:

(1) Notices of proposed rulemaking;

(2) Interim final rules;

(3) Advance notices of proposed rulemaking; and

(4) Any other published notice that solicits, or affords interested members of the public an opportunity to submit, written views with respect to any proposed action relating to any program administered in the Department regardless of the fact that the issuance of a rule may not be contemplated.

(b) Each notice identified in paragraph (a) of this section shall indicate the procedure to be followed with respect to the notice, unless the procedure is prescribed by statute or by published rule of the Department. Each notice shall contain a statement that advises the public of the policy regarding the availability of written submissions by indicating whether paragraph (c), (d), or (e) of this section is applicable to written submissions made pursuant to the notice.

(c) All written submissions made pursuant to the notice shall be made available for public inspection at times and places and in a manner convenient to the public business.

(d)(1) Any written submission, pursuant to a notice, may be held confidential if the person making the submission requests that the submission be held confidential, the person making the submission has shown that the written submission may be withheld under the Freedom of Information Act, and the Department official authorized to issue the notice determines that the submission may be withheld under the Freedom of Information Act.

(2) If a request is made in accordance with paragraph (d)(1) of this section for confidential treatment of a written submission, the person making the request shall be informed promptly in the event the request is denied and afforded an opportunity to withdraw the submission.

(3) If a determination is made to grant a request for confidential treatment under paragraph (d)(1) of this section, a statement of the specific basis for the determination that will not be susceptible of identifying the person making the request will be made available for public inspection.

(e) If the subject of the notice is such that meaningful submissions cannot be expected unless they disclose information that may be withheld under the Freedom of Information Act, the notice shall so indicate and contain a statement that written submissions pursuant to the notice will be treated as confidential and withheld under the Freedom of Information Act. *Provided*, That the policy regarding availability of written submissions set forth in this paragraph may only be used with the prior approval of the Secretary, or the Under Secretary or Assistant Secretary that administers the program that is the subject of the notice.

[60 FR 66480, Dec. 22, 1995]

§ 1.28 Petitions.

Petitions by interested persons in accordance with 5 U.S.C. 553(e) for the issuance, amendment or repeal of a rule may be filed with the official that issued or is authorized to issue the rule. All such petitions will be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions.

[11 FR 177A, Sept. 11, 1946. Redesignated at 13 FR 6703, Nov. 16, 1948, as amended at 60 FR 66481, Dec. 22, 1995]

§ 1.29 Subpoenas relating to investigations under statutes administered by the Secretary of Agriculture.

(a) *Issuance of subpoena.* (1) When the Secretary is authorized by statute to issue a subpoena in connection with an investigation being conducted by the Department, the attendance of a witness and the production of evidence relating to the investigation may be required by subpoena at any designated place, including the witness' place of business. Upon request of any representative of the Secretary involved in connection with the investigation, the subpoena may be issued by the Secretary, the Inspector General, or any Department official authorized pursuant to part 2 of this title to administer the program to which the subpoena relates, if the official who is to issue the subpoena is satisfied as to the reasonableness of the grounds, necessity, and scope of the subpoena. Except as provided in paragraph (a)(2) of this section, the authority to issue subpoenas

may not be delegated or redelegated by the head of an agency.

(2) The Administrator, Grain Inspection, Packers and Stockyards Administration, may delegate the authority to issue subpoenas in connection with investigations being conducted under the Packers and Stockyards Act (7 U.S.C. 181–229), to the Deputy Administrator, Packers and Stockyards Programs.

(3) In the case of a subpoena issued under the Animal Health Protection Act (7 U.S.C. 8301–8317), Plant Protection Act (7 U.S.C. 7701–7772), or Title V of the Agricultural Risk Protection Act of 2000 (7 U.S.C. 2279e–2279f), the subpoena will be reviewed for legal sufficiency by the Office of the General Counsel, USDA.

(b) *Service of subpoena.* (1) A subpoena issued pursuant to this section may be served by:

(i) A U.S. Marshal or Deputy Marshal,

(ii) Any other person who is not less than 18 years of age, or

(iii) Certified or registered mailing of a copy of the subpoena addressed to the person to be served at his, her, or its last known residence or principal place of business or residence.

(2) Proof of service may be made by the return of service on the subpoena by the U.S. Marshal, or Deputy Marshal; or, if served by an individual other than a U.S. Marshal or Deputy Marshal, by an affidavit or certification of such person stating that he or she personally served a copy of the subpoena upon the person named in the subpoena; or, if service was by certified or registered mail, by the signed Postal Service receipt.

(3) In making personal service, the person making service shall leave a copy of the subpoena with the person subpoenaed; and the original, bearing or accompanied by the required proof of service, shall be returned to the official who issued the subpoena.

[39 FR 15277, May 2, 1974, as amended at 40 FR 58281, Dec. 16, 1975; 42 FR 65131, Dec. 30, 1977; 43 FR 12673, Mar. 27, 1978; 60 FR 66481, Dec. 22, 1995; 66 FR 36907, July 16, 2001; 67 FR 70674, Nov. 26, 2002]

Subpart C—Judicial Proceedings

§ 1.41 Service of process.

Process in any suit brought in Washington, District of Columbia, against the United States or any officer of the U.S. Department of Agriculture in any matter involving the activities of this Department, shall be served on the General Counsel of the Department. A U.S. Marshal or other process server attempting to serve process in such a suit on any officer of the Department shall be referred to the Office of the General Counsel, in order that service of process may be made. In the event an officer of the Department of Agriculture is served with process in such a suit, the officer shall immediately notify the General Counsel. Any subpoena, summons, or other compulsory process requiring an officer or employee to give testimony, or to produce or disclose any record or material of the U.S. Department of Agriculture, shall be served on the officer or employee of the U.S. Department of Agriculture named in the subpoena, summons, or other compulsory process.

[19 FR 4052, July 3, 1954, as amended at 33 FR 10273, July 18, 1968; 43 FR 6202, Feb. 14, 1978; 60 FR 66481, Dec. 22, 1995]

Subpart D—Claims

§ 1.51 Claims based on negligence, wrongful act or omission.

(a) *Authority of the Department.* Under the provisions of the Federal Tort Claims Act (FTCA), as amended, 28 U.S.C. 2671–2680, and the regulations issued by the Department of Justice (DOJ) contained in 28 CFR part 14, the United States Department of Agriculture (USDA) may, subject to the provisions of the FTCA and DOJ regulations, consider, ascertain, adjust, determine, compromise, and settle claims for money damages against the United States for personal injury, death, or property loss or damage caused by the negligent or wrongful act or omission of any employee of USDA while acting within the scope of his or her office or employment, under circumstances where the United States, if it were a

private person, would be liable, in accordance with the law of the place where the act or omission occurred.

(b) *Procedure for filing claims.* Claims must be presented by the claimant, or by his or her duly authorized agent or legal representative as specified in 28 CFR 14.3. Standard Form 95, Claim for Damage or Injury, may be obtained from the agency within USDA that employs the employee who allegedly committed the negligent or wrongful act or omission. The completed claim form, together with appropriate evidence and information, as specified in 28 CFR 14.4, shall be filed with the agency from which it was obtained.

(c) *Determination of claims*—(1) *Delegation of authority to determine claims.* The General Counsel, and such employees of the Office of the General Counsel as may be designated by the General Counsel, are hereby authorized to consider, ascertain, adjust, determine, compromise, and settle claims pursuant to the FTCA, as amended, and the regulations contained in 28 CFR part 14 and in this section.

(2) *Disallowance of claims.* If a claim is denied, the General Counsel, or his or her designee, shall notify the claimant, or his or her duly authorized agent or legal representative.

[61 FR 57577, Nov. 7, 1996]

Subpart E—Cooperative Production of Television Films

SOURCE: 22 FR 2904, Apr. 25, 1957, unless otherwise noted.

§ 1.71 Purpose.

This subpart establishes procedures for developing special working relationships with the Department of Agriculture requested by producers of films for television use. These procedures are designed to guide Department employees and producers of commercial television pictures in entering into such arrangements.

§ 1.72 Policy.

(a) *General.* It is a basic policy of the Department of Agriculture to make information freely available to the public.

(b) *Cooperation with television film producers.* The Department recognizes that its people and programs constitute a rich source of materials on public services, often dramatic and interesting for their human values, which are suitable for production of films for television showings. The Department welcomes the interest of television film producers in its activities and maintains an ''open door'' policy with respect to the availability of factual information to such producers, as it does to representatives of other media. As its resources will permit, the Department will work with producers at their request, to assure technical accuracy of scripts and story treatments.

(c) *Special working relationships.* In those instances where a producer of films for television seeks special Department participation such as the use of official insignia of the Department, or who request special assistance such as the services of technical advisors, use of Government equipment and similar aids which require a material expenditure of public funds, and where the proposed film will further the public service of the Department, the Department will consider entering into a special working relationship with such producer.

(d) *News film reporting exempted.* Television and news film reporting of Department activities is not covered by this subpart.

§ 1.73 Responsibility.

The Director of Information or his designee will be the authority for the approval of special working relationships on the part of the Department of Agriculture and its agencies. The Director or his designee shall not commit the Department to such special arrangements without proper concurrence and coordination with interested agencies and approval by the appropriate Assistant Secretary or Group Director.

§ 1.74 Basis for special working relationships.

The Department and its agencies may lend special assistance on television films when it is clearly evident that public interests are served. Where

special assistance is sought, an individual cooperative agreement will be drawn up between the Department with the Director of Information as its agent, and the producer. Details on such assistance as reviewing stories and scripts, loan of material, arrangements for locations, use of official motion picture footage, assignment of technical advisors and similar aids will be covered in the agreement, which shall delineate the general stipulations listed in §1.75.

§ 1.75 General stipulations.

In requesting special working arrangements the producer must agree to the following stipulations:

(a) The producer must show that he has legal authority to the literary property concerned.

(b) The producer must show access to a distribution channel recognized by the motion picture or television industry. In lieu of complete distribution plans for a television series, a producer must produce satisfactory evidence of financial responsibility (showing financial resources adequate for the defrayment of costs for the proposed undertaking).

(c) The commercial advertising of any show produced, using oral or written rights granted to the producer, shall not indicate any endorsement, either direct or implied, by the U.S. Department of Agriculture or its agencies, of the sponsor's product.

(d) Commercial sponsorship shall be only by a person, firm, or corporation acceptable under the terms of the 1954 Television Code of the National Association of Radio and Television Broadcasters, and all subsequent amendments thereto. Political sponsorship shall not be permitted.

(e) That no production costs shall be chargeable to the U.S. Department of Agriculture.

(f) That such cooperation will not interfere with the conduct of Department programs.

(g) All damages, losses and personal liability incurred by producer will be his responsibility.

(h) That mutual understanding and agreement will be reached upon story, script and film treatment with the Department before film production is begun.

§ 1.76 Department cooperation.

When the producer agrees to meet the above stipulations to the satisfaction of the Director of Information, the U.S. Department of Agriculture and its agencies will be available for consultation on story ideas and give guidance through the services of a technical advisor to insure technical authenticity. Equipment, locations, and personnel will be available to the extent that such availability is concurrent with normal and usual conduct of the operations of the Department. The Department will check and work with the cooperators to arrange shooting schedules in order to avoid interferences with working schedules.

§ 1.77 Assignment of priorities.

(a) *Authority.* (1) The Director of Information or his designee will make assignment of priorities for the U.S. Department of Agriculture for a television film company's and/or individual producer's story treatment of the subject matter, but no such priority shall limit use of the subject matter itself.

(2) A priority will be given in writing upon acceptance in writing by the producer of the stipulations in §1.75(b). The U.S. Department of Agriculture will hold the producer's treatment of the story material in confidence until the producer has made a public release pertaining to the subject.

(b) *Time and scope.* A priority will be given on the producer's story treatment for an agreed upon period of time. Requests for cooperation with similar or conflicting ideas and backgrounds will be considered only after holder of the first priority has used the agreed upon time to develop the materials.

(1) Details on priorities will be written into the agreements.

(2) The Director of Information will retain the right to cancel priorities when the producer at any stage violates the provisions of the regulations or of a particular agreement, or when public interest is no longer served.

(3) No priority will be canceled until the producer has had an opportunity to appear before the Secretary of Agriculture or his designee.

§ 1.78 Development of special working relationships.

(a) *Preliminary.* Prior to the submittal of a script or the rendering of an agreement, assistance may be given by the Department or one of its agencies in outlining story plans, visits to field points, and other incidentals that will assist the producer in determining his course of action.

(b) *Request for special working arrangements.* Once the decision is made to go ahead with an agreement, either the interested agency or the producer will make a written submission to the Director of Information, requesting that special working arrangements be established.

(1) In submitting scripts prior or subsequent to executing a written agreement under a special working relationship four (4) copies of the completed script shall be submitted to the Director of Information or his designee, along with a statement of specific requirements and the anticipated production schedule.

(2) No script will be used under a special working relationship without the specific approval of the Director of Information.

(3) Upon approval of the script, the agency of the Department concerned with subject matter will endeavor to arrange for the desired assistance with the stipulations of this policy.

§ 1.79 Credits.

On films on which the Department or one of its agencies provides special assistance it shall be mutually agreed by the producer and the Director of Information what credits shall be given to the Department, and the form these credits will take.

Subpart G—Privacy Act Regulations

AUTHORITY: 5 U.S.C. 301 and 552a; 31 U.S.C. 9701.

SOURCE: 40 FR 39519, Aug. 28, 1975, unless otherwise noted.

§ 1.110 Purpose and scope.

This subpart contains the regulations of the U.S. Department of Agriculture (USDA) implementing the Privacy Act of 1974 (5 U.S.C. 552a). This subpart sets forth the basic responsibilities of each agency of USDA with regard to USDA's compliance with the requirements of the Privacy Act, and offers guidance to members of the public who wish to exercise any of the rights established by the Privacy Act with regard to records maintained by an agency of USDA.

[40 FR 39519, Aug. 28, 1975, as amended at 62 FR 33981, June 24, 1997]

§ 1.111 Definitions.

For purposes of this subpart the terms *individual*, *maintain*, *record*, *system of records*, *statistical record*, and *routine use* shall have the meanings set forth in 5 U.S.C. 552a(a). The term *agency* shall mean an agency of USDA, unless otherwise indicated.

§ 1.112 Procedures for requests pertaining to individual records in a record system.

(a) Any individual who wishes to be notified if a system of records maintained by an agency contains any record pertaining to him or her, or to request access to such records, shall submit a written request in accordance with the instructions set forth in the system notice for that system of records. This request shall include:

(1) The name of the individual making the request;

(2) The name of the system of records (as set forth in the system notice to which the request relates);

(3) Any other information specified in the system notice; and

(4) When the request is one for access, a statement as to whether the requester desires to make a personal inspection of the records, or be supplied with copies by mail.

(b) Any individual whose request under paragraph (a) of this section is denied may appeal that denial to the head of the agency which maintains the system of records to which the request relates.

(c) In the event that an appeal under paragraph (b) of this section is denied, the requester may bring a civil action in federal district court to seek review of the denial.

[40 FR 39519, Aug. 28, 1975, as amended at 62 FR 33981, June 24, 1997]

§ 1.113 Times, places, and requirements for identification of individuals making requests.

(a) If an individual submitting a request for access under § 1.112 has asked that an agency authorize a personal inspection of records pertaining to him or her, and the agency has granted that request, the requester shall present himself or herself at the time and place specified in the agency's response or arrange another, mutually convenient, time with the appropriate agency official.

(b) Prior to inspection of the records, the requester shall present sufficient identification (e.g., driver's license, employee identification card, social security card, credit cards) to establish that the requester is the individual to whom the records pertain. If the requester is unable to provide such identification, the requester shall complete and sign in the presence of an agency official a signed statement asserting the requester's identity and stipulating that the requester understands that knowingly or willfully seeking or obtaining access to records about another individual under false pretenses is a misdemeanor punishable by fine up to $5,000. No identification shall be required, however, if the records are required by 5 U.S.C. 552 to be released.

(c) Any individual who has requested access to records about himself or herself by personal inspection, and who wishes to have another person or persons accompany the requester during this inspection, shall submit a written statement authorizing disclosure of the record in the presence of such other person or persons.

(d) Any individual having made a personal inspection of records pertaining to the requester may request the agency to provide the requester copies of those records or any portion of those records. Each agency shall grant such requests but may charge fees in accordance with § 1.120.

(e) If an individual submitting a request for access under § 1.112 wishes to be supplied with copies of the records by mail, the requester shall include with his or her request sufficient data for the agency to verify the requester's identity. If the sensitivity of the records warrant it, however, the agency to which the request is directed may require the requester to submit a signed, notarized statement indicating that the requester is the individual to whom the records pertain and stipulating the requester understands that knowingly or willfully seeking or obtaining access to records about another individual under false pretenses is a misdemeanor punishable by fine up to $5,000. No identification shall be required, however, if the records are required by 5 U.S.C. 552 to be released. If the agency to which this request is directed determines to grant the requested access, it may charge fees in accordance with § 1.120 before making the necessary copies.

[40 FR 39519, Aug. 28, 1975, as amended at 62 FR 33981, June 24, 1997]

§ 1.114 Disclosure of requested information to individuals.

(a) Any agency which receives a request or appeal under § 1.112 should acknowledge the request or appeal within 10 days of its receipt (excluding Saturdays, Sundays, and legal public holidays). Wherever practicable, the acknowledgment should indicate whether or not access will be granted and, if so, when and where. When access is to be granted, the agency should provide the access within 30 days of receipt of the request or appeal (excluding Saturdays, Sundays and legal public holidays) unless, for good cause shown, it is unable to do so. If the agency is unable to meet this deadline, it shall inform the requester of this fact, the reasons for its inability to do so, and an estimate of the date on which access will be granted.

(b) Nothing in 5 U.S.C. 552a or this subpart shall be interpreted to require that an individual making a request under § 1.112 be granted access to the physical record itself. The form in which a record is kept (e.g., on magnetic tape), or the content of the record (e.g., a record indexed under the name of the requester may contain records which are not about the requester) may require that the record be edited or translated in some manner. Neither of these procedures may be utilized, however, to withhold information in a record about the requester.

(c) No agency shall deny any request under §1.112 for information concerning the existence of records about the requester in any system of records it maintains, or deny any request for access to records about the requester in any system of records it maintains, unless that system is exempted from the requirements of 5 U.S.C. 552a(d) in §1.123.

(d) If any agency receives a request pursuant to §1.112(a) for access to records in a system of records it maintains which is so exempted, the system manager shall determine if the exemption is to be asserted. If the system manager determines to deny the request, the system manager shall inform the requester of that determination, the reason for the determination, and the title and address of the agency head to whom the denial can be appealed.

(e) If the head of an agency determines that an appeal pursuant to §1.112(b) is to be denied, the head of the agency shall inform the requester of that determination, the reason for the determination, and the requester's right under 5 U.S.C. 552a(g) to seek judicial review of the denial in Federal district court.

(f) Nothing in 5 U.S.C. 552a or this subpart shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

[40 FR 39519, Aug. 28, 1975, as amended at 62 FR 33981, June 24, 1997]

§1.115 Special procedures: Medical records.

In the event an agency receives a request pursuant to §1.112 for access to medical records (including psychological records) whose disclosure it determines would be harmful to the individual to whom they relate, it may refuse to disclose the records directly to the requester but shall transmit them to a doctor designated by that individual.

§1.116 Request for correction or amendment to record.

(a) Any individual who wishes to request correction or amendment of any record pertaining to him or her contained in a system of records maintained by an agency shall submit that request in writing in accordance with the instructions set forth in the system notice for that system of records. This request shall include:

(1) The name of the individual making the request;

(2) The name of the system of records (as set forth in the system notice to which the request relates);

(3) A description of the nature (e.g., modification, addition or deletion) and substance of the correction or amendment requested; and

(4) Any other information specified in the system notice.

(b) Any individual submitting a request pursuant to paragraph (a) of this section shall include sufficient information in support of that request to allow the agency to which it is addressed to apply the standards set forth in 5 U.S.C. 552a(e) (1) and (5).

(c) Any individual whose request under paragraph (a) of this section is denied may appeal that denial to the head of the agency which maintains the system of records to which the request relates.

(d) In the event that an appeal under paragraph (c) of this section is denied, the requester may bring a civil action in federal district court to seek review of the denial.

[40 FR 39519, Aug. 28, 1975, as amended at 62 FR 33981, June 24, 1997]

§1.117 Agency review of request for correction or amendment of record.

(a) Any agency which receives a request for amendment or correction under §1.116 shall acknowledge that request within 10 days of its receipt (excluding Saturdays, Sundays and legal public holidays). The agency shall also promptly, either:

(1) Make any correction, deletion or addition with regard to any portion of a record which the requester believes is not accurate, relevant, timely or complete; or

(2) Inform the requester of its refusal to amend the record in accordance with the request; the reason for the refusal; the procedures whereby the requester can appeal the refusal to the head of the agency; and the title and business address of that official. If the agency

informs the requester of its determination within the 10-day deadline, a separate acknowledgement is not required.

(b) If an agency is unable to comply with either paragraphs (a)(1) or (2) of this section within 30 days of its receipt of a request for correction or amendment, (excluding Saturdays, Sundays and legal public holidays), it should inform the requester of that fact, the reasons for the inability to comply with paragraphs (a)(1) or (a)(2) of this section within 30 days, and the approximate date on which a determination will be reached.

(c) In conducting its review of a request for correction or amendment, each agency shall be guided by the requirements of 5 U.S.C. 552a(e)(1) and (5).

(d) If an agency determines to grant all or any portion of a request for correction or amendment, it shall:

(1) Advise the individual of that determination;

(2) Make the requested correction or amendment; and

(3) Inform any person or agency outside USDA to whom the record has been disclosed, if an accounting of that disclosure is maintained in accordance with 5 U.S.C. 552a(c), of the occurrence and substance of the correction or amendments.

(e) If an agency determines not to grant all or any portion of a request for correction or amendment, it shall:

(1) Comply with paragraph (d) of this section with regard to any correction or amendment which is made;

(2) Advise the requester of its determination and the reasons for the determination not to grant all or a portion of the request for a correction or amendment;

(3) Inform the requester that he or she may appeal this determination to the head of the agency which maintains the system of records; and

(4) Describe the procedures for making such an appeal, including the title and business address of the official to whom the appeal is to be addressed.

(f) In the event that an agency receives a notice of correction or amendment to information in a record contained in a system of records which it maintains, it shall comply with paragraphs (d)(2) and (3) of this section in the same manner as if it had made the correction or amendment itself.

[40 FR 39519, Aug. 28, 1975, as amended at 62 FR 33981, June 24, 1997]

§ 1.118 Appeal of initial adverse agency determination on correction or amendment.

(a) Any individual whose request for correction or amendment under § 1.116 is denied, and who wishes to appeal that denial, shall address such appeal to the head of the agency which maintains the system of records to which the request relates, in accordance with the procedures set forth in the agency's initial denial of the request.

(b) The head of each agency shall make a final determination with regard to an appeal submitted under paragraph (a) of this section not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests a review, unless, for good cause shown, the head of the agency extends this 30-day period and so notifies the requester, together with an estimate of the date on which a final determination will be made. Such extension should be utilized only in exceptional circumstances and should not normally exceed 30 days. The delegation of authority set forth in this paragraph may not be redelegated.

(c) In conducting a review of an appeal submitted under paragraph (a) of this section, the head of an agency shall be guided by the requirements of 5 U.S.C. 552a(e)(1) and (5).

(d) If the head of an agency determines to grant all or any portion of an appeal submitted under paragraph (a) of this section, the head of the agency shall inform the requester and the agency shall comply with the procedures set forth in § 1.117(d)(2) and (d)(3).

(e) If the head of an agency determines in accordance with paragraph (c) of this section not to grant all or any portion of an appeal submitted under paragraph (a) of this section, the head of the agency shall inform the requester:

(1) Of this determination and the reasons for the determination;

(2) Of the requester's right to file a concise statement of the requester's

reasons for disagreeing with the agency's decision;

(3) Of the procedures for filing such a statement of disagreement;

(4) That such statements of disagreements will be made available to anyone to whom the record is subsequently disclosed, together with (if the agency deems it appropriate) a brief statement by the agency summarizing its reasons for refusing to amend the record;

(5) That prior recipients of the disputed record will be provided with a copy of the statement of disagreement, together with (if the agency deems it appropriate) a brief statement of the agency's reasons for refusing to amend the record, to the extent that an accounting of disclosures is maintained under 5 U.S.C. 552a(c); and

(6) Of the requester's right to seek judicial review of the agency's determination in accordance with 5 U.S.C. 552a(g). The agency shall insure that any statements of disagreement submitted by a requester are handled in accordance with paragraphs (e)(4) and (5) of this section.

[40 FR 39519, Aug. 28, 1975, as amended at 62 FR 33981, June 24, 1997]

§ 1.119 Disclosure of record to person other than the individual to whom it pertains.

No agency shall disclose any record which is contained in a system of records it maintains, by any means of communication to any person, or to another agency outside USDA, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless the disclosure is authorized by one or more provisions of 5 U.S.C. 552a(b).

§ 1.120 Fees.

Any agency which provides copies of records pursuant to a request under this subpart may charge fees for the direct costs of producing such copies in accordance with appendix A to subpart A of this part. No agency, however, shall charge any fee for searches necessary to locate records. Nor shall an agency charge any fees for copies or searches, when the requester sought to make a personal inspection but was provided copies instead at the discretion of the agency.

§ 1.121 Penalties.

The criminal penalties which have been established for violations of the Privacy Act of 1974 are set forth in 5 U.S.C. 552a(i). These penalties are applicable to any officer or employee of an agency who commits any of the acts enumerated in 5 U.S.C. 552a(i). These penalties also apply to contractors and employees of such contractors who enter into contracts with an agency of USDA and who are considered to be employees of the agency within the meaning of 5 U.S.C. 552a(m)(1).

[40 FR 39519, Aug. 28, 1975, as amended at 62 FR 33982, June 24, 1997]

§ 1.122 General exemptions.

Pursuant to 5 U.S.C. 552a(j), and for the reasons set forth in 54 FR 11204–11206 (March 17, 1989), the systems of records (or portions of systems of records) maintained by agencies of USDA identified in this section are exempted from the provisions of 5 U.S.C. 552a, except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i).

Office of Inspector General

Informant and Undercover Agent Records, USDA/OIG–2.

Investigative Files and Automated Investigative Indices System, USDA/OIG–3.

OIG Hotline Complaint Records, USDA/OIG–4.

Consolidated Assignments, Personnel Tracking, and Administrative Information Network (CAPTAIN), USDA/OIG–5.

[54 FR 39517, Sept. 27, 1989, as amended at 62 FR 33982, June 24, 1997; 62 FR 61209, Nov. 17, 1997]

§ 1.123 Specific exemptions.

Pursuant to 5 U.S.C. 552a(k), the systems of records (or portions thereof) maintained by agencies of USDA identified below are exempted from the provisions of 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f). The reasons for exempting each system are set out in the notice for that system published in the FEDERAL REGISTER.

AGRICULTURAL MARKETING SERVICE

AMS Office of Compliance Review Cases, USDA/AMS–11.

AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE

EEO Complaints and Discrimination Investigation Reports, USDA/ASCS–12.
Investigation and Audit Reports, USDA/ASCS–18.
Producer Appeals, USDA/ASCS–21.

ANIMAL AND PLANT HEALTH INSPECTION SERVICE

Plant Protection and Quarantine Program—Regulatory Actions, USDA/APHIS–1.
Veterinary Services Programs—Records of Accredited Veterinarians, USDA/APHIS–2.
Veterinary Services Programs—Animal Quarantine Regulatory Actions, USDA/APHIS–3.
Veterinary Services Programs—Animal Welfare and Horse Protection Regulatory Actions, USDA/APHIS–4.

FARMERS HOME ADMINISTRATION

Credit Report File, USDA/FmHA–3.

FEDERAL CROP INSURANCE CORPORATION

FCIC Compliance Review Cases, USDA/FCIC–2.

FEDERAL GRAIN INSPECTION SERVICE

Investigations Undertaken by the Government Pursuant to the United States Grain Standards Act of 1976, as amended, or the Agricultural Marketing Act of 1946, as amended, USDA/FGIS–2.

FOOD AND NUTRITION SERVICE

Civil Rights Complaints and Investigations, USDA/FNS–1.
Claims Against Food Stamp Recipients, USDA/FNS–3.
Investigations of Fraud, Theft, or Other Unlawful Activities of Individuals Involving Food Stamps, USDA/FNS–5.

FOOD SAFETY AND INSPECTION SERVICE

Meat and Poultry Inspection Program—Slaughter, Processing and Allied Industries Compliance Records System, USDA/FSIS–1.

FOREST SERVICE

Law Enforcement Investigation Records, USDA/FS–33.

OFFICE OF THE GENERAL COUNSEL

Regulatory Division

Cases by the Department under the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the voluntary inspection and certification provisions of the Agricultural Marketing Act of 1946, USDA/OGC–6.
Cases by the Department under the Humane Methods of Livestock Slaughter Law (i.e., the Act of August 27, 1958), USDA/OGC–7.
Cases by the Department under the 28 Hour Law, as amended, USDA/OGC–8.
Cases by the Department under the various Animal Quarantine and related laws, USDA/OGC–9.
Cases by the Department under the various Plant Protection Quarantine and related laws, USDA/OGC–10.
Cases by the Department under Horse Protection Act of 1970, USDA/OGC–41.
Cases by the Department under the Laboratory Animal Welfare Act, USDA/OGC–42.

Community Development Division

Community Development Division Litigation, USDA/OGC–11.
Farmers Home Administration (FmHA) General Case Files, USDA/OGC–12.

Food and Nutrition Division

Claims by and against USDA under the Food Assistance Legislation, USDA/OGC–13.
Perishable Agricultural Commodities, USDA/OGC–14.

Foreign Agriculture and Commodity Stabilization Division

Agricultural Stabilization and Conservation Service (ASCS), Foreign Agricultural Service (FAS), and Commodity Credit Corporation Cases, USDA/OGC–15.
Federal Crop Insurance Corporation (FCIC) Cases, USDA/OGC–16.
Administrative proceedings brought by the Department, court cases in which the government is plaintiff and court cases in which the government is a defendant brought pursuant to the United States Warehouse Act, USDA/OGC–43.

Marketing Division

Administrative proceedings brought by the Department pursuant to the Plant Variety Protection Act, the Federal Seed Act, or the Agricultural Marketing Act of 1946, USDA/OGC–18.
Cases brought by the Government pursuant to the Cotton Futures provisions of the Internal Revenue Code of 1954, USDA/OGC–22.
Court cases brought by the Government pursuant to either the Agricultural Marketing Act of 1946 or the Tobacco Inspection Act, USDA/OGC–24.
Court cases brought by the Government pursuant to either the Agricultural Marketing Agreement Act of 1937, as amended, or the Anti-Hog-Cholera Serum and Hog Cholera Virus Act, USDA/OGC–25.
Court cases brought by the Government pursuant to either the Cotton Research and Promotion Act, Potato Research and Promotion Act, the Egg Research and Consumer Information Act, USDA/OGC–26.

Court cases brought by the Government pursuant to either the Export Apple and Pear Act or the Export Grape and Plum Act, USDA/OGC–27.

Court cases brought by the Government pursuant to either the Cotton Statistics and Estimates Act of 1927 or the United States Cotton Standards Act, USDA/OGC–28.

Court cases brought by the Government pursuant to either the Naval Stores Act, or the Tobacco Seed and Plant Exportation Act, USDA/OGC–29.

Court cases brought by the Government pursuant to either the Peanut Statistics Act or the Tobacco Statistics Act, USDA/OGC–30.

Court cases brought by the Government pursuant to either the Plant Variety Protection Act or the Egg Products Inspection Act, USDA/OGC–31.

Court cases brought by the Government pursuant to either the Produce Agency Act, or the Process of Renovated Butter Provisions of the Internal Revenue Code of 1954, USDA/OGC–32.

Court cases brought by the Government pursuant to either the United States Grain Standards Act or the Federal Seed Act, USDA/OGC–33.

Court cases brought by the Government pursuant to the Agricultural Fair Practices Act, USDA/OGC–34.

Cases by and against the Department under the Virus-Serum Toxin Act, USDA/OGC–44.

Office of Inspector General

Informant and Undercover Agent Records, USDA/OIG–2.

Investigative Files and Automated Investigative Indices System, USDA/OIG–3.

OIG Hotline Complaint Records, USDA/OIG–4.

Consolidated Assignments, Personnel Tracking, and Administrative Information Network (CAPTAIN), USDA/OIG–5.

Packers and Stockyards Division

Packers and Stockyards Act, Administrative Cases, USDA/OGC–69.

Packers and Stockyards Act, Civil and Criminal Cases, USDA/OGC–70.

Research and Operations Division

Personnel Irregularities, USDA/OGC–75.

Office of the Secretary

Non-Career Applicant File, USDA/SEC–1.

[40 FR 45103, Sept. 30, 1975, as amended at 41 FR 22333, June 3, 1976; 53 FR 5969, Feb. 29, 1988; 54 FR 5073, Feb. 1, 1989; 55 FR 41179, Oct. 10, 1990; 62 FR 61209, Nov. 17, 1997]

APPENDIX A TO SUBPART G OF PART 1—INTERNAL DIRECTIVES

SECTION 1. *General requirements.* Each agency that maintains a system of records subject to 5 U.S.C. 552a and the regulations of this subpart shall:

(a) Maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(b) Collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(c) Inform each individual whom it asks to supply information, on the form which it uses to collect the information, or on a separate form that can be retained by the individual, of:

(1) The authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(2) The principal purpose or purposes for which the information is intended to be used;

(3) The routine uses which may be made of the information, as published pursuant to paragraph (d)(4) of this section; and

(4) The effects on the individual, if any, of not providing all or any part of the requested information;

(d) Subject to the provisions of section 2 of this appendix, prepare for publication in the FEDERAL REGISTER at least annually a notice of the existence and character of each system it maintains, which notice shall include:

(1) The name and location(s) of the system;

(2) The categories of individuals on whom records are maintained in the system;

(3) The categories of records maintained in the system;

(4) Each routine use of the records contained in the system, including the categories of uses and the purpose of such use;

(5) The policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(6) The title and business address of the agency official who is responsible for the system of records;

(7) The agency procedures whereby an individual can be notified at his or her request if the system of records contains a record pertaining to the individual;

(8) The agency procedures whereby an individual can be notified at his or her request how the individual can gain access to any record pertaining to him or her contained in the system of records, and how he can contest its content; and

(9) The categories of sources of records in the system;

(e) Maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(f) Prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to 5 U.S.C. 552a(b)(2), make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(g) Maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained, or unless pertinent to and within the scope of an authorized law enforcement activity;

(h) Make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(i) Establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(j) Establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.

SEC. 2. *Amendment of routine uses for an existing system of records, or establishment of a new system of records.*

(a) Any agency which intends to add a routine use, or amend an existing one, in a system of records it maintains, shall, in accordance with 5 U.S.C. 552a(e)(11), ensure that at least 30 days advance notice of such action is given by publication in the FEDERAL REGISTER and an opportunity provided for interested persons to submit written data, views or arguments to the agency.

(b) Any agency which intends to establish a new system of records, or to alter any existing system of records, shall insure that adequate advance notice is provided to Congress and the Office of Management and Budget to permit an evaluation of the probable or potential effect of such action on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers. Such notice is required for any new system of records and for any alteration in an existing one which will:

(1) Increase the number or types of individuals on whom records are maintained;

(2) Expand the type or amount of information maintained;

(3) Increase the number or categories of agencies or other persons who may have access to those records;

(4) Alter the manner in which the records are organized so as to change the nature or scope of those records (e.g., the combining of two or more existing systems);

(5) Modify the way the system operates at its location(s) in such a manner as to alter the procedures by which individuals can exercise their rights under this subpart; or

(6) Change the equipment configuration on which the system is operated so as to create the potential for greater access (e.g., adding a telecommunications capability).

SEC. 3. *Accounting of certain disclosures.* Each agency, with respect to each system of records under its control, shall:

(a) Except for disclosures made under 5 U.S.C. 552a(b)(1) and (2), keep an accurate account of:

(1) The date, nature, and purpose of each disclosure of a record to any person or agency outside the Department; and

(2) The name and address of the person or agency to whom the disclosure is made;

(b) Retain the accounting made under paragraph (a) of this section for the longer of a period of five years, after the date of the disclosure for which the accounting is made, or the life of the record disclosed;

(c) Except for disclosures made under 5 U.S.C. 552a(b)(7), make the accounting required under paragraph (a) of this section available to the individual named in the record at his or her request.

SEC. 4. *Government contractors.* When an agency within the Department provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this subpart to be applied to such system. For purposes of 5 U.S.C. 552a(i) any such contractor or any employee of such contractor shall be considered to be an employee of an agency and therefore subject to the criminal penalties set forth in 5 U.S.C. 552a(i).

SEC. 5. *Mailing lists.* No agency within the Department shall sell or rent any individual's name and address unless such action is specifically authorized by law. This section shall not be construed to require, or to authorize, the withholding of names and addresses whose disclosure is required by 5 U.S.C. 552.

SEC. 6. *Social security account numbers.* (a) No agency shall deny, or permit any State or local government with whom it is involved

in a cooperative venture to deny, to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his or her social security account number.

(b) Paragraph (a) of this section shall not apply with respect to:

(1) Any disclosure required by Federal statute; or

(2) Any disclosure to any agency relating to a system of records it maintained prior to January 1, 1975, if such disclosure was required under statute or regulation adopted prior to that date, to verify the identity of an individual.

(c) Any agency in the Department which requests an individual to disclose his or her social security account number shall inform that individual whether the disclosure is mandatory or voluntary, by what statutory or other authority the number is solicited, and what uses will be made of it. The agency shall also insure that this information is provided by a State or local government with whom it is involved in a cooperative agreement.

SEC. 7. *Annual report.* Each agency in the Department shall submit to the Office of the General Counsel prior to March 30 of each year a report containing the following information related to implementation of 5 U.S.C. 552a:

(a) A summary of major accomplishments;

(b) A summary of major plans for activities in the upcoming year;

(c) A list of the systems which were exempted during the year from any of the operative provisions of this subpart pursuant to 5 U.S.C. 552a (j) and (k), whether or not the exemption was effected during that year, the number of instances with respect to each system exempted in which the exemption was invoked to deny access, and the reasons for invoking the exemption;

(d) A brief summary of changes to the total inventory of personal data system subject to this subpart including reasons for major changes; and

(e) A general description of operational experiences including estimates of the number of individuals (in relation to the total number of records in the system):

(1) Requesting information on the existence of records pertaining to them;

(2) Refusing to provide information;

(3) Requesting access to their records;

(4) Appealing initial refusals to amend records; and

(5) Seeking redress through the courts.

SEC. 8. *Effect of 5 U.S.C. 552.* No agency in the Department shall rely on any exemption in 5 U.S.C. 552 to withhold from an individual any record which is otherwise accessible to such individual under 5 U.S.C. 552a and this subpart.

[40 FR 44480, Sept. 26, 1975, as amended at 62 FR 33982, June 24, 1997]

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

AUTHORITY: 5 U.S.C. 301; 7 U.S.C 61, 87e, 228, 268, 499o, 608c(14), 1592, 1624(b), 1636b, 1638b, 2151, 2279e, 2621, 2714, 2908, 3812, 4610, 4815, 4910, 6009, 6107, 6207, 6307, 6411, 6519, 6520, 6808, 7107, 7734, 8313; 15 U.S.C. 1828; 16 U.S.C. 534, 620d, 1540(f), 3373; 21 U.S.C. 104, 111, 117, 120, 122, 127, 134e, 134f, 135a, 154, 463(b), 621, 1043; 30 U.S.C. 185(o)(1); 43 U.S.C. 1740; 7 CFR 2.27, 2.35.

SOURCE: 42 FR 743, Jan. 4, 1977, unless otherwise noted.

§ 1.130 Meaning of words.

As used in this subpart, words in the singular form shall be deemed to import the plural, and vice versa, as the case may require.

§ 1.131 Scope and applicability of this subpart.

(a) The rules of practice in this subpart shall be applicable to all adjudicatory proceedings under the statutory provisions listed below as those provisions have been or may be amended from time to time,[1] except that those rules shall not be applicable to reparation proceedings under section 6(c) of the Perishable Agricultural Commodities Act, 1930. Section 1.26 shall be inapplicable to the proceedings covered by this subpart.

Agricultural Bioterrorism Protection Act of 2002, section 212(i) (7 U.S.C. 8401(i)).

Agricultural Marketing Act of 1946, as amended, section 253 (7 U.S.C. 1636b) and section 283 (7 U.S.C. 1638b).

Agricultural Marketing Agreement Act of 1937, as amended, section 8c(14), 7 U.S.C. 608c(14).

Animal Health Protection Act, section 10414 (7 U.S.C. 8313).

Animal Welfare Act, section 19 (7 U.S.C. 2149).

[1] See also the regulations promulgated under these statutes for any supplemental rules relating to particular circumstances arising thereunder.

Beef Promotion and Research Act of 1985, section 9 (7 U.S.C. 2908).
Egg Products Inspection Act, section 18 (21 U.S.C. 1047).
Endangered Species Act of 1973, as amended, section 11(a) (16 U.S.C. 1540(a)).
Egg Research and Consumer Information Act, as amended, 7 U.S.C. 2714, Pub. L. 96–276, 94 Stat. 541.
Federal Land Policy and Management Act of 1976, section 506 (43 U.S.C. 1766).
Federal Meat Inspection Act, sections 4, 6, 7(e), 8, and 401 (21 U.S.C. 604, 606, 607(e), 608, 671).
Federal Seed Act, section 409 (7 U.S.C. 1599).
Fluid Milk Promotion Act of 1990, section 1999L [7 U.S.C. 6411].
Forest Resources Conversation and Shortage Relief Act of 1990, section 492 (16 U.S.C. 620d)
Fresh Cut Flowers and Fresh Cut Greens Promotion and Consumer Information Act of 1993, section 9 [7 U.S.C. 6808].
Honey Research, Promotion, and Consumer Information Act, section 11 (7 U.S.C. 4610).
Horse Protection Act of 1970, sections 4(c) and 6 (15 U.S.C. 1823(c), 1825).
Lacey Act Amendments of 1981, section 4 (a) and (b) (16 U.S.C. 3373 (a) and (b)).
Lime Research, Promotion, and Consumer Information Act of 1990, as amended, section 1958 [7 U.S.C. 6207]
Mineral Leasing Act, section 28(o)(1) (30 U.S.C. 185(o)(1)).
Mushroom Promotion, Research, and Consumer Information Act of 1990, section 1928 [7 U.S.C. 6107]
National Forest Roads and Trails Act (16 U.S.C. 534).
Organic Foods Production Act of 1990, sections 2119 and 2120 (7 U.S.C. 6519, 6520).
Packers and Stockyards Act, 1921, as supplemented, sections 203, 312, and 401 of the Act, and section 1, 57 Stat. 422, as amended by section 4, 90 Stat. 1249 (7 U.S.C. 193, 204, 213, 221)
Pecan Promotion and Research Act of 1990, section 1914 [7 U.S.C. 6009]
Perishable Agricultural Commodities Act, 1930, sections 1(b)(9), 3(c), 4(d), 6(c), 8(a), 8(b), 8(c), 8(e), 9, and 13(a) (7 U.S.C. 499a(b)(9), 499c(c), 499d(d), 499f(c), 499h(a), 499h(b), 499h(c), 499h(e), 499i, 499m(a))
Plant Protection Act, section 424 (7 U.S.C. 7734).
Pork Promotion, Research, and Consumer Information Act of 1985, section 1626 (7 U.S.C. 4815).
Potato Research and Promotion Act, as amended, 7 U.S.C. 2621, Pub. L. 97–244, 96 Stat. 310.
Poultry Products Inspection Act, sections 6, 7, 8(d), and 18 (21 U.S.C. 455, 456, 457(d), 467).
Sheep Promotion, Research, and Information Act of 1994 [7 U.S.C. 7107].
Soybean Promotion, Research, and Consumer Information Act, section 1972 [7 U.S.C. 6307].
Swine Health Protection Act, sections 5 and 6 (7 U.S.C. 3804, 3805).
Title V of the Agricultural Risk Protection Act of 2000, section 501(a) (7 U.S.C. 2279e).
United States Cotton Standards Act, as supplemented, section 3 of the Act and section 2 of 47 Stat. 1621 (7 U.S.C. 51b, 53).
United States Grain Standards Act, sections 7(g)(3), 9, 10, and 17A(d) (7 U.S.C. 79(g)(3), 85, 86, 87f-1(d)).
United States Warehouse Act, sections 12 and 25 (7 U.S.C. 246, 253).
Virus-Serum-Toxin Act (21 U.S.C. 156).
Watermelon Research and Promotion Act, section 1651 (7 U.S.C. 4910).

(b) These rules of practice shall also be applicable to:

(1) Adjudicatory proceedings under the regulations promulgated under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*) for the denial or withdrawal of inspection, certification, or grading service; [1]

(2) Adjudicatory proceedings under the regulations promulgated under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*) for the suspension or revocation of accreditation of veterinarians (9 CFR parts 160, 161);

(3) Proceedings for debarment of counsel under §1.141(d) of this subpart;

(4) Adjudicatory proceedings under the regulations promulgated under the Animal Welfare Act (7 U.S.C. 2131 *et seq.*) for the denial of an initial license application (9 CFR 2.11) or the termination of a license during the license renewal process or at any other time (9 CFR 2.12);

(5) Adjudicatory proceedings under the regulations promulgated under sections 901–905 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 1901 note) pertaining to the commercial transportation of equines to slaughtering facilities (9 CFR part 88); and

(6) Other adjudicatory proceedings in which the complaint instituting the proceeding so provides with the concurrence of the Assistant Secretary for Administration.

[42 FR 743, Jan. 4, 1977]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §1.131, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

§ 1.132 Definitions.

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

Administrator means the Administrator of the Agency administering the statute involved, or any officer or employee of the Agency to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act for the Administrator.

Complainant means the party instituting the proceeding.

Complaint means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.

Decision means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

Hearing means that part of the proceeding which involves the submission of evidence before the Judge for the record in the proceeding.

Hearing Clerk means the Hearing Clerk, United States Department of Agriculture, Washington, DC 20250.

Judge means any Administrative Law Judge appointed pursuant to 5 U.S.C. 3105 and assigned to the proceeding involved.

Judicial Officer means an official of the United States Department of Agriculture delegated authority by the Secretary of Agriculture, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c–450g) and Reorganization Plan No. 2 of 1953 (5 U.S.C. App. (1988)), to perform the function involved (§ 2.35(a) of this chapter), or the Secretary of Agriculture if the authority so delegated is exercised by the Secretary.

Mail means to deposit an item in the United States Mail with postage affixed and addressed as necessary to cause it to be delivered to the address shown by ordinary mail, or by certified or registered mail if specified.

Petitioner means an individual who has filed a petition for review of a determination that the individual is responsibly connected to a licensee within the meaning of 7 U.S.C. 499a(b)(9).

Re-mail means to mail by ordinary mail to an address an item that has been returned after being sent to the same address by certified or registered mail.

Respondent means the party proceeded against.

[42 FR 743, Jan. 4, 1977, as amended at 55 FR 30673, July 27, 1990; 60 FR 8455, Feb. 14, 1995; 61 FR 11503, Mar. 21, 1996; 68 FR 6340, Feb. 7, 2003]

§ 1.133 Institution of proceedings.

(a) *Submission of information concerning apparent violations.* (1) Any interested person desiring to submit information regarding an apparent violation of any provision of a statute listed in § 1.131 or of any regulation, standard, instruction, or order issued pursuant thereto, may file the information with the Administrator of the agency administering the statute involved in accordance with this section and any applicable statutory or regulation provisions. Such information may be made the basis of any appropriate proceeding covered by the rules in this subpart, or any other appropriate proceeding authorized by the particular statute or the regulations promulgated thereunder.

(2) The information may be submitted by telegram, by letter, or by a preliminary statement of facts, setting forth the essential details of the transaction complained of. So far as practicable, the information shall include such of the following items as may be applicable:

(i) The name and address of each person and of the agent, if any, representing such person in the transaction involved;

(ii) Place where the alleged violation occurred;

(iii) Quantity and quality or grade of each kind of product or article involved;

(iv) Date of alleged violation;

(v) Car initial and number, if carlot;
(vi) Shipping and destination points;
(vii) If a sale, the date, sale price, and amount actually received;
(viii) If a consignment, the date, reported proceeds, gross, net;
(ix) Amount of damage claimed, if any;
(x) Statement of other material facts, including terms of contract; and
(xi) So far as practicable, true copies of all available papers relating to the transaction complained about, including shipping documents, letters, telegrams, invoices, manifests, inspection certificates, accounts of sales and any special contracts or agreements.

(3) Upon receipt of the information and supporting evidence, the Administrator shall cause such investigation to be made as, in the opinion of the Administrator, is justified by the facts. If such investigation discloses that no violation of the Act or of the regulations, standards, instructions, or orders issued pursuant thereto, has occurred, no further action shall be taken and the person submitting the information shall be so informed.

(4) The person submitting the information shall not be a party to any proceeding which may be instituted as a result thereof and such person shall have no legal status in the proceeding, except as a subpoenaed witness or as a deponent in a deposition taken without expense to such person.

(b) *Filing of complaint or petition for review.* (1) If there is reason to believe that a person has violated or is violating any provision of a statute listed in §1.131 or of any regulation, standard, instruction or order issued pursuant thereto, whether based upon information furnished under paragraph (a) of this section or other information, a complaint may be filed with the Hearing Clerk pursuant to these rules.

(2) Any person determined by the Chief, PACA Branch, pursuant to §§47.47–47.49 of this title to have been responsibly connected within the meaning of 7 U.S.C. 499a(b)(9) to a licensee who is subject or potentially subject to license suspension or revocation as the result of an alleged violation of 7 U.S.C. 499b or 499h(b) or as provided in 7 U.S.C. 499g(d) shall be entitled to institute a proceeding under this section and to have determined the facts with respect to such responsibly connected status by filing with the Hearing Clerk a petition for review of such determination.

(3) As provided in 5 U.S.C. 558, in any case, except one of willfulness or one in which public health, interest, or safety otherwise requires, prior to the institution of a formal proceeding which may result in the withdrawal, suspension, or revocation of a ''license'' as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the regulation, standard, instruction or order promulgated thereunder.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8455, Feb. 14, 1995; 61 FR 11503, Mar. 21, 1996; 68 FR 6340, Feb. 7, 2003]

§1.134 Docket number.

Each proceeding, immediately following its institution, shall be assigned a docket number by the Hearing Clerk, and thereafter the proceeding shall be referred to by such number.

§1.135 Contents of complaint or petition for review.

(a) *Complaint.* A complaint filed pursuant to §1.133(b) shall state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought.

(b) *Petition for review.* The Petition for Review of responsibly connected status shall describe briefly and clearly the determination sought to be reviewed and shall include a brief statement of the factual and legal matters that the petitioner believes warrant the reversal of the determination.

[42 FR 743, Jan. 4, 1977, as amended at 61 FR 11503, Mar. 21, 1996]

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint (within 10 days in a proceeding under section 4(d) of the Perishable Agricultural Commodities Act, 1930), or such other time as may be specified therein, the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. The attorney may file an appearance of record prior to or simultaneously with the filing of the answer. The answer shall be served upon the complainant, and any other party of record, by the Hearing Clerk. As response to a petition for review of responsibly connected status, the Chief, PACA Branch, shall within ten days after being served by the Hearing Clerk with a petition for review, file with the Hearing Clerk a certified copy of the agency record upon which the Chief, PACA Branch, made the determination that the individual was responsibly connected to a licensee under the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, and such agency record shall become part of the record in the review proceeding.

(b) *Contents.* The answer shall:

(1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

[42 FR 743, Jan. 4, 1977, as amended at 61 FR 11504, Mar. 21, 1996; 68 FR 6340, Feb. 7, 2003]

§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.

(a) *Amendment.* At any time prior to the filing of a motion for a hearing, the complaint, petition for review, answer, or response to petition for review may be amended. Thereafter, such an amendment may be made with consent of the parties, or as authorized by the Judge upon a showing of good cause.

(b) *Joinder.* The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

[61 FR 11504, Mar. 21, 1996, as amended at 68 FR 6340, Feb. 7, 2003]

§ 1.138 Consent decision.

At any time before the Judge files the decision, the parties may agree to the entry of a consent decision. Such agreement shall be filed with the Hearing Clerk in the form of a decision signed by the parties with appropriate space for signature by the Judge, and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. The Judge shall enter such decision without further procedure, unless an error is apparent on the face of the document. Such decision shall have the same force and effect as a decision issued after full hearing, and shall become final upon issuance to become effective in accordance with the terms of the decision.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. Copies of the decision or denial of complainant's Motion shall be served by the Hearing Clerk upon each of the parties and may be appealed pursuant to §1.145. Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to §1.145: *Provided*, *however*, That no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

§ 1.140 Conferences and procedure.

(a) *Purpose and scope.* (1) Upon motion of a party or upon the Judge's own motion, the Judge may direct the parties or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing, when the Judge finds that the proceeding would be expedited by a conference. Reasonable notice of the time, place, and manner of the conference shall be given. The Judge may order each of the parties to furnish at or subsequent to the conference any or all of the following:

(i) An outline of the case or defense;

(ii) The legal theories upon which the party will rely;

(iii) Copies of or a list of documents which the party anticipates introducing at the hearing; and

(iv) A list of anticipated witnesses who will testify on behalf of the party. At the discretion of the party furnishing such list of witnesses, the names of the witnesses need not be furnished if they are otherwise identified in some meaningful way such as a short statement of the type of evidence they will offer.

(2) The Judge shall not order any of the foregoing procedures that a party can show is inappropriate or unwarranted under the circumstances of the particular case.

(3) At the conference, the following matters shall be considered:

(i) The simplification of issues;

(ii) The necessity of amendments to pleadings;

(iii) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(iv) The limitation of the number of expert or other witnesses;

(v) Negotiation, compromise, or settlement of issues;

(vi) The exchange of copies of proposed exhibits;

(vii) The identification of documents or matters of which official notice may be requested;

(viii) A schedule to be followed by the parties for completion of the actions decided at the conference; and

(ix) Such other matters as may expedite and aid in the disposition of the proceeding.

(b) *Reporting.* A conference will not be stenographically reported unless so directed by the Judge.

(c) *Manner of Conference.* (1) The conference shall be conducted by telephone or correspondence unless the Judge determines that conducting the conference by audio-visual telecommunication:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the conference; or

(iii) Would cost less than conducting the conference by telephone or correspondence. If the Judge determines that a conference conducted by audio-

visual telecommunication would measurably increase the United States Department of Agriculture's cost of conducting the conference, the conference shall be conducted by personal attendance of any individual who is expected to participate in the conference, by telephone, or by correspondence.

(2) If the conference is not conducted by telephone or correspondence, the conference shall be conducted by audio-visual telecommunication unless the Judge determines that conducting the conference by personal attendance of any individual who is expected to participate in the conference:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the conference; or

(iii) Would cost less than conducting the conference by audio-visual telecommunication.

(d) *Order.* Actions taken as a result of a conference shall be reduced to a written appropriate order, unless the Judge concludes that a stenographic report shall suffice, or, if the conference takes place within 7 days of the beginning of the hearing, the Judge elects to make a statement on the record at the hearing summarizing the actions taken.

(e) *Related matters.* Upon motion of a respondent, the Judge may order the attorney for the complainant to produce and permit the respondent to inspect and copy or photograph any relevant written or recorded statements or confessions made by such respondent within the possession, custody or control of the complainant.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8455, Feb. 14, 1995]

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. A petition for review shall be deemed a request for a hearing. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing. Waiver of hearing shall not be deemed to be a waiver of the right to request oral argument before the Judicial Officer upon appeal of the Judge's decision. In the event the respondent denies any material fact and fails to file a timely request for a hearing, the matter may be set down for hearing on motion of the complainant or upon the Judge's own motion.

(b) *Time, place, and manner.* (1) If any material issue of fact is joined by the pleadings, the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties. The Judge shall file with the Hearing Clerk a notice stating the time and place of the hearing.[2] This notice shall state whether the hearing will be conducted by telephone, audio-visual telecommunication, or personal attendance of any individual expected to participate in the hearing. The Judge's determination regarding the manner of the hearing shall be made in accordance with paragraphs (b)(3) and (b)(4) of this section. If any change in the time, place, or manner of the hearing is made, the Judge shall file with the Hearing Clerk a notice of such change, which notice shall be served upon the parties, unless it is made during the course of an oral hearing and made part of the transcript or recording, or actual notice is given to the parties.

[2]The place of hearing in a proceeding under the Packers and Stockyards Act shall be set in accordance with the Packers and Stockyards Act (7 U.S.C. 228(e) and (f)). In essence, if there is only one respondent, the hearing is to be held as near as possible to the respondent's place of business or residence depending on the availability of an appropriate location for conducting the hearing. If there is more than one respondent and they have their places of business or residence within a single unit of local government, a single geographical area within a State, or a single State, the hearing is to be held as near as possible to their places of business or residence depending on the availability of an appropriate location for conducting the hearing. If there is more than one respondent, and they have their places of business or residence distant from each other, 7 U.S.C. 228(e) and (f) have no applicability.

(2)(i) If any material issue of fact is joined by the pleadings and the matter is at issue and is ready for hearing, any party may move that the hearing be conducted by telephone or personal attendance of any individual expected to attend the hearing rather than by audio-visual telecommunication. Any motion that the hearing be conducted by telephone or personal attendance of any individual expected to attend the hearing must be accompanied by a memorandum in support of the motion stating the basis for the motion and the circumstances that require the hearing to be conducted other than by audio-visual telecommunication.

(ii) Within 10 days after the Judge issues a notice stating the manner in which the hearing is to be conducted, any party may move that the Judge reconsider the manner in which the hearing is to be conducted. Any motion for reconsideration must be accompanied by a memorandum in support of the motion stating the basis for the motion and the circumstances that require the hearing to be conducted other than in accordance with the Judges's notice.

(3) The hearing shall be conducted by audio-visual telecommunication unless the Judge determines that conducting the hearing by personal attendance of any individual who is expected to participate in the hearing:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the hearing; or

(iii) Would cost less than conducting the hearing by audio-visual telecommunication. If the Judge determines that a hearing conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of conducting the hearing, the hearing shall be conducted by personal attendance of any individual who is expected to participate in the hearing or by telephone.

(4) The Judge may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone if the Judge finds that a hearing conducted by telephone:

(i) Would provide a full and fair evidentiary hearing;

(ii) Would not prejudice any party; and

(iii) Would cost less than conducting the hearing by audio-visual telecommunication or personal attendance of any individual who is expected to participate in the hearing.

(c) *Appearances.* The parties may appear in person or by attorney of record in the proceeding. Any person who appears as attorney must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

(d) *Debarment of attorney.* (1) Whenever a Judge finds that a person acting as attorney for any party to the proceeding is guilty of unethical or contumacious conduct, in or in connection with a proceeding , the Judge may order that such person be precluded from further acting as attorney in the proceeding. An appeal to the Judicial Officer may be taken from any such order, but no proceeding shall be delayed or suspended pending disposition of the appeal: *Provided,* That the Judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney.

(2) Whenever it is found, after notice and opportunity for hearing, that a person, who is acting or has acted as attorney for another person in any proceeding before the United States Department of Agriculture, is unfit to act as such counsel because of such unethical or contumacious conduct, such person will be precluded from acting as counsel in any or all proceedings before the Department as found to be appropriate.

(e) *Failure to appear.* (1) A respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the respondent shall also constitute an admission of all the material allegations of fact contained in the complaint. Complainant shall have an election whether to follow the procedure set forth in §1.139 or whether to present evidence, in whole or in

part, in the form of affidavits or by oral testimony before the Judge. 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 and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in §1.145.

(2) If the petitioner in the case of a Petition for Review of a determination of responsibly connected status within the meaning of 7 U.S.C. 499a(b)(9), having been duly notified, fails to appear at the hearing without good cause, such petitioner shall be deemed to have waived the right to a hearing and to have voluntarily withdrawn the petition for review.

(f) *Order of proceeding.* Except as may be determined otherwise by the Judge, the complainant shall proceed first at the hearing.

(g) *Written statements of direct testimony.* (1) Except as provided in paragraph (g)(2) of this section, each party must exchange with all other parties a written narrative verified statement of the oral direct testimony that the party will provide at any hearing to be conducted by telephone; the direct testimony of each employee or agent of the party that the party will call to provide oral direct testimony at any hearing to be conducted by telephone; and the direct testimony of each expert witness that the party will call to provide oral direct testimony at any hearing to be conducted by telephone. The written direct testimony of witnesses shall be exchanged by the parties at least 10 days prior to the hearing. The oral direct testimony provided by a witness at a hearing conducted by telephone will be limited to the presentation of the written direct testimony, unless the Judge finds that oral direct testimony which is supplemental to the written direct testimony would further the public interest and would not constitute surprise.

(2) The parties shall not be required to exchange testimony in accordance with this paragraph if the hearing is scheduled to begin less than 20 days after the Judge's notice stating the time of the hearing.

(h) *Evidence*—(1) *In general.* (i) The testimony of witnesses at a hearing shall be on oath or affirmation and subject to cross-examination.

(ii) Upon a finding of good cause, the Judge may order that any witness be examined separately and apart from all other witnesses except those who may be parties to the proceeding.

(iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

(2) *Objections.* (i) If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination or to any other ruling of the Judge, the party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the Judge.

(ii) Only objections made before the Judge may subsequently be relied upon in the proceeding.

(3) *Depositions.* The deposition of any witness shall be admitted in the manner provided in and subject to the provisions of §1.148.

(4) *Exhibits.* Unless the Judge finds that the furnishing of copies is impracticable, four copies of each exhibit shall be filed with the Judge: *Provided,* That, where there are more than two parties in the proceeding, an additional copy shall be filed for each additional party. A true copy of an exhibit may be substituted for the original.

(5) *Official records or documents.* An official government record or document or entry therein, if admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same, and shall be prima facie evidence of the relevant facts stated therein. Such

record or document shall be evidenced by an official publication thereof or by a copy certified by a person having legal authority to make such certification.

(6) *Official notice.* Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided,* That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

(7) *Offer of proof.* Whenever evidence is excluded by the Judge, the party offering such evidence may make an offer of proof, which shall be included in the transcript or recording. The offer of proof shall consist of a brief statement describing the evidence excluded. If the evidence consists of a brief oral statement, it shall be included in the transcript or recording in toto. If the evidence consists of an exhibit, it shall be marked for identification and inserted in the hearing record. In either event, the evidence shall be considered a part of the transcript or recording and hearing record if the Judicial Officer, upon appeal, decides the Judge's ruling excluding the evidence was erroneous and prejudicial. If the Judicial Officer decides the Judge's ruling excluding the evidence was erroneous and prejudicial and that it would be inappropriate to have such evidence considered a part of the hearing record, the Judicial Officer may direct that the hearing be reopened to permit the taking of such evidence or for any other purpose in connection with the excluded evidence.

(i) *Transcript or recording.* (1) Hearings to be conducted by telephone shall be recorded verbatim by electronic recording device. Hearings conducted by audio-visual telecommunication or the personal attendance of any individual who is expected to participate in the hearing shall be transcribed, unless the Judge finds that recording the hearing verbatim would expedite the proceeding and the Judge orders the hearing to be recorded verbatim. The Judge shall certify that to the best of his or her knowledge and belief any recording made pursuant to this paragraph with exhibits that were accepted into evidence is the record of the hearing.

(2) If a hearing is recorded verbatim, a party requests the transcript of a hearing or part of a hearing, and the Judge determines that the disposition of the proceeding would be expedited by a transcript of the hearing or part of a hearing, the Judge shall order the verbatim transcription of the recording as requested by the party.

(3) Recordings or transcripts of hearings shall be made available to any person at actual cost of duplication.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8455, Feb. 14, 1995; 61 FR 11504, Mar. 21, 1996; 68 FR 6340, Feb. 7, 2003]

§ 1.142 Post-hearing procedure.

(a) *Corrections to transcript or recording.* (1) Within the period of time fixed by the Judge, any party may file a motion proposing corrections to the transcript or recording.

(2) Unless a party files such a motion in the manner prescribed, the transcript or recording shall be presumed, except for obvious typographical errors, to be a true, correct, and complete transcript or recording of the testimony given at the hearing and to contain an accurate description or reference to all exhibits received in evidence and made part of the hearing record, and shall be deemed to be certified without further action by the Judge.

(3) As soon as practicable after the close of the hearing and after consideration of any timely objections filed as to the transcript or recording, the Judge shall issue an order making any corrections to the transcript or recording which the Judge finds are warranted, which corrections shall be entered onto the original transcript or recording by the Hearing Clerk (without obscuring the original text).

(b) *Proposed findings of fact, conclusions, orders, and briefs.* Prior to the Judge's decision, each party shall be afforded a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and brief in support thereof. A copy of each such document filed by a party shall be served upon each of the other parties.

(c) *Judge's decision.* (1) The Judge may, upon motion of any party or in his or her own discretion, issue a decision orally at the close of the hearing, or within a reasonable time after the closing of the hearing.

(2) If the decision is announced orally, a copy thereof, excerpted from the transcript or recording, shall be furnished to the parties by the Hearing Clerk. Irrespective of the date such copy is mailed, the issuance date of the decision shall be the date the oral decision was announced.

(3) If the decision is in writing, it shall be filed with the Hearing Clerk and served upon the parties as provided in §1.147.

(4) The Judge's decision shall become final and effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to §1.145; *Provided, however,* that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

[42 FR 743, Jan. 4, 1977, as amended at 53 FR 7177, Mar. 7, 1988; 60 FR 8456, Feb. 14, 1995; 68 FR 6340, Feb. 7, 2003]

§1.143 Motions and requests.

(a) *General.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties, except (1) requests for extensions of time pursuant to §1.147, (2) requests for subpoenas pursuant to §1.149, and (3) motions and requests made on the record during the oral hearing. The Judge shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Judge's decision pursuant to §1.145, except motions directly relating to the appeal. Thereafter, the Judicial Officer will rule on any motions and requests, as well as the motions directly relating to the appeal.

(b) *Motions entertained.* (1) Any motion will be entertained other than a motion to dismiss on the pleading.

(2) All motions and request concerning the complaint must be made within the time allowed for filing an answer.

(c) *Contents.* All written motions and requests shall state the particular order, ruling, or action desired and the grounds therefor.

(d) *Response to motions and requests.* Within 20 days after service of any written motion or request, or within such shorter or longer period as may be fixed by the Judge or the Judicial Officer, an opposing party may file a response to the motion or request. The other party shall have no right to reply to the response; however, the Judge or the Judicial Officer, in the Judge's or the Judicial Officer's discretion, may order that a reply be filed.

(e) *Certification to the judicial officer.* The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to §1.145 shall be made by and in the discretion of the Judge. The Judge may either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

[42 FR 743, Jan. 4, 1977, as amended at 55 FR 30673, July 27, 1990; 68 FR 6340, Feb. 7, 2003]

§1.144 Judges.

(a) *Assignment.* No Judge shall be assigned to serve in any proceeding who (1) has any pecuniary interest in any matter or business involved in the proceeding, (2) is related within the third degree by blood or marriage to any party to the proceeding, or (3) has any conflict of interest which might impair the Judge's objectivity in the proceeding.

(b) *Disqualification of Judge.* (1) Any party to the proceeding may, by motion made to the Judge, request that the Judge withdraw from the proceeding because of an alleged disqualifying reason. Such motion shall set forth with particularity the grounds of alleged disqualification. The Judge may then either rule upon or certify the motion to the Secretary, but not both.

(2) A Judge shall withdraw from any proceeding for any reason deemed by the Judge to be disqualifying.

(c) *Powers.* Subject to review as provided in this subpart, the Judge, in any

assigned proceeding, shall have power to:

(1) Rule upon motions and requests;

(2) Set the time, place, and manner of a conference and the hearing, adjourn the hearing, and change the time, place, and manner of the hearing;

(3) Administer oaths and affirmations;

(4) Issue subpoenas as authorized by the statute under which the proceeding is conducted, requiring the attendance and testimony of witnesses and the production of books, contracts, papers, and other documentary evidence at the hearing;

(5) Summon and examine witnesses and receive evidence at the hearing;

(6) Take or order the taking of depositions as authorized under these rules;

(7) Admit or exclude evidence;

(8) Hear oral argument on facts or law;

(9) Require each party to provide all other parties and the Judge with a copy of any exhibit that the party intends to introduce into evidence prior to any hearing to be conducted by telephone or audio-visual telecommunication;

(10) Require each party to provide all other parties with a copy of any document that the party intends to use to examine a deponent prior to any deposition to be conducted by telephone or audio-visual telecommunication;

(11) Require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the Judge are able to transmit and receive documents during the hearing;

(12) Require that any deposition to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties are able to transmit and receive documents during the deposition;

(13) Do all acts and take all measures necessary for the maintenance of order, including the exclusion of contumacious counsel or other persons; and

(14) Take all other actions authorized under these rules.

(d) *Who may act in the absence of the Judge.* In case of the absence of the Judge or the Judge's inability to act, the powers and duties to be performed by the Judge under these rules of practice in connection with any assigned proceeding may, without abatement of the proceeding unless otherwise directed by the Chief Judge, be assigned to any other Judge.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6340, Feb. 7, 2003]

§ 1.145 Appeal to Judicial Officer.

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

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection

with a prehearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the judicial officer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite*—(1) *Filing; service; ruling.* A petition for reopening the hearing to take further evidence, or for rehearing or reargument of the proceeding, or for reconsideration of the decision of the Judicial Officer, must be made by petition filed with the Hearing Clerk. Every such petition must state specifically the grounds relied upon. Any such petition filed prior to the filing of an appeal of the Judge's decision pursuant to §1.145 shall be ruled upon by the Judge, and any such petition filed thereafter shall be ruled upon by the Judicial Officer.

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of*

the Judicial Officer. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

(b) *Procedure for disposition of petitions.* Within 20 days following the service of any petition provided for in this section, any party to the proceeding may file with the Hearing Clerk a reply thereto. As soon as practicable thereafter, the Judge or the Judicial Officer, as the case may be, shall announce the determination whether to grant or deny the petition. The decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely petition. Such decision shall not be final for purposes of judicial review until the petition is denied or the decision is affirmed or modified pursuant to the petition and the time for judicial review shall begin to run upon the filing of such final action on the petition. In the event that any such petition is granted, the applicable rules of practice, as set out elsewhere herein, shall be followed. A person filing a petition under this section shall be regarded as the moving party, although such person shall be referred to as the complainant or respondent, depending upon the designation in the original proceeding.

§ 1.147 Filing; service; extensions of time; and computation of time.

(a) *Filing; number of copies.* Except as otherwise provided in this section, all documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be filed in quadruplicate: *Provided,* That where there are more than two parties in the proceeding, an additional copy shall be filed for each additional party. Any document or paper required or authorized under the rules in this part to be filed with the Hearing Clerk shall, during the course of an oral hearing, be filed with the Judge.

(b) *Who shall make service.* Copies of all such documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be served upon the parties by the Hearing Clerk, or by some other employee of the Department, or by a U.S. Marshal or deputy marshal.

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that,* if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

(2) Any document or paper, other than one specified in paragraph (c)(1) of this section or written questions for a deposition as provided in §1.148(d)(2), shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of mailing by ordinary mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual.

(3) Any document or paper served other than by mail, on any party to a proceeding, other than the Secretary or agent thereof, shall be deemed to be received by such party on the date of:

(i) Delivery to any responsible individual at, or leaving in a conspicuous place at, the last known principal place of business of such party, last known

principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, or

(ii) Delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

(d) *Service on another.* Any subpoena, written questions for a deposition under §1.148(d)(2), or other document or paper, served on any person other than a party to a proceeding, the Secretary or agent thereof, shall be deemed to be received by such person on the date of:

(1) Delivery by certified mail or registered mail to the last known principal place of business of such person, last known principal place of business of the attorney or representative of record of such person, or last known residence of such person if an individual;

(2) Delivery other than by mail to any responsible individual at, or leaving in a conspicuous place at, any such location; or

(3) Delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

(e) *Proof of service.* Any of the following, in the possession of the Department, showing such service, shall be deemed to be accurate:

(1) A certified or registered mail receipt returned by the postal service with a signature;

(2) An official record of the postal service;

(3) An entry on a docket record or a copy placed in a docket file by the Hearing Clerk of the Department or by an employee of the Hearing Clerk in the ordinary course of business;

(4) A certificate of service, which need not be separate from and may be incorporated in the document or paper of which it certifies service, showing the method, place and date of service in writing and signed by an individual with personal knowledge thereof, *Provided* that such certificate must be verified by oath or declaration under penalty of perjury if the individual certifying service is not a party to the proceeding in which such document or paper is served, an attorney or representative of record for such a party, or an official or employee of the United States or of a State or political subdivision thereof.

(f) *Extensions of time.* The time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge or the Judicial Officer as provided in §1.143, if, in the judgment of the Judge or the Judicial Officer, as the case may be, there is good reason for the extension. In all instances in which time permits, notice of the request for extension of the time shall be given to the other party with opportunity to submit views concerning the request.

(g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

(h) *Computation of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided,* That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

[42 FR 743, Jan. 4, 1977, as amended at 55 FR 30674, July 27, 1990; 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

§1.148 Depositions.

(a) *Motion for taking deposition.* Upon the motion of a party to the proceeding, the Judge may, at any time after the filing of the complaint, order the taking of testimony by deposition. The Motion shall be in writing, shall be filed with the Hearing Clerk, and shall set forth:

(1) The name and address of the proposed deponent;

(2) The name and address of the person (referred to hereafter in this section as the ''officer'') qualified under the regulations in this part to take depositions, before whom the proposed examination is to be made;

(3) The proposed time and place of the examination, which shall be at least 15 days after the date of the mailing of the motion; and

(4) The reasons why such deposition should be taken, which shall be solely for the purpose of eliciting testimony which otherwise might not be available at the time of hearing, for uses as provided in paragraph (g) of this section.

(b) *Judge's order for taking deposition.* (1) If the Judge finds that the testimony may not be otherwise available at the hearing, the taking of the deposition may be ordered. The order shall be filed with the Hearing Clerk and shall state:

(i) The time of the deposition;

(ii) The place of the deposition;

(iii) The manner of the deposition (telephone, audio-visual telecommunication, or personal attendance of those who are to participate in the deposition);

(iv) The name of the officer before whom the deposition is to be made; and

(v) The name of the deponent. The officer and the time, place, and manner need not be the same as those suggested in the motion for the deposition.

(2) The deposition shall be conducted by telephone unless the Judge determines that conducting the deposition by audio-visual telecommunication:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the deposition; or

(iii) Would cost less than conducting the deposition by telephone. If the Judge determines that a deposition conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of conducting the deposition, the deposition shall be conducted by personal attendance of any individual who is expected to participate in the deposition or by telephone.

(3) If the deposition is not conducted by telephone, the deposition shall be conducted by audio-visual telecommunication unless the Judge determines that conducting the deposition by personal attendance of any individual who is expected to participate in the deposition:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the deposition; or

(iii) Would cost less than conducting the deposition by telephone or audio-visual telecommunication.

(c) *Qualifications of officer.* The deposition shall be made before the Judge or before an officer authorized by the law of the United States or by the law of the place of the examination to administer oaths, or before an officer authorized by the Secretary to administer oaths.

(d) *Procedure on examination.* (1) The deponent shall be examined under oath or affirmation and shall be subject to cross-examination. Objections to questions or documents shall be in short form, stating the grounds of objections relied upon. The questions proponded, together with all objections made (but not including argument or debate), shall be recorded verbatim. In lieu of oral examination, parties may transmit written questions to the officer prior to the examination and the officer shall propound such questions to the deponent.

(2) The applicant shall arrange for the examination of the witness either by oral examination, or by written questions upon agreement of the parties or as directed by the Judge. If the examination is conducted by means of written questions, copies of the applicant's questions must be received by the other party to the proceeding and the officer at least 10 days prior to the date set for the examination unless otherwise agreed, and any cross questions of a party other than the applicant must be received by the applicant and the officer at any time prior to the time of the examination.

(e) *Certification by officer.* The officer shall certify on the deposition that the deponent was duly sworn and that the deposition is a true record of the deponent's testimony. The officer shall then securely seal the deposition, together with one copy thereof (unless there are more than two parties in the proceeding, in which case there should be another copy for each additional party), in an envelope and mail the

same by registered or certified mail to the Hearing Clerk.

(f) *Corrections to the transcript or recording.* (1) At any time prior to the hearing, any party may file a motion proposing corrections to the transcript or recording of the deposition.

(2) Unless a party files such a motion in the manner prescribed, the transcript or recording shall be presumed, except for obvious typographical errors, to be a true, correct, and complete transcript or recording of the testimony given in the deposition proceeding and to contain an accurate description or reference to all exhibits in connection therewith, and shall be deemed to be certified correct without further procedure.

(3) At any time prior to use of the deposition in accordance with paragraph (g) of this section and after consideration of any objections filed thereto, the Judge may issue an order making any corrections in the transcript or recording which the Judge finds are warranted, which corrections shall be entered onto the original transcript or recording by the Hearing Clerk (without obscuring the original text).

(g) *Use of deposition.* A deposition ordered and taken in accordance with the provisions of this section may be used in a proceeding under these rules if the Judge finds that the evidence is otherwise admissible and (1) that the witness is dead; (2) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; (3) that the party offering the deposition has endeavored to procure the attendance of the witness by subpoena, but has been unable to do so; or (4) that such exceptional circumstances exist as to make it desirable, in the interests of justice, to allow the deposition to be used. If the party upon whose motion the deposition was taken refuses to offer it in evidence, any other party may offer the deposition or any part thereof in evidence. If only part of a deposition is offered in evidence by a party, an adverse party may require the introduction of any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

[42 FR 743, Jan. 4, 1977, as amended at 55 FR 30674, July 27, 1990; 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

§ 1.149 Subpoenas.[3]

(a) *Issuance of subpoenas.* The attendance and testimony of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the proceeding may be required by subpoena at any designated place of hearing if authorized by the statute under which the proceeding is conducted. Subpoenas shall be issued by the Judge upon a reasonable showing by the applicant of the grounds and necessity thereof; and with respect to subpoenas for the production of documents, the request shall also show their competency, relevancy, and materiality. All requests for subpoenas shall be in writing, unless waived by the Judge for good cause shown. Except for good cause shown, requests for subpoenas shall be received by the Judge at least 10 days prior to the date set for the hearing.

(b) *Service of subpoenas.* Subpoenas may be served by any person not less than 18 years of age. The party at whose instance a subpoena is issued shall be responsible for service thereof. Subpoenas shall be served as provided in §1.147.

[42 FR 743, Jan. 4, 1977, as amended at 55 FR 30674, July 27, 1990; 60 FR 8457, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

§ 1.150 Fees of witnesses.

Witnesses summoned under these rules of practice shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken, and the officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears or the deposition is taken.

[3] This section relates only to subpoenas for the stated purpose and has no relevance with respect to investigatory subpoenas.

§ 1.151 *Ex parte* communications.

(a) At no stage of the proceeding between its institution and the issuance of the final decision shall the Judge or Judicial Officer discuss *ex parte* the merits of the proceeding with any person who is connected with the proceeding in an advocative or in an investigative capacity, or with any representative of such person: *Provided,* That procedural matters shall not be included within this limitation; and *Provided further,* That the Judge or Judicial Officer may discuss the merits of the case with such a person if all parties to the proceeding, or their attorneys have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record.

(b) No interested person shall make or knowingly cause to be made to the Judge or Judicial Officer an *ex parte* communication relevant to the merits of the proceeding.

(c) If the Judge or the Judicial Officer receives an *ex parte* communication in violation of this section, the one who receives the communication shall place in the public record of the proceeding:

(1) All such written communications;

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

(3) All written responses, and memoranda stating the substance of all oral responses thereto.

(d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Judge or Judicial Officer may, to the extent consistent with the interests of justice and the policy of the underlying statute, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(e) To the extent consistent with the interests of justice and the policy of the underlying statute, a violation of this section shall be sufficient grounds for a decision adverse to the party who knowingly commits a violation of this section or who knowingly causes such a violation to occur.

(f) For purposes of this section *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 it shall not include requests for status reports on any matter or the proceeding.

Subpart I—Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper-Volstead Act

AUTHORITY: 7 U.S.C. 291, 292; 7 CFR 2.35, 2.41.

SOURCE: 45 FR 6587, Jan. 29, 1980, unless otherwise noted.

§ 1.160 Scope and applicability of rules in this part.

The rules of practice in this part shall be applicable to cease and desist proceedings, initiated upon complaint by the Secretary of Agriculture, pursuant to section 2 of the Capper-Volstead Act.

§ 1.161 Definitions.

As used in this part, words in the single form shall be deemed to import the plural, and vice versa, as the case may require. The following terms shall be construed, respectively, to mean:

Act means the Capper-Volstead Act, approved February 18, 1922, 42 Stat. 388, 7 U.S.C. 291, 292.

Association means a cooperative association, a federation of cooperatives, or other association of agricultural producers, as defined in section 1 of the Act.

Complainant or *Secretary* means the Secretary of Agriculture, United States Department of Agriculture, or any officer(s) or employee(s) to whom authority has heretofore been delegated, or whom authority may hereafter be delegated, to act in his or her stead.

Complaint means a formal complaint instituted by the Secretary of Agriculture requiring respondent to show cause why an order should not be made directing it to cease and desist from acts of monopolization or restraint of trade, which result in undue price enhancement.

Decision means: (1) the Judge's decision, and includes (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law, or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and order submitted by the parties, and (2) the decision and order by the Judicial Officer upon an appeal of the Judge's decision.

Hearing means that part of the proceeding which involves the submission of evidence before the Judge for the record in the proceeding.

Hearing Clerk means the Hearing Clerk, United States Department of Agriculture, Washington, DC 20250.

Judge means any Administrative Law Judge appointed pursuant to 5 U.S.C. 3105 (the Administrative Procedure Act) and assigned to the proceeding involved.

Judicial Officer means an official of the United States Department of Agriculture delegated authority by the Secretary, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c–450g) and Reorganization Plan No. 2 of 1953 (5 U.S.C. App. (1988)), to perform the function involved (§2.35(a) of this chapter), or the Secretary if he or she exercises the authority so delegated.

Respondent means the cooperative associations, or association, against whom a complaint has been issued.

[45 FR 6587, Jan. 29, 1980, as amended at 60 FR 8457, Feb. 14, 1995]

§ 1.162 Institution of proceedings.

(a) *Filing of information.* Any person having information that any agricultural association, as defined in the Capper-Volstead Act, is engaged in any practice which monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, may submit such information to the Secretary. Such information shall be in writing and shall contain a complete statement of facts detailing the price enhancement and the practices alleged.

(b) *Consideration of information.* The Secretary shall consider all information filed under paragraph (a) of this section, and any other information which the Secretary may obtain relating to a violation of section 2 of the Act. If the Secretary finds that there is reason to believe that any association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby the Secretary shall cause a complaint to be filed, requiring the association to show cause why an order should not be made directing the association to cease and desist from such monopolization or restraint of trade. The complaint shall be filed with the Hearing Clerk, who shall assign to the proceeding a docket number and effect service upon respondent.

[45 FR 6587, Jan. 29, 1980, as amended at 60 FR 8457, Feb. 14, 1995]

§ 1.163 The complaint.

The complaint shall state briefly all allegations of fact which constitute a basis for the proceeding, and shall designate a time and place for the hearing in the matter, which shall be at least 30 days after the service of the complaint upon the respondent.

§ 1.164 Answer.

(a) *Filing and service.* Within 20 days after service of the complaint, or such other time as may be specified therein, the respondent shall file with the Hearing Clerk, an answer, signed by the respondent or the respondent's attorney. The answer shall be served upon the complainant by the Hearing Clerk.

(b) *Contents.* The answer shall clearly admit, deny, or offer an explanation in response to each of the allegations of the complaint, and shall clearly set forth any affirmative defense.

(c) *Default.* Failure to file an answer shall constitute an admission of the allegations in the complaint, and may be the basis for a decision upon the presentation of a *prima facie* case by the complainant.

[45 FR 6587, Jan. 29, 1980, as amended at 60 FR 8457, Feb. 14, 1995]

§ 1.165 Amendments.

Amendments to the complaint may be made prior to the filing of an answer in which case the time for filing the answer shall be extended 20 days or for other time agreed to by the parties. After the answer is filed, amendments

to the complaint, or to the answer or other pleading, may be made by agreement of the parties or allowed at the discretion of the Judge. In case of an amendment which significantly changes the issues, the hearing shall, on the request of a party, be postponed or adjourned for a reasonable period, if the Judge determines that such action is necessary to avoid prejudice to the party.

§ 1.166 Consent order.

At any time, complainant and respondent may agree to the entry of a consent order. Such order shall be entered by the Judge (prior to a decision) or the Judicial Officer (after a decision by the Judge), and become effective on the date specified therein.

§ 1.167 Conference.

(a) *Purpose.* Upon motion of a party or upon the Judge's own motion, the Judge may direct the parties to attend a conference when the Judge finds that the proceeding would be expedited by discussions on matters of procedure and/or possible stipulations. The conference may include discussions regarding:

(1) Simplification of the issues;

(2) Limitation of expert or other witnesses;

(3) The orderly presentation of evidence; and

(4) Any other matters that may expedite and aid in the disposition of the proceeding.

(b) *Manner of the Conference.* (1) The conference shall be conducted by telephone or correspondence unless the Judge determines that conducting the conference by audio-visual telecommunication:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the conference; or

(iii) Would cost less than conducting the conference by telephone or correspondence. If the Judge determines that a conference conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of conducting the conference, the conference shall be conducted by personal attendance of any individual who is expected to participate in the conference, by telephone, or by correspondence.

(2) If the conference is not conducted by telephone or correspondence, the conference shall be conducted by audio-visual telecommunication unless the Judge determines that conducting the conference by personal attendance of any individual who is expected to participate in the conference:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the conference; or

(iii) Would cost less than conducting the conference by audio-visual telecommunication.

[60 FR 8457, Feb. 14, 1995]

§ 1.168 Procedure for hearing.

(a) *Time and place.* The oral hearing shall be held at such time and place as specified in the complaint, and not less than 30 days after service thereof. The time and place of the hearing may be changed for good cause, by the Judge, upon motion of either complainant or respondent.

(b) *Manner of hearing.* (1) The Judge shall file with the Hearing Clerk a notice stating whether the hearing will be conducted by telephone, audio-visual telecommunication, or personal attendance of any individual expected to attend the hearing and the Judge's determination regarding the manner of hearing shall be made in accordance with paragraphs (b)(3) and (b)(4) of this section. If any change in the manner of the hearing is made, the Judge shall file with the Hearing Clerk a notice of the change, which notice shall be served on the parties, unless it is made during the course of an oral hearing and made part of the transcript or recording, or actual notice is given to the parties.

(2)(i) Any party may move that the hearing be conducted by telephone or personal attendance of any individual expected to attend the hearing rather than by audio-visual telecommunication. Any motion that the hearing be conducted by telephone or personal attendance of any individual expected to attend the hearing must be accompanied by a memorandum in support of

the motion stating the basis for the motion and the circumstances that require the hearing to be conducted other than by audio-visual telecommunication.

(ii) Within 10 days after the Judge issues a notice stating the manner in which the hearing is to be conducted, any party may move that the Judge reconsider the manner in which the hearing is to be conducted. Any motion for reconsideration must be accompanied by a memorandum in support of the motion stating the basis for the motion and the circumstances that require the hearing to be conducted other than in accordance with the Judges's notice.

(3) The hearing shall be conducted by audio-visual telecommunication unless the Judge determines that conducting the hearing by personal attendance of any individual who is expected to participate in the hearing:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the hearing; or

(iii) Would cost less than conducting the hearing by audio-visual telecommunication. If the Judge determines that a hearing conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of conducting the hearing, the hearing shall be conducted by personal attendance of any individual who is expected to participate in the hearing or by telephone.

(4) The Judge may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone if the Judge finds that a hearing conducted by telephone:

(i) Would provide a full and fair evidentiary hearing;

(ii) Would not prejudice any party; and

(iii) Would cost less than conducting the hearing by audio-visual telecommunication or personal attendance of any individual who is expected to participate in the hearing.

(c) *Appearances.* The parties may appear in person or by counsel or by other representative. Persons who appear as counsel or in a representative capacity must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

(d) *Order of proceeding.* Except as otherwise may be agreed by the parties and approved by the Judge, the complainant shall proceed first at the hearing.

(e) *Failure to appear.* If respondent, after being duly notified, fails to appear at the hearing, and no good cause for such failure is established, complainant shall present a *prime facie* case on the matters denied in the answer.

(f) *Written statements of direct testimony.* (1) Except as provided in paragraph (f)(2) of this section, each party must exchange with all other parties a written narrative verified statement of the oral direct testimony that the party will provide at any hearing to be conducted by telephone; the direct testimony of each employee or agent of the party that the party will call to provide oral direct testimony at any hearing to be conducted by telephone; and the direct testimony of each expert witness that the party will call to provide oral direct testimony at any hearing to be conducted by telephone. The written direct testimony of witnesses shall be exchanged by the parties at least 10 days prior to the hearing. The oral direct testimony provided by a witness at a hearing conducted by telephone will be limited to the presentation of the written direct testimony, unless the Judge finds that oral direct testimony which is supplemental to the written direct testimony would further the public interest and would not constitute surprise.

(2) The parties shall not be required to exchange testimony in accordance with this paragraph if the hearing is scheduled to begin less than 20 days after the Judge's notice stating the time of the hearing.

(g) *Evidence.* (1) The testimony of witnesses at the hearing shall be upon oath or affirmation, transcribed or recorded verbatim, and subject to cross-examination. Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

(2) *Objections.* If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination, the party shall briefly state the grounds of such objections, whereupon an automatic exception will follow if the objection is overruled by the Judge. The ruling of the Judge on any objection shall be part of the transcript or recording. Only objections made before the Judge may subsequently be relied upon in the proceeding.

(3) *Official records or documents.* An official record or document, if admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same, and shall be *prima facie* evidence of the relevant facts stated therein. Such record or document shall be evidenced by an official publication thereof, or by a copy certified by a person having legal authority to make such certification.

(4) *Exhibits.* Unless the Judge finds that the furnishing of multiple copies is impracticable, four copies of each exhibit shall be filed with the Judge unless the Judge finds that a greater or lesser number is desirable. A true copy of an exhibit may be substituted for the original.

(5) *Official notice.* Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided,* That the opposing party shall be given adequate opportunity to show that such facts are erroneously noticed.

(6) *Offer of proof.* Whenever evidence is deleted from the record, the party offering such evidence may make an offer of proof, which shall be included in the transcript or recording. The offer of proof shall consist of a brief statement describing the evidence excluded. If the evidence consists of a brief oral statement or of an exhibit, it shall be inserted into the transcript or recording in toto. In such event, it shall be considered a part of the transcript or recording and record if the Judicial Officer decides that the Judge's ruling in excluding the evidence was erroneous and prejudicial. The Judge shall not allow the insertion of such excluded evidence in toto if the taking of such evidence will consume considerable time at the hearing. In the latter event, if the Judicial Officer decides that the Judge's ruling excluding the evidence was both prejudicial and erroneous, the hearing may be reopened to permit the taking of such evidence.

(7) *Affidavits.* Affidavits may be submitted into evidence, in lieu of witness testimony, only to the extent, and in the manner agreed upon by the parties.

(h) *Transcript or recording.* (1) Hearings to be conducted by telephone shall be recorded verbatim by electronic recording device. Hearings conducted by audio-visual telecommunication or the personal attendance of any individual who is expected to participate in the hearing shall be transcribed, unless the Judge finds that recording the hearing verbatim would expedite the proceeding and the Judge orders the hearing to be recorded verbatim. The Judge shall certify that to the best of his or her knowledge and belief any recording made pursuant to this paragraph with exhibits that were accepted into evidence is the record of the hearing.

(2) If a hearing is recorded verbatim, a party requests the transcript of a hearing or part of a hearing, and the Judge determines that the disposition of the proceeding would be expedited by a transcript of the hearing or part of a hearing, the Judge shall order the verbatim transcription of the recording as requested by the party.

(3) Recordings or transcripts of hearings shall be made available to any person at actual cost of duplication.

[45 FR 6587, Jan. 29, 1980, as amended at 60 FR 8457, Feb. 14, 1995]

§ 1.169 Post-hearing procedure and decision.

(a) *Corrections to transcript or recording.* (1) At any time, but not later than the time fixed for filing proposed findings of fact, conclusions and order, or briefs, as the case may be, any party may file a motion proposing corrections to the transcript or recording.

(2) Unless a party files such a motion in the manner prescribed, the transcript or recording shall be presumed,

except for obvious typographical errors, to be a true, correct, and complete transcript or recording of the testimony given at the hearing and to contain an accurate description or reference to all exhibits received in evidence and made part of the hearing record.

(3) At any time prior to the filing of the Judge's decision and after consideration of any objections filed as to the transcript or recording, the Judge may issue an order making any corrections in the transcript or recording which the Judge finds are warranted, which corrections shall be entered onto the original transcript or recording by the Hearing Clerk (without obscurring the original text).

(b) *Proposed findings of fact, conclusions, order and briefs.* The parties may file with the Hearing Clerk proposed findings of fact, conclusions and orders based solely upon the record and on matters subject to official notice, and briefs in support thereof. The Judge shall announce at the hearing a definite period of time within which these documents may be filed.

(c) *Judge's decision.* The Judge, within a reasonable time after the termination of the period allowed for the filing of proposed findings of fact, conclusions and order, and briefs in support thereof, shall prepare, upon the basis of the record and matters officially noticed, and shall file with the Hearing Clerk, the Judge's decision, a copy of which shall be served by the Hearing Clerk upon each of the parties. Such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to §1.170: *Provided,* That no decision shall be final for purposes of a request for Judicial Review, as provided in §1.175(a), except a final decision of the Judicial Officer on appeal.

[45 FR 6587, Jan. 29, 1980, as amended at 60 FR 8458, Feb. 14, 1995]

§ 1.170 Appeal to the Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in §1.168(g)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a prehearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral arguments before the Judicial Officer. Within the time allowed for filing a response, appellee

may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; Postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the judicial officer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of a request for judicial review as provided in §1.175(a).

[45 FR 6587, Jan. 29, 1980, as amended at 60 FR 8458, Feb. 14, 1995]

§ 1.171 Intervention.

Intervention under these rules shall not be allowed, except that, in the discretion of the Judicial Officer, or the Judge, any person showing a substantial interest in the outcome of the proceeding shall be permitted to participate in oral or written argument pursuant to §§1.169 and 1.170.

[45 FR 6587, Jan. 29, 1980, as amended at 60 FR 8458, Feb. 14, 1995]

§ 1.172 Motions and requests.

(a) *General.* All motions and requests shall be filed with the Hearing Clerk, and shall be served upon the parties, except those made on record during the oral hearing. The Judge shall rule upon all motions and requests filed or made prior to the filing of the certification of the transcript or recording. Thereafter, the Judicial Officer will rule on any motions or requests.

(b) *Motions entertained.* Any motion will be entertained except a motion to dismiss on the pleadings. All motions and requests concerning the complaint must be made within the time allowed for filing an answer.

(c) *Contents.* All written motions and requests shall state the particular order, ruling, or action desired and the grounds therefor.

(d) *Response to motions in request.* Within ten days after service of any written motion or request, or within such shorter or longer period as may be fixed by the Judge or the Judicial Officer the opposing party may file a response to the motion or request.

(e) *Certification to the judicial officer.* The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the time when the Judge's certification of the transcript is filed with the Hearing Clerk, shall be made by and in the discretion of the Judge. The Judge may either rule upon or certify the motion,

request, objection, or other question to the Judicial Officer, but not both.

[45 FR 6587, Jan. 29, 1980, as amended at 60 FR 8458, Feb. 14, 1995]

§ 1.173 Judges.

(a) *Assignment.* No Judge shall be assigned to serve in any proceeding who (1) has any pecuniary interest in any matter or business involved in the proceeding, (2) is related within the third degree by blood or marriage to any party to the proceeding, or (3) has participated in the investigation preceding the institution of the proceeding or in determination that it should be instituted or in the preparation of the moving paper or in the development of the evidence to be introduced therein.

(b) *Disqualification of Judge.* (1) Any party to the proceeding may, by motion made to the Judge, request that the Judge disqualify himself or herself and withdraw from the proceeding. Such motion shall set forth with particularity the alleged disqualification. The Judge may then either rule upon or certify the motion to the Judicial Officer, but not both.

(2) A Judge will withdraw from any proceeding in which the Judge deems himself or herself disqualified for any reason.

(c) *Conduct.* At no stage of the proceeding between its institution and the issuance of the final decision shall the Judicial Officer or the Judge discuss *ex parte* the merits of the proceeding with any person who is connected with the proceeding as an advocate or in an investigative capacity, or with any representative of such person: *Provided,* That procedural matters shall not be included within the limitation: and *Provided further,* That the Judicial Officer of Judge may discuss the merits of the case with such a person if all parties to the proceeding, or their representatives, have been given an opportunity to be present. Any memorandum or other communication addressed to the Judicial Officer or a Judge, during the pendency of the proceeding, and relating to the merits thereof, by or on behalf of any party or any interested person, shall be filed with the Hearing Clerk. A copy thereof shall be served upon the parties to the proceeding, and, in the discretion of the Judge or the Judicial Officer, opportunity may be given to file a reply thereto within a specified period.

(d) *Powers.* Subject to review by the Judicial Officer as provided elsewhere in this part, the Judge, in any proceeding assigned to him or her shall have power to:

(1) Rule upon motions and requests;

(2) Set the time, place, and manner of any conference, set the manner of the hearing, adjourn the hearing, and change the time, place, and manner of the hearing;

(3) Administer oaths and affirmations;

(4) Examine witnesses and receive relevant evidence;

(5) Admit or exclude evidence;

(6) Hear oral argument on facts or law;

(7) Require each party to provide all other parties and the Judge with a copy of any exhibit that the party intends to introduce into evidence prior to any hearing to be conducted by telephone or audio-visual telecommunication;

(8) Require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the Judge are able to transmit and receive documents during the hearing;

(9) Do all acts and take all measures necessary for the orderly presentation of evidence, maintenance of order, and the efficient conduct of the proceeding.

(e) *Who may act in the absence of the Judge.* In case of the absence of the Judge or upon the Judge's inability to act, the powers and duties to be performed by the Judge under these Rules of Practice in connection with a proceeding assigned to the Judge may, without abatement of the proceeding, be assigned to any other Judge.

[45 FR 6587, Jan. 29, 1980, as amended at 60 FR 8458, Feb. 14, 1995]

§ 1.174 Filing; service; extensions of time; and computation of time.

(a) *Filing; Number of Copies.* Except as otherwise provided by the Judge or the Secretary, all documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be filed in quadruplicate:

Provided, That, where there are parties to the proceeding in addition to complainant and respondent, an additional copy shall be filed for each such additional party. Any document or paper, required or authorized under the rules in this part to be filed with the Hearing Clerk, shall, during the course of an oral hearing, be filed with the Judge.

(b) *Service; proof of service.* Copies of all such documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk, shall be served upon the parties by the Hearing Clerk, or by some other employee of the Department, or by a U.S. Marshal or his Deputy. Service shall be made either (1) by delivering a copy of the document or paper to the individual to be served or to a member of the partnership to be served, or to the president, secretary, or other executive officer or any director of the corporation or association to be served, or to the attorney or agent of record of such individual, partnership, corporation, organization, or association; or (2) by leaving a copy of the document or paper at the principal office or place of business or residence of such individual, partnership, corporation, organization, or association, or of his or its attorney or agent of record and mailing by regular mail another copy to each person at such address; or (3) by registering or certifying and mailing a copy of the document or paper, addressed to such individual, partnership, corporation, organization, or association, or to his or its attorney or agent of record, at his or its last known residence or principal office or place of business: *Provided*, That if the registered or certified document or paper is returned undelivered because the addressee refused or failed to accept delivery, the document or paper shall be served by remailing it by regular mail. Proof of service hereunder shall be made by the certification of the person who actually made the service: *Provided*, That if the service be made by mail, as outlined in paragraph (b)(3) of this section proof of service shall be made by the return post office receipt, in the case of registered or certified mail, or by the certificate of the person who mailed the matter by regular mail. The certificate and post office receipt contemplated herein shall be filed with the Hearing Clerk, and the fact of filing thereof shall be noted in the record of the proceeding.

(c) *Extension of time.* The time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge prior to the filing of the certification of the transcript or recording if there is good reason for the extension. In all instances in which time permits, notice of the request for extension of the time shall be given to the other party with opportunity to submit views concerning the request.

(d) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Department of Agriculture in Washington, D.C.; or, if authorized to be filed with an officer or employee of the Department at any place outside the District of Columbia, it shall be deemed to be filed at the time when it reaches the office of such officer or employee.

(e) *Computation of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That when such time expires on a Saturday, Sunday or Federal holiday, such period shall be extended to include the next following business day.

[45 FR 6587, Jan. 29, 1980, as amended at 60 FR 8459, Feb. 14, 1995]

§ 1.175 Procedure following entry of cease and desist order.

(a) *Request for judicial review.* An association subject to a cease and desist order may, within thirty days following the date of the order, request the Secretary to institute proceedings for judicial review of the order. Such request shall, to the extent practicable, identify findings of fact, conclusions of law, and any part of the order which the association claims are in error. The Secretary shall, thereupon, file in the district in the judicial district in which such association has its principal place of business, a certified copy of the order and of all records in the proceeding, including the request of the association, together with a petition

asking that the order be affirmed and enforced.

(b) *Enforcement.* If an association subject to a cease and desist order fails or neglects, within thirty days of the date of the order, or at any time thereafter, to obey such order, and has not made a request for judicial review as provided above, the Secretary shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all records in the proceeding, together with a petition asking that the order be enforced.

(c) *Notice.* The Secretary shall give notice of the filing of a petition for enforcement or review to the Attorney General, and to the association, by service of a copy of the petition.

Subpart J—Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department

SOURCE: 67 FR 63237, Oct. 11, 2002, unless otherwise noted.

GENERAL PROVISIONS

§ 1.180 Definitions.

(a) The definitions contained in § 1.132 of this part are incorporated into and made applicable to this subpart.

(b) *Adjudicative Officer* means an administrative law judge, administrative judge, or other person assigned to conduct a proceeding covered by EAJA.

(c) *Agency* means an organizational unit of the Department whose head reports to an official in the Office of the Secretary.

(d) *Agency counsel* means the attorney from the Office of the General Counsel representing the agency of the Department administering the statute involved in the proceeding.

(e) *Days* means calendar days.

(f) *Department* means the United States Department of Agriculture.

§ 1.181 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (called ''EAJA'' in this subpart), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called ''adversary adjudications'') before the Department. An eligible party may receive an award when it prevails over the Department unless the position of the Department was substantially justified or special circumstances make an award unjust. Alternatively, an eligible party may receive an award in connection with an adversary adjudication arising from an agency action to enforce the party's compliance with a statutory or regulatory requirement where the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision under the facts and circumstances of the case. The rules in this subpart describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Department will use to make awards.

§ 1.182 When EAJA applies.

EAJA applies to any adversary adjudication pending or commenced before the Department on or after August 5, 1985, except with respect to a proceeding covered under § 1.183(a)(1)(iii) of this part, which is effective on or after October 21, 1986. In addition, the provisions of § 1.185(b) relating to award for excessive demand apply only to adversary adjudications commenced on or after March 29, 1996. Changes in maximum rates for attorney fees are effective as of October 11, 2002.

§ 1.183 Proceedings covered.

(a)(1) The rules in this subpart apply to adversary adjudications. These are:

(i) Adjudications required by statute to be conducted by the Department under 5 U.S.C. 554 in which the position of the Department or any other agency of the United States, or any component of an agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding,

(ii) Appeals of decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before the Agriculture Board of Contract Appeals as

provided in section 8 of that Act (41 U.S.C. 607), and

(iii) Any hearing conducted under chapter 38 of title 31, United States Code.

(2) Any proceeding in which the Department may prescribe a lawful present or future rate is not covered by EAJA. Proceedings to grant or renew licenses also are excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise ''adversary adjudications.'' The proceedings covered include adversary adjudications under the following statutory provisions.

Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 608c(15)(A))
Animal Health Protection Act, sections 10414 and 10415 (7 U.S.C. 8313 and 8314).
Animal Quarantine Laws (21 U.S.C. 104, 117, 122, 127, 134e, and 135a)
Animal Welfare Act (7 U.S.C. 2149)
Archaeological Resources Protection Act (16 U.S.C. 470ff)
Beef Research and Information Act (7 U.S.C. 2912)
Capper-Volstead Act (7 U.S.C. 292)
Cotton Research and Promotion Act (7 U.S.C. 2111)
Egg Products Inspection Act (21 U.S.C. 1047)
Egg Research and Consumer Information Act (7 U.S.C. 2713, 2714(b))
Endangered Species Act (16 U.S.C. 1540(a))
Federal Land Policy and Management Act (43 U.S.C. 1766)
Federal Meat Inspection Act (21 U.S.C. 604, 606, 607(e), 608, 671)
Federal Seed Act (7 U.S.C. 1599)
Horse Protection Act (15 U.S.C. 1823(c), 1825)
Packers and Stockyards Act (7 U.S.C. 193, 204, 213, 218d, 221)
Perishable Agricultural Commodities Act (7 U.S.C. 499c(c), 499d(d), 499f(c), 499h(a), 499h(b), 499h(c), 499i, 499m(a))
Plant Protection Act (7 U.S.C. 7734, 7735, and 7736)
Potato Research and Promotion Act (7 U.S.C. 2620)
Poultry Products Inspection Act (21 U.S.C. 455, 456, 457(d), 467)
Swine Health Protection Act (7 U.S.C. 3804(b), 3805(a))
Title V of the Agricultural Risk Protection Act of 2000, section 501(a) (7 U.S.C. 2279e).
U.S. Cotton Standards Act (7 U.S.C. 51b, 53)
U.S. Grain Standards Act (7 U.S.C. 79(g)(3), 85, 86)
U.S. Warehouse Act (7 U.S.C. 246, 253)
Virus-Serum-Toxin Act (21 U.S.C. 156)
Wheat and Wheat Foods Research and Nutrition Education Act (7 U.S.C. 3409)

(b) The failure of the Department to identify a type of proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by EAJA; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by EAJA and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

[67 FR 63237, Oct. 11, 2002, as amended at 67 FR 70674, Nov. 26, 2002]

§ 1.184 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under EAJA, the applicant must meet one of the following conditions:

(1) The applicant must be a prevailing party to the adversary adjudication for which it seeks an award; or

(2) The applicant must be a party to an adversary adjudication arising from an agency action to enforce the party's compliance with a statutory or regulatory requirement in which the demand by the agency was substantially in excess of the decision of the adjudicative officer and the demand is unreasonable when compared with such decision under the facts and circumstances of the case.

(b) In addition to the criteria set out in paragraph (a) of this section, a party seeking an award must be one of the following:

(1) An individual with a net worth of not more than $2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (2 U.S.C. 1141j(a)) with not more than 500 employees;

(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than $7 million and nor more than 500 employees;

(6) For purposes only of paragraph (a)(2) of this section, a small entity as defined in 5 U.S.C. 601.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the adversary adjudication was initiated: Provided, that for purposes of eligibility in proceedings covered by §1.183(a)(1)(ii) of this part, the net worth and number of employees of an applicant shall be determined as of the date the applicant filed its appeal under 41 U.S.C. 606.

(d) In interpreting the criteria set forth in paragraph (b) of this section, the following apply:

(1) An applicant who owns an unincorporated business will be considered as an ''individual'' rather than a ''sole owner of an unincorporated business'' if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(2) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(3) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this subpart, unless the adjudicative officer determines such treatment would be unjust and contrary to the purposes of EAJA in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(4) An applicant that participates in a proceeding primarily on behalf of one or more other person or entity that would be ineligible is not itself eligible for an award.

§1.185 Standards for awards.

(a) Prevailing party. (1) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Department was substantially justified. The position of the Department includes, in addition to the position taken by the Department in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant because the position of the Department was substantially justified is on the agency.

(2) An award to a prevailing applicant will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

(b) Excessive demand. (1) If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance.

(2) ''Demand'' means the express demand of the agency which led to the adversary adjudication, but does not include a recitation by the agency of the maximum statutory penalty:

(i) In the administrative complaint, or

(ii) Elsewhere when accompanied by an express demand for a lesser amount.

§ 1.186 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at reduced rate to the applicant.

(b) In proceedings commenced on or after the effective date of this paragraph, no award for the fee of an attorney or agent under the rules in this subpart may exceed $150 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at §1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the adjudicative officer shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

[67 FR 63237, Oct. 11, 2002, as amended at 76 FR 11668, Mar. 3, 2011]

§ 1.187 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Department may adopt regulations providing that attorney fees may be awarded at a rate higher than $150 per hour in some or all of the types of proceedings covered by this part. The Department will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) Any person may file with the Department a petition for rulemaking to increase the maximum rate for attorney fees in accordance with §1.28 of this part. The petition should identify the rate the petitioner believes the Department should establish and the types of proceedings in which the rate should be used. It also should explain fully the reasons why the higher rate is warranted. The Department will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

[67 FR 63237, Oct. 11, 2002, as amended at 76 FR 11668, Mar. 3, 2011]

§ 1.188 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before the Department and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

§ 1.189 Delegations of authority.

(a) Except as provided in paragraph (b) of this section, the Secretary of Agriculture delegates to the Judicial Officer authority to take final action on matters pertaining to the Act in proceedings covered by these rules. The Secretary by order may delegate authority to take final action on matters pertaining to the Act in particular cases to other subordinate officials or bodies.

(b)(1) The Secretary of Agriculture delegates to the Director of the National Appeals Division authority to take final actions on matters pertaining to the Act for proceedings under 7 CFR part 11.

(2) With respect to proceedings covered under §1.183(b)(1)(ii) of this part, the Board of Contract Appeals is authorized by statute (41 U.S.C. 607) to take final action.

[68 FR 27435, May 20, 2003]

INFORMATION REQUIRED FROM APPLICANTS

§ 1.190 Contents of application.

(a) An application for an award of fees and expenses under EAJA shall identify the applicant and the proceeding for which an award is sought. Unless the applicant is an individual, the application shall state the number of employees of the applicant and describe briefly the type and purpose of its organization or business. The application shall also:

(1) Show that the applicant has prevailed and identify the position of the Department that the applicant alleges was not substantially justified and shall briefly state the basis for such allegation; or

(2) Show that the demand by the Department in the proceeding was substantially in excess of, and was unreasonable when compared with, the decision in the proceeding.

(b) The application also shall, as appropriate, include a declaration that the applicant is a small entity as defined in 5 U.S.C. 601 or a statement that the applicant's net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 114j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application also may include any other matters that the applicant wishes the Department to consider in determining whether, and in what amount, an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It also shall contain or be accompanied by a written verification under oath or affirmation under penalty of perjury that the information provided in the application and all accompanying material is true and complete to the best of the signer's information and belief.

§ 1.191 Net worth exhibit.

(a) An applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in §1.184 of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled ''Confidential Financial Information,'' accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of

Information Act, 5 U.S.C. 552(b) (1) through (9). The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the established procedures of the Department under the Freedom of Information Act (§§1.1 through 1.23 of this part).

§ 1.192 Documentation of fees and expenses.

(a) The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project, or similar matter, for which an award is sought.

(b) The documentation shall include an affidavit from any attorney, agent, or expert witness representing or appearing on behalf of the party, stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.

(1) The affidavit shall state the services performed. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.

(2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide information about two attorneys or agents with similar experience, who perform similar work, stating their hourly rate.

(c) The documentation also shall include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

(d) The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any fees or expenses claimed, pursuant to §1.199 of this part.

§ 1.193 Time for filing application.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after final disposition of the proceeding by the Department.

(b) For the purposes of this subpart, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become final and unappealable, both within the Department and to the courts.

(c) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. When the United States appeals the underlying merits of an adversary adjudication to a court, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

Procedures for Considering Applications

§ 1.194 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding except as provided in §1.191 of this part for confidential financial information. The provisions relating to filing, service, extensions of time, and computation of time contained in §1.147 of this part are incorporated into and made applicable to this subpart, except that the statutory 30 day time limit on filing the application as set out in §1.193 of this part may not be extended.

§ 1.195 Answer to application.

(a) Within 30 days after service of an application, agency counsel may file an answer. If agency counsel fails to timely answer or settle the application, the adjudicative officer, upon a satisfactory showing of entitlement by the applicant, may make an award for the applicant's allowable fees and expenses.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the adjudicative officer upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 1.199 of this part.

§ 1.196 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 1.199 of this part.

§ 1.197 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application, unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 1.198 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 1.199 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether the position of the Department was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(b) A request that the adjudicative officer order further proceedings under this section shall identify specifically the information sought or the disputed issues, and shall explain specifically why the additional proceedings are necessary to resolve the issues.

(c) In the event that an evidentiary hearing is held, it shall be conducted pursuant to §§ 1.130 through 1.151 of this part, except that any hearing in a proceeding covered by § 1.183(a)(1)(ii) of this part shall be conducted pursuant to Rules 17 through 25 of the Board of Contract Appeals contained in § 24.21 of this title.

§ 1.200 Decision.

The adjudicative officer or Board of Contract Appeals shall issue an initial decision on the application as expeditiously as possible after completion of

proceedings on the application. Whenever possible, the decision shall be made by the same administrative judge or panel that decided the contract appeal for which fees are sought. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. This decision also shall include, if at issue, findings on whether the position of the Department was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

§ 1.201 Department review.

(a) Except with respect to a proceeding covered by §1.183(a)(1)(ii) of this part either the applicant or agency counsel may seek review of the initial decision on the fee application, in accordance with the provisions of §§1.145(a) and 1.146(a) of this part or in accordance with any delegation made pursuant to §1.189 of this part. If neither the applicant nor agency counsel seeks review, the initial decision on the fee application shall become a final decision of the Department 35 days after it is served upon the applicant. If review is taken, it will be in accord with the provisions of §§1.145(b) through (i) and 1.146(b) of this part, or

(b) With respect to a proceeding covered by §1.183(a)(1)(ii) of this part, either party may seek reconsideration of the decision on the fee application in accordance with Rule 29 of the Board of Contract Appeals contained in §24.21 of this title. In addition, either party may appeal a decision of the Board of Contract Appeals to the Court of Appeals for the Federal Circuit in accordance with 41 U.S.C. 607.

§ 1.202 Judicial review.

Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 1.203 Payment of award.

An applicant seeking payment of an award shall submit to the head of the agency administering the statute involved in the proceeding a copy of the final decision of the Department granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

Subpart K—Production or Disclosure of Official Information in Legal Proceedings

SOURCE: 87 FR 10927, Feb. 28, 2022, unless otherwise noted.

GENERAL INFORMATION

§ 1.210 What does this subpart cover?

(a) This subpart sets forth the procedures to be followed with respect to demands seeking official information or employee testimony relating to official information for use in a legal proceeding.

(b) This subpart does not apply to:

(1) Congressional requests or subpoenas for official information or testimony relating to official information;

(2) Federal court civil proceedings in which the United States is a party;

(3) Federal administrative proceedings in which the Department is a party;

(4) The disclosure of official information or testimony relating to official information provided to other Federal agencies, including United States Department of Justice attorneys, in connection with a legal proceeding conducted on behalf of or in defense of the United States or a legal proceeding in which the United States has an interest; and

(5) Employees who testify, while on their own time or in approved leave status, as private citizens as to facts or events that are not related to the official business of the Department.

(c) Nothing in this subpart affects the rights, procedures, or Department regulations governing requests for, and release of, records under the Freedom of Information Act (FOIA, 5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), or the Government in the Sunshine Act (5 U.S.C. 552b).

(d) Nothing in this subpart affects procedures governing requests for authentication or certified copies of records under §1.10.

(e) Nothing in this subpart permits the Department or employees to disclose official in-formation or give testimony relating to official information if the disclosure or testimony is protected or prohibited by statute or other applicable law.

(f) This subpart only provides guidance for the internal operations of the Department, and neither creates nor is intended to waive the sovereign immunity of the United States or create any enforceable right or benefit against the United States.

§ 1.211 Definitions that apply to this subpart.

For the purpose of this subpart:

(a) The term ''demand'' means any effort or attempt to obtain, for use in a legal proceeding, official information or testimony relating to official information, including any request, order, subpoena, or other command, as well as any informal or other attempt (by any method) to obtain official information, or testimony relating to official information, by an attorney, investigator, or others.

(b) The term ''Department'' means the United States Department of Agriculture, its constituent agencies, and Department officials authorized to decide whether to allow disclosures of official information or testimony relating to official information in response to demands.

(c) The term ''appropriate Department official'' means the head of a Department agency or office.

(d) The term ''employee'' means all employees or officers of the Department, including individuals who are or have been appointed by the Department, or who are or have been subject to the Department's supervision, jurisdiction, or control, including individuals hired through contractual agreements by or on behalf of the Department, or performing services under such agreements for the Department, such as consultants, contractors, subcontractors, and their employees or other personnel. Also included in the definition are former Department employees where the demand seeks testimony relating to official information acquired while the person was an employee of the Department.

(e) The term ''legal proceeding'' means all pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards, grand juries, or other tribunals. This phrase includes all phases of discovery as well as formal or informal requests by attorneys or others involved in legal proceedings.

(f) The term ''Office of the General Counsel'' means the Office of the General Counsel of the Department.

(g) The term ''official information'' means all information of any kind, however stored, that is in the custody and control of the Department or relates to information in the custody and control of the Department, or information or knowledge acquired by a Department employee as part of the employee's official duties or because of the employee's official status with the Department.

(h) The term ''testimony'' means any written or oral statement by an employee, including personal appearances in court or at depositions, interviews, or informal inquiries in person or by telephone, responses to written interrogatories or other written statements such as reports, declarations, or affidavits, or any response involving more than the de-livery of documents.

(i) The term ''United States'' means the Federal Government, its departments, and its agencies.

§ 1.212 What is the Department's policy on providing official information or testimony relating to official information in response to a demand?

(a) It is the Department's general policy not to allow its employees to provide official information or testimony relating to official information

in response to a demand. However, the Department will consider a demand submitted in accordance with this subpart and issue a decision to grant or deny the demand.

(b) No employee may provide official information or testimony relating to official information in response to a demand unless authorized by the Department in accordance with this subpart. *See United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951). An employee who fails to comply with this regulation may be subject to disciplinary action up to and including removal.

RESPONSIBILITIES IF MAKING A DEMAND

§ 1.213 How can I obtain official information or testimony relating to official information in response to my demand?

You must submit a demand in accordance with this subpart (*see United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951)). The appropriate Department official, in consultation with the Office of the General Counsel, will consider your demand in accordance with this subpart. The Counsel to the Inspector General will consider and make any final determinations regarding all demands seeking official information or employee testimony from the Office of Inspector General.

§ 1.214 What information must I include with my demand?

Your demand must include the following information, if applicable:

(a) The caption of the legal proceeding underlying your demand, including the docket number and the name of the court or other authority involved;

(b) The parties to the legal proceeding underlying your demand and any known relationships they have to the Department's mission or programs;

(c) A copy of the complaint or equivalent document setting forth the assertions in the legal proceeding underlying your demand;

(d) The identity of the employee whose testimony is sought and an affidavit or declaration under 28 U.S.C. 1746 or, if such an affidavit or declaration is not feasible, a written statement by you or your attorney, setting forth a reasonably detailed summary of the testimony sought and its relevance to the legal proceeding underlying your demand. Any authorization the Department decides to grant for testimony by an employee shall be limited to testimony within the scope of the summary provided;

(e) If the demand seeks documents or other materials to be obtained or inspected, a de-scription of the official information and the relevance to the legal proceeding underlying your demand;

(f) A written description of all prior decisions, orders, or pending motions in the legal proceeding underlying your demand that bear on the relevance of the official information or testimony you seek;

(g) A showing that the desired official information or testimony is not reasonably available from any other source, including a showing that no document could be provided and used in lieu of testimony; and

(h) An explanation of how each of the Department's considerations set forth in §1.220(a) apply to your demand.

§ 1.215 How soon before I need the official information or testimony relating to official information should I submit my demand?

You must submit your demand, including all information identified in §1.214, at least 14 calendar days before the date when you need the official information or testimony relating to official information.

§ 1.216 If I serve a subpoena, must I also submit information in accordance with § 1.214?

Yes. A subpoena shall be served in accordance with the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, or applicable state procedure, as appropriate. If you serve a subpoena, including a subpoena *duces tecum*, together with the subpoena you must also submit information in accordance with §1.214. If you serve a subpoena on the Department or a Department employee before submitting information in accordance with §1.214 of this subpart, the Department may oppose the subpoena on the grounds that you failed to follow the requirements of this subpart.

§ 1.217 Where must I send my demand?

(a) Except for subpoenas served in accordance with the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, or applicable state procedure as appropriate, you must send your demand, including all information required by § 1.214 of this subpart, to:

(1) The Office of the General Counsel at 1400 Independence Avenue SW, Washington, DC 20250, Attention: ''Touhy Demands,'' or by electronic mail to *OGC-Touhy-Demands@usda.gov* and

(2) The United States Department of Agriculture agency office from which the official information or testimony is sought.

(b) Notwithstanding paragraph (a) of this section, a demand for Office of Inspector General information or testimony must be sent to the Counsel to the Inspector General, United States Department of Agriculture, Attention: ''Touhy Demands,'' at 1400 Independence Avenue SW, Mail Stop 2308, Washington, DC 20250–2308; by facsimile to (202) 690–1528; or by electronic mail to *OIG.TOUHY-DEMANDS@oig.usda.gov*.

[84 FR 56100, Oct. 21, 2019, as amended at 87 FR 25571, May 2, 2022]

§ 1.218 How much will I be charged?

(a) In the event that a demand is granted, the Department may charge reasonable fees. The appropriate Department official will determine all fees, if any, associated with this subpart and shall timely notify you of the fees, particularly those that are to be paid in advance.

(b) When a demand is granted under this subchapter to permit an employee to testify, you must pay the witness the fee and expenses, including any travel related costs, prescribed for attendance by the applicable rule of court. If no such fees are prescribed, the local Federal district court rule relating to witness fees for the Federal district court closest to where the witness appears will apply.

(c) When a demand is granted under this subchapter to produce documents, blueprints, electronic tapes, or other official information, the fees to be charged and paid prior to production shall be calculated as provided in Department regulations implementing the fee provisions of the FOIA.

RESPONSIBILITIES OF THE DEPARTMENT

§ 1.219 How will the Department process my demand?

(a) The appropriate Department official, in consultation with the Office of the General Counsel, will consider your demand, and decide whether to grant or deny it. An Office of the General Counsel attorney or Department official may negotiate with you or your representative to refine or limit your demand. All demands for Office of Inspector General information or testimony will be processed by the Counsel to the Inspector General.

(b) Any decision in response to your demand will be limited to the scope of information requested in accordance with the requirements of this subpart.

(c) If you fail to follow the requirements of this subpart, the Department may decide not to grant your demand. If the Department determines that your demand is not complete, the Department may require that you provide additional information before your demand will be considered.

(d) If your demand is complete, the Department will consider it by applying the criteria under § 1.220.

§ 1.220 The Department's considerations in deciding whether to grant or deny a demand.

(a) In deciding whether to grant or deny a demand, the appropriate Department official should consider the following factors:

(1) Whether compliance with the demand would be unduly burdensome, disproportionate to the needs of the case, or otherwise inappropriate under the applicable rules of discovery or rules of procedure governing the legal proceeding underlying the demand;

(2) Whether compliance with the demand is appropriate under the relevant substantive law concerning privilege or disclosure of information;

(3) The public interest;

(4) The need to conserve the time and expense of Department employees for the conduct of official business;

(5) The need to avoid spending the time and money of the United States for non-Federal government purposes;

(6) The need to maintain impartiality between private litigants in cases in which a substantial Department interest is not implicated;

(7) Whether compliance with the demand would have an adverse effect on the Department's mission and duties;

(8) The need to avoid involving the Department in issues not related to its mission; and

(9) Any other factor the Department determines to be relevant to the interests of the Department.

(b) A demand will not be granted if the disclosure of official information or employee testimony relating to official information:

(1) Would violate a statute or a rule of procedure;

(2) Would violate a regulation or executive order;

(3) Would reveal information properly classified in the interest of national security;

(4) Would reveal confidential commercial or financial information or trade secrets in the absence of the owner's consent;

(5) Would reveal the internal deliberative processes of the Executive Branch or other privileged information; or

(6) Would potentially impede or prejudice an on-going law enforcement investigation.

§ 1.221 In responding to my demand, what conditions or restrictions may the Department impose on the production of official information or testimony relating to official information?

In responding to a demand, the Department may, at its discretion, impose conditions or restrictions on the production of official information or testimony relating to official information. Such conditions or restrictions may include the following:

(a) A requirement that the parties to the legal proceeding underlying your demand obtain a protective order or execute a confidentiality agreement to limit access to, and limit any further disclosure of, official information or testimony provided;

(b) A limitation on the subject matter areas of the permitted testimony;

(c) A requirement that the manner, time, location, and duration of any testimony be prescribed by the Department;

(d) A requirement that the parties to the legal proceeding underlying your demand agree that a transcript of the permitted testimony be kept under seal or will only be used or only made available in the particular legal proceeding underlying the demand;

(e) A requirement that you purchase an extra copy of the transcript of the employee's testimony from the court reporter and provide the Department with a copy at your expense; or

(f) Any other condition or restriction deemed to be in the best interests of the United States.

§ 1.222 Delegation authority for deciding whether to grant or deny a demand.

(a) Except as provided in paragraphs (b), (c), or (d) of this section, the appropriate department official may delegate his or her responsibilities under this subpart to employees of his or her agency as follows:

(1) In the national office of the agency, to a level no lower than two levels below the agency head;

(2) In a field component of an agency, to a level no lower than the official who heads a state office.

(b) Notwithstanding paragraph (a) of this section, the Chief of the Forest Service may delegate his or her responsibilities under this subpart as follows:

(1) In the national office of the Forest Service, to a level no lower than a Deputy Chief of the Forest Service;

(2) In a field component of the Forest Service, to a level no lower than a Regional Forester or Station Director.

(c) Notwithstanding paragraph (a) of this section, the General Counsel may delegate his or her responsibilities under this subpart as follows:

(1) In the national office of the Office of the General Counsel, to a level no lower than an Assistant General Counsel;

(2) In the field component of the Office of the General Counsel, to Regional Attorneys who may redelegate

their responsibilities to Associate Regional Attorneys and Assistant Regional Attorneys who report to them.

(d) Notwithstanding paragraph (a) of this section, the Counsel to the Inspector General may delegate his or her responsibility under this subpart to the Deputy Counsel or an Assistant Counsel.

RESPONSIBILITIES OF DEPARTMENT EMPLOYEES

§ 1.223 What must I, as an employee, do upon receiving a demand?

(a)(1) If you receive a demand, you must immediately notify your supervisor, who must in turn notify the appropriate Department official. Either your supervisor or the appropriate Department official must notify the Office of the General Counsel contact for your region or division for assistance with issuing the proper response.

(2) Demands for Office of Inspector General official information or testimony should be forwarded immediately to the Counsel to the Inspector General.

(b)(1) The appropriate Department official will decide whether to grant or deny the demand. Before a decision granting or denying a demand is made, the Office of the General Counsel contact for your region or division must be consulted for advice. All decisions granting or denying a demand must be in writing and must receive Office of the General Counsel concurrence prior to issuance. Absent Office of the General Counsel concurrence, a demand decision cannot be issued.

(2) The Counsel to the Inspector General will decide whether to grant or deny a demand for Office of Inspector General information and testimony.

(c) In the event that the appropriate Department official decides to deny the demand, the decision shall state that you are not authorized to provide official information or testimony and, if applicable, that you will not personally appear in response to the demand.

§ 1.224 What must I, as an employee, do upon becoming aware that a court or other authority has ordered compliance with a demand?

(a) If you become aware that a court or other authority has ordered compliance with a demand, you must promptly notify your supervisor, who must in turn notify the Office of the General Counsel for your region or division.

(b) In the case of compliance orders involving a demand for Office of Inspector General information and testimony, promptly forward them to your supervisor and the Counsel to the Inspector General.

Subpart L—Procedures Related to Administrative Hearings Under the Program Fraud Civil Remedies Act of 1986

AUTHORITY: 31 U.S.C. 3801–3812.

SOURCE: 56 FR 9582, Mar. 7, 1991, unless otherwise noted. Correctly designated at 57 FR 3909, Feb. 3, 1992.

§ 1.301 Basis, purpose and scope.

(a) *Basis.* This subpart implements the Program Fraud Civil Remedies Act of 1986, Public Law No. 99–509, Sections 6101–6104, 100 Stat. 1874 (1986). This statute added 31 U.S.C. 3801–3812. Section 3809 of Title 31, United States Code, requires the Secretary to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This subpart—

(1) Establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and

(2) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

(c) *Scope.* The procedures for imposing civil penalties and assessments established by this subpart are intended to enhance existing administrative enforcement efforts against fraud and to provide an additional remedy against false, fictitious, and fraudulent claims and statements in the programs administered by this Department.

§ 1.302 Definitions.

(a) *Agency* means a constituent organizational unit of the USDA.

(b) *Agency Fraud Claims Officer—(AFCO)* means an officer or employee of an agency who is designated by the head of that agency to receive the reports of the investigating official, evaluate evidence, and make a recommendation to the reviewing official with respect to the determination required under §1.305 of this part.

(c) *ALJ* means an Administrative Law Judge in USDA appointed pursuant to 5 U.S.C. 3105 or detailed to the USDA pursuant to 5 U.S.C. 3344.

(d) *Authority* means the USDA.

(e) *Benefits* means, except as otherwise defined in this subpart, anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

(f) *Claim* means any request, demand, or submission—

(1) Made to USDA for property, services, or money (including money representing grants, loans, insurance, or benefits);

(2) Made to a recipient of property, services, or money from USDA or to a party to a contract with USDA—

(i) For property or services if the United States—

(A) Provided such property or services; or

(B) Provided any portion of the funds for the purchase of such property or services; or

(C) Will reimburse such recipient or party for the purchase of such property or services; or

(ii) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(A) Provided any portion of the money requested or demanded; or

(B) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(3) Made to USDA which has the effect of decreasing an obligation to pay or account for property, services, or money.

(g) *Complaint* means the written notice served by the reviewing official on the respondent under §1.307 of this part.

(h) *Days* means business days for all periods referred to in these regulations of 10 days or less and calendar days for all periods referred to in these regulations in excess of 10 days.

(i) *Family* means the individual's parents, spouse, siblings, children, and grandchildren with respect to an individual making a claim or statement for benefits.

(j) *Government* means the United States Government.

(k) *Household* means a family or one or more individuals occupying a single residence.

(l) *Individual* means a natural person.

(m) *Investigating official* means the Inspector General of USDA or an officer or employee of the Office of Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

(n) *Judicial officer* means an official of USDA delegated authority by the Secretary, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c–450g) and Reorganization Plan No. 2 of 1953, 67 Stat. 633, as amended by Public Law No. 97–325 (7 U.S.C. 2201n.), to perform the adjudicating function for the Department under §2.35 of this title, or the Secretary if he exercises the authority so delegated.

(o) *Knows or has reason to know* means that a person, with respect to a claim or statement—

(1)(i) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(ii) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(iii) Acts in reckless disregard of the truth or falsity of the claim or statement; and

(2) No proof of specific intent to defraud is required.

(p) *Makes* means presents, submits, or causes to be made, presented, or submitted. As the context requires, ''making'' or ''made'' shall likewise include the corresponding forms of such terms.

(q) *Person* means any individual, partnership, corporation, association, or private organization, and includes the plural of that term.

(r) *Representative* means an attorney who is a member in good standing of

the bar of any State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico. This definition is not intended to foreclose *pro se* appearances. An individual may appear for himself or herself, and a corporation or other entity may appear by an owner, officer, or employee of the corporation or entity.

(s) *Respondent* means any person alleged in a complaint issued under §1.308 of this part to be liable for a civil penalty or assessment under §1.303 of this part.

(t) *Reviewing official* means an officer or employee of USDA—

(1) Who is designated by the Secretary to make the determination required under §1.305 of this part;

(2) Who is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule; and

(3) Who is—

(i) Not subject to supervision by, or required to report to, the investigating official; and

(ii) Not employed in the organizational unit of USDA in which the investigating official is employed.

(u) *Secretary* means the Secretary of Agriculture.

(v) *Statement* means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(1) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(2) With respect to (including relating to eligibility for)—

(i) A contract with, or a bid or proposal for a contract with; or

(ii) A grant, loan, or benefit from, USDA, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

(w) *USDA* means the U.S. Department of Agriculture.

§1.303 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed,shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than the amount specified at §3.91(b)(11)(i) of this title for each such claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, food coupons, or money constitutes a separate claim.

(3) A claim shall be considered made to the USDA, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the USDA, recipient, or party.

(4) Each claim for property, services, food coupons, or money is subject to a civil penalty regardless of whether such property, services, food coupons, or money is actually delivered or paid.

(5) If the Government has made payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages

sustained by the Government because of such claim.

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement had a duty to include in such statement; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than the amount specified at §3.91(b)(11)(ii) of this title for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the USDA when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the USDA.

(c) *Benefits.* (1) In the case of any claim or statement made by any individual relating to any of the benefits listed in paragraph (c)(2) of this section received by such individual, such individual may be held liable for penalties and assessments under this section only if such claim or statement is made by such individual in making application for such benefits with respect to such individual's eligibility to receive such benefits.

(2) For purposes of this paragraph, the term *benefits* means—

(i) Benefits under the food stamp program established under the Food Stamp Act of 1977 which are intended as food assistance for the personal use of the individual who receives the benefits or for a member of the individual's family or household (as defined in section 3(h) of the Food Stamp Act of 1977);

(ii) Benefits under the National School Lunch Act;

(iii) Benefits under any housing assistance program for lower income families or elderly or handicapped persons which is administered by the Secretary or USDA;

(iv) Benefits under the special supplemental food program for women, infants, and children established under section 17 of the Child Nutrition Act of 1966 which are intended for the personal use of the individual who receives the benefits or for a member of the individual's family or household.

(d) *Intent.* No proof of specific intent to defraud is required to establish liability under this section.

(e) *More than one person liable.* In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each person may be held liable for a civil penalty under this section.

(f) *Joint and several liability.* In any case in which it is determined that more than one person is liable for making a claim under this section on which the government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons. The aggregate amount of the assessments collected with respect to such claim shall not exceed twice the portion of such claim determined to be in violation of paragraph (a)(1) of this section.

[56 FR 9582, Mar. 7, 1991, as amended at 57 FR 3909, Feb. 3, 1992; 75 FR 17556, Apr. 7, 2010]

§ 1.304 Investigation.

(a) The investigating official may investigate allegations that a person is liable under §1.303 of this part.

(b) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted, the investigating officer may issue a subpoena, which shall notify the person to whom it is addressed of the authority under which it is issued and shall identify the information, documents, reports, answers, records, accounts, papers, or data sought.

(c) The investigating official may designate a person to act on his behalf

to receive the documents or other materials sought by a subpoena issued under paragraph (b) of this section.

(d) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents or other materials sought have been produced, or that such documents or other materials are not available and the reasons therefore, or that such documents or other materials, suitably identified, have been withheld based upon the assertion of an identified privilege.

(e) Each agency shall develop criteria for determining which allegations that a person is liable under §1.303 of this part are to be referred to the investigating official.

(f) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing findings and conclusions of such investigation to the reviewing official.

(g) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, nor preclude or limit such official's discretion to defer or postpone a report or referral to the reviewing official in order to avoid interference with a criminal investigation or prosecution.

(h) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§1.305 Review by the reviewing official.

(a) Upon receipt of the report of the investigating official, the reviewing official may refer the report to the appropriate agency fraud claims officer (AFCO) for a recommendation with respect to the determination required under this section.

(b) The AFCO shall evaluate the evidence and make a recommendation to the reviewing officer within 45 days of receipt of the report of the investigating official.

(c) The reviewing official is not bound by the recommendation of the AFCO, and may accept or reject it.

(d) If, based on the report of the investigating official under §1.304(f) of this part, the reviewing official determines that there is adequate evidence to believe that a person is liable under §1.303 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under §1.307 of this part.

(e) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement of the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of §1.303 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements;

(6) A statement that there is a reasonable prospect of collecting the amount specified in §1.307(b)(2) of this part and the reasons supporting such statement.

§1.306 Prerequisites for issuing a complaint.

The reviewing official may issue a complaint under §1.307 of this part only if:

(a) The Attorney General or an Assistant Attorney General designated by the Attorney General approves the issuance of a complaint in a written statement as provided in 31 U.S.C. 3803(b)(1);

(b) In the case of allegations of liability under §1.303(a) of this part with respect to a claim, the reviewing official determines with respect to such claim, or a group of related claims submitted at the same time, that the amount of money or the value of property or services demanded or requested in violation of §1.303(a) of this part does not exceed $150,000; and

(c) For the purposes of this section, a group of related claims submitted at the same time shall include only those

claims arising from the same transaction (e.g., a single grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission, regardless of the amount of money or the value of property or services demanded or requested.

(d) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money or the value of property or services demanded or requested.

§ 1.307 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the respondent, as provided in §1.308 of this part.

(b) The complaint shall state—

(1) The allegations of liability, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons that liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the respondent may be held liable;

(3) Instructions for requesting a hearing, including a specific advice of the respondent's right to request a hearing and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint may result in the imposition of the penalty and assessment sought in the complaint without right to appeal.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the respondent with a copy of these regulations.

§ 1.308 Service of complaint and notice of hearing.

(a) Service of a complaint or notice of hearing shall be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure.

(b) Proof of service, stating the name and address of the person on whom the notice was served, and the manner and date of service, shall be made by:

(1) Affidavit of the individual making service;

(2) An acknowledged United States Postal Service return receipt card; or

(3) Written acknowledgment by the respondent or his representative.

§ 1.309 Answer and request for hearing.

(a) Within 30 days of the date of receipt or refusal to accept service of the complaint, the respondent may file an answer with the reviewing official.

(b) In the answer, the respondent—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense upon which the respondent intends to rely;

(3) Shall state the name, address, and telephone number of the person authorized to act as the respondent's representative, if any;

(4) May state any reasons why the respondent contends the penalty and assessment should be reduced or modified; and

(5) May request a hearing.

§ 1.310 Default upon failure to file an answer.

(a) If the respondent does not file an answer within the time prescribed in §1.309(a) of this part, the reviewing official may refer the complaint together with proof of service to the ALJ and request that the ALJ issue an order of default imposing the penalties and assessments sought in the complaint. An answer must comply in all material respects with §1.309(b) of this part in order to be considered filed within the time prescribed in §1.310(a) of this part.

(b) Upon the referral of the complaint under paragraph (a) of this section, the ALJ shall promptly serve on the respondent, in the manner prescribed in §1.308 of this part, a notice that a decision will be issued under this section.

(c) If the respondent fails to answer, the ALJ shall assume the facts alleged in the complaint to be true and, if such facts establish liability under §1.303 of this part, the ALJ shall issue a decision imposing the penalties and assessments sought in the complaint, not to

exceed the maximum amount allowed under the statute.

(d) A respondent who fails to file a timely answer waives any right to a review of the penalty and assessment, unless he can demonstrate extraordinary circumstances justifying the failure to file an answer.

§ 1.311 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall send to the ALJ copies of the complaint, proof of service, and the answer.

§ 1.312 Procedure where respondent does not request a hearing.

(a) If the respondent files an answer with the reviewing official within the time period prescribed in §1.309(a) of this part but does not request a hearing, the ALJ, upon receipt of the complaint, proof of service, and answer, shall notify the respondent that a decision will be issued under this section and shall afford the parties 30 days in which to submit documentary evidence or other relevant written information, including briefs or other written arguments. At the end of that period, the ALJ shall issue a decision based upon the pleadings and the evidence submitted, or if no evidence has been submitted, upon the pleadings. The burden of proof shall be as set forth in §1.329 of this part.

(b) When a decision is to be issued under this section, the ALJ shall have discretion to permit, allow, limit, or otherwise control discovery to the extent set forth under §§1.322 thru 1.324 of this part.

§ 1.313 Procedure where respondent requests a hearing; notice of hearing.

(a) When the ALJ receives the complaint, proof of service, and an answer requesting a hearing, the ALJ shall promptly serve, in accordance with §1.308 of this part, a notice of hearing on all parties.

(b) Such notice shall include:

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative for the USDA and the representative for the respondent, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 1.314 Parties to the hearing.

(a) The parties to the hearing shall be the respondent and USDA. The proceeding shall be brought in the name of the Secretary.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private party plaintiff under the False Claims Act may participate in proceedings under this subpart to the extent authorized by the provisions of that Act.

§ 1.315 Separation of functions.

(a) Neither the investigating official, the reviewing official, nor any employee or agent of the USDA who takes part in investigating, preparing, or presenting a particular case may, in such case or in a factually related case—

(1) Conduct the hearing in such case;

(2) Participate in or advise the ALJ in the decision in such case, or participate in or advise in the review of the decision in such case by the judicial officer, except as a witness or representative in public proceedings; or

(3) Make the collection of penalties and assessments under §1.341 of this part.

(b) The ALJ shall not be responsible to or subject to the supervision or direction of the investigating official or the reviewing official.

(c) Except to the extent limited by paragraph (a) of this section, the representative for USDA may be employed in any constituent agency of USDA, including the offices of either the investigating official or the reviewing official.

§ 1.316 *Ex parte* contacts.

Except to the extent required for the disposition of *ex parte* matters as authorized by law, the ALJ shall not consult or be consulted by any person or party (except employees of the ALJ's office) on any matter in issue, unless

on notice and opportunity for all parties to participate.

§ 1.317 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f).

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the authority head may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

§ 1.318 Rights of parties.

All parties may:

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any prehearing or post-hearing conference held by the ALJ;

(c) Agree to stipulations of fact or law, which shall be made part of the record;

(d) Conduct discovery;

(e) Make opening and closing statements at the hearing;

(f) Present evidence relevant to the issues at the hearing;

(g) Cross examine witnesses;

(h) Present oral arguments at the hearings; and

(i) Submit written briefs, proposed findings of fact, and proposed conclusions of law after the hearing.

§ 1.319 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceedings is made.

(b) The ALJ may:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of attorneys and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this subpart.

(c) The ALJ does not have the authority to decide upon the validity of Federal statutes, regulations, or legal opinions.

§ 1.320 Prehearing conferences.

(a) The ALJ may schedule a prehearing conference at a reasonable time in advance of the hearing and may schedule additional prehearing conferences as appropriate.

(b) The ALJ may conduct any prehearing conference in person or by telephone.

(c) The ALJ may use prehearing conferences to discuss the following matters:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations, admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument.

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ shall issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 1.321 Disclosure of documents.

(a) Upon written request to the reviewing official, the respondent may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under §1.304(f) of this part are based unless such documents are privileged under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the respondent also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in §1.305 of this part is not discoverable under any circumstances.

(d) The respondent may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may be filed with the ALJ following the filing of the answer pursuant to §1.309 of this part.

§ 1.322 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production, inspection and photocopying of documents;

(2) Requests for admission of the authenticity of any relevant document or the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) The ALJ shall set the schedule for discovery.

(c) Requests for production of documents and requests for admission.

(1) A party may serve requests for production of documents or requests for admission on another party.

(2) If a party served with such requests fails to respond timely, the requesting party may file a motion to compel production or deem admissions, as appropriate.

(3) A party served with such a request may file a motion for a protective order before the date on which a response to the discovery request is due, stating reasons why discovery should be limited or should not be required.

(4) Within 15 days of service of a motion to compel or to deem matter admitted or a motion for a protective order, the opposing party may file a response.

(5) The ALJ may grant a motion to compel production or deem matter admitted or may deny a motion for a protective order only if he finds that—

(i) The discovery sought is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) It is not unduly costly or burdensome;

(iii) It will not unduly delay the proceeding; and

(iv) The information sought is not privileged.

(d) Depositions and written interrogatories. Depositions and written interrogatories are permitted only on the order of the ALJ.

(1) A party seeking to use depositions or written interrogatories may file a motion with the ALJ.

(2) A party and/or the potential deponent may file an opposition to the motion or a motion for a protective order within 10 days of service of the motion.

(3) The ALJ may grant a motion allowing the taking of a deposition or the use of interrogatories or may deny a motion for a protective order only if he finds that the moving party has satisfied the standards set forth in paragraph (c)(5) of this section and has shown that the information sought cannot be obtained by any other means.

(4) If the ALJ grants a motion permitting a deposition, he shall issue a subpoena, which may also require the witness to produce documents. The party seeking to depose shall serve the subpoena in the manner prescribed in §1.308 of this part.

(5) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(e) Costs. The costs of discovery shall be borne by the party seeking discovery.

(f) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

(g) Exchange of witness lists, statements, and exhibits. Witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements or depositions that a party intends to offer in lieu of live testimony in accordance with §1.331(b) of this part, shall be exchanged at least 15 days in advance of the hearing, or at such other time as may be set by the ALJ. A witness whose name does not appear on the witness list shall not be permitted to testify and no exhibit not provided to the opposing party as provided above shall be admitted into evidence at the hearing absent a showing of good cause.

§1.323 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony at the hearing of any individual may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at such hearing.

(c) A party who desires the issuance of a subpoena shall file with the ALJ a written request not less than 15 days

before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses whose attendance is sought to be required and describe their addresses and locations with sufficient particularity to permit such witnesses to be found. The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce. Such a request may be made *ex parte*.

(d) When the ALJ issues a subpoena under this section, the party who requested such subpoena shall serve all other parties with notice of the names and addresses of the individuals subpoenaed and specify any documents required to be produced.

(e) A subpoena shall be served by delivery, or by registered mail or by certified mail in the manner prescribed in §1.308 of this part. A subpoena upon a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file a motion to quash the subpoena within five days of service or on or before the time specified in the subpoena for compliance if it is less than five days after service.

§1.324 Fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of USDA, a check for witness fees and mileage need not accompany the subpoena.

§1.325 Form, filing and service of papers.

(a) *Form.* (1) The original and two copies of all papers in a proceeding conducted under this subpart shall be filed with the ALJ assigned to the case.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (e.g., motion to quash subpoena).

(3) Every pleading and paper shall be signed by and shall contain the address and telephone number of the representative for the party or the person on whose behalf the paper was filed.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or his representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than the complaint or notice of hearing shall be made by delivering or mailing a copy to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the person serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§1.326 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) When the period of time allowed is ten or fewer calendar days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government shall be excluded from the computation.

(c) When a document has been served by mail, an additional five days will be added to the time permitted for any response.

§1.327 Motions.

(a) Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) The ALJ may require written motions to be accompanied by supporting memorandums.

(d) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(e) The ALJ may not grant a written motion prior to expiration of the time for filing responses thereto, except upon consent of the parties or following a hearing, but may overrule or deny such motion without awaiting a response.

(f) The ALJ shall make every reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 1.328 Sanctions.

(a) The ALJ may sanction a person, including any party or representative for:

(1) Failing to comply with a lawful order, subpoena, or procedure;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with a subpoena or an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem admitted each item as to which an admission is requested;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon testimony relating to the information sought;

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request; or

(5) Request that the Attorney General petition an appropriate district court for an order to enforce a subpoena.

(d) If a party fails to prosecute or defend an action under this subpart commenced by service of a complaint, the ALJ may dismiss the action or enter an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion or other action which is not filed in a timely fashion.

§ 1.329 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the respondent is liable for a civil penalty or assessment under §1.303 of this part, and if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The USDA shall prove respondent's liability and any aggravating factors by a preponderance of the evidence.

(c) The respondent shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 1.330 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the respondent resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the respondent and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The ALJ shall issue an order to the parties designating the time and the place of the hearing.

§ 1.331 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in §1.322(g) of this part.

(c) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(d) A witness may be cross-examined on any matter relevant to the proceeding without regard to the scope of his or her direct examination.

(e) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party designated by the representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the USDA engaged in assisting the representative for USDA.

§ 1.332 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided herein, the Federal Rules of Evidence are not applicable to the hearing, except that the ALJ may in his discretion apply the Federal Rules of Evidence in order to assure production of credible evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties unless otherwise ordered by the ALJ pursuant to §1.322 of this part.

§ 1.333 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained from the reporter by anyone at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the judicial officer.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone unless otherwise ordered by the ALJ.

§ 1.334 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 1.335 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the judicial officer, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support

the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the judicial officer in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the respondent's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the respondent has engaged in a pattern of the same or similar misconduct;

(9) Whether the respondent attempted to conceal the misconduct;

(10) The degree to which the respondent has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the respondent, the extent to which the respondent's practices fostered or attempted to preclude such misconduct;

(12) Whether the respondent cooperated in or obstructed an investigation of the misconduct;

(13) Whether the respondent assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the respondent's sophistication with respect to it, including the extent of the respondent's prior participation in the program or in similar transactions;

(15) Whether the respondent has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the government of the United States or of a State, directly or indirectly; and

(16) The need to deter the respondent and others from any engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the judicial officer from considering any other factors that in any given case may mitigate or aggravate the acts for which penalties and assessments are imposed.

§ 1.336 Initial decision of the ALJ.

(a) The ALJ shall issue an initial decision, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues for every claim or statement with respect to which a penalty or assessment was proposed:

(1) Whether any claim or statement identified in the complaint violates § 1.303 of this part;

(2) If the respondent is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors described in § 1.335 of this part.

(c) The ALJ shall serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall include with the initial decision a statement describing the right of any respondent determined to be liable for a civil penalty or assessment to file notice of appeal with the judicial officer. The ALJ may extend the time period

for serving the initial decision on the parties.

(d) Unless the initial decision of the ALJ is timely appealed to the judicial officer, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the Secretary and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 1.337 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the judicial officer in accordance with §1.338 of this part.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the judicial officer in accordance with §1.338 of this part.

§ 1.338 Appeal to the judicial officer.

(a) Any respondent who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the Secretary by filing a notice of appeal with the judicial officer in accordance with this section. The judicial officer of USDA shall consider all appeals to the Secretary under this subpart and render a decision on behalf of the Secretary.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if another party files a motion for reconsideration under §1.337 of this part, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(c) The judicial officer may extend the initial 30-day period during which a notice of appeal may be filed for an additional 30 days if the respondent files a request for an extension within the initial 30-day period and shows good cause.

(d) If the respondent timely files a notice of appeal with the judicial officer and the time for filing motions for reconsideration under §1.337 of this part has expired, the ALJ will forward the record of the proceeding to the judicial officer.

(e) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(f) The representative for USDA may file a brief in opposition to exceptions within 30 days of receiving the brief proposing exceptions.

(g) There is no right to appear personally before the judicial officer.

(h) There is no right to interlocutory appeal of rulings by the ALJ.

(i) The judicial officer, in reviewing the decision, shall not consider any objection that was not raised before the ALJ unless a demonstration is made that extraordinary circumstances caused the failure to raise the objection.

(j) If any party demonstrates to the satisfaction of the judicial officer that additional evidence not presented to the ALJ is material and that there

were reasonable grounds for the failure to present such evidence to the ALJ, the judicial officer shall remand the matter to the ALJ for consideration of such additional evidence.

(k) The judicial officer may affirm, reduce, reverse, compromise, remand or settle any penalty or assessment determined by the ALJ.

(l) The judicial officer shall promptly serve each party to the appeal with a copy of the decision of the judicial officer and a statement describing the respondent's right to seek judicial review.

(m) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a respondent has exhausted all administrative remedies under this part and within 60 days after the date on which the judicial officer serves the respondent with a copy of the judicial officer's decision, a determination that a respondent is liable under §1.303 of this part is final and is not subject to judicial review.

§ 1.339 Stays ordered by the Department of Justice.

(a) If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the Secretary a written finding that continuation of the administrative process described in this subpart with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the judicial officer shall stay the process immediately.

(b) If the judicial officer stays the administrative process in accordance with paragraph (a) of this section, the judicial officer may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 1.340 Stay pending appeal.

(a) A decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the judicial officer.

(b) The respondent may file with the ALJ a request for stay of the effective date of a decision of the judicial officer pending judicial review. Such request shall state the grounds upon which respondent relies in requesting the stay, together with a copy of the notice(s) of appeal filed by respondent seeking review of a decision of the judicial officer. The filing of such a request shall automatically stay the effective date of the decision of the judicial officer until the ALJ rules upon the request.

(c) The representative for the USDA may file an opposition to respondent's request for a stay within 10 days of receipt of the request. If the representative for the USDA fails to file such an opposition within the allotted time, or indicates that the USDA has no objection to the request, the ALJ may grant the stay without requiring respondent to give a bond or other security.

(d) The ALJ may grant a contested request where justice so requires and to the extent necessary to prevent irreparable harm but only upon the respondent's giving of a bond or other adequate security. The ALJ shall rule promptly on a contested request for stay.

(e) A decision of the ALJ denying respondent's request for a stay shall constitute final agency action.

§ 1.341 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the judicial officer imposing penalties or assessments under this part and specifies the procedures for such review.

§ 1.342 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this subpart and specify the procedures for such actions.

§ 1.343 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under §1.341 or §1.342 of this part, or any amount agreed upon in a settlement under §1.345 of this part, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund

of an overpayment of Federal taxes then or later owing by the United States to the respondent.

§ 1.344 Deposit to Treasury of the United States.

All amounts collected pursuant to this subpart shall be deposited as miscellaneous receipts in the Treasury of the United States.

§ 1.345 Settlement.

(a) A respondent may make offers of compromise of settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this subpart at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues a decision.

(c) The judicial officer has exclusive authority to compromise or settle a case under this subpart at any time after the date on which the ALJ issues a decision, except during the pendency of any appeal under §1.341 of this part or during the pendency of any action to collect penalties and assessments under §1.342 of this part.

(d) The Attorney General has exclusive authority to compromise or settle a case under this subpart during the pendency of any appeal under §1.341 of this part, or any action to recover penalties and assessments under §1.342 of this part.

(e) The investigating official may recommend settlement terms to the reviewing official, the judicial officer, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the judicial officer, or the Attorney General, as appropriate.

(f) Any settlement must be in writing.

§ 1.346 Limitation.

The complaint referred to in §1.307 of this part with respect to a claim or statement must be served in the manner specified in §1.308 of this part within 6 years after the date on which such claim or statement is made.

Subpart M—Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620 *et seq.*)

AUTHORITY: 5 U.S.C. 556 and 16 U.S.C. 620 *et seq.*

SOURCE: 59 FR 8824, Feb. 24, 1994, unless otherwise noted.

§ 1.410 Meaning of words.

As used in these procedures, words in the singular form shall be deemed to import the plural, and vice versa, as the circumstance may require.

§ 1.411 Definitions.

As used in these procedures, the terms as defined in the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620 *et seq.* (Act) and in the regulations issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in these procedures:

(a) *Applicant* or *Sourcing area applicant* means a person who submits a sourcing area application pursuant to these rules, or a person who sourcing area is subject to formal review pursuant to 36 CFR 223.191(e).

(b) *Decision* means:

(1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 554, 556, 557, and 16 U.S.C. 620 *et seq.* and 36 CFR 223.190 and 223.191(e), which includes the Judge's findings and conclusions and the reasons or basis therefore on all material issues of fact, law or discretion, orders and rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial officer upon appeal of the Judge's decision.

(c) *Determination* is synonymous with *decision*.

(d) *Hearing* means that part of the proceeding which may be requested by a party of record, and which involves the submission of additional evidence

before the Administrative Law Judge for the record in the proceeding.

(e) *Hearing Clerk* means the Office of the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250.

(f) *Judge* means any Administrative Law Judge Appointed pursuant to 5 U.S.C. 3105 and assigned to the proceeding involved.

(g) *Judicial Officer* means an official of the United States Department of Agriculture delegated authority by the Secretary of Agriculture, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c–459g) and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1988 ed., appendix, p. 1280), to perform the function involved (7 CFR 235(a)), or the Secretary of Agriculture, if the authority so delegated is exercised by the Secretary.

(h) *Party of record* or *Party* is a party to the proceeding to determine approval or disapproval of a sourcing area application, including the proceeding for formal review of a sourcing area. The sourcing area applicant and persons who submit written comments on the sourcing area application at issue during the 30 calendar day comment period, including the Regional Forester, are the parties of record. For purposes of a formal review of a sourcing area, the holder of the sourcing area that is the subject of the review and persons who submit written comments on the sourcing area application at issue during the 30 calendar day comment period after institution of the formal review, including the Regional Forester, are the parties of record.

(i) *Sourcing Area Application* means the application by which a person applies for a sourcing area or the application by which a sourcing area holder applies for a formal review of a sourcing area.

§ 1.412 Institution of proceedings.

(a) *Sourcing area applications.* The proceeding for determining sourcing areas shall be instituted by receipt of a sourcing area application by the Office of Administrative Law Judges, pursuant to 36 CFR 223.190.

(b) *Review of sourcing areas.* Informal review of a sourcing area precedes institution of a formal review as follows:

(1) *Request by Sourcing area holder.* A sourcing area holder who wishes to begin a review of a sourcing area shall send a written request for a review to the Regional Forester of the region in which the manufacturing facility being sourced is located. The request shall state the reason for the request.

(i) *Informal review.* The Regional Forester shall begin an informal review, pursuant to 36 CFR 223.191(e), based on the written request. If no agreement is reached in the informal review process, the Regional Forester of the region in which the manufacturing facility being sourced is located shall transmit to the Office of Administrative Law Judges any submissions received during the informal review process, within 5 working days of the meeting convened during the informal review (36 CFR 223.191)e)). Agreement is reached when all persons attending the meeting convened by the Regional Forester to resolve differences as to the proper sourcing area, including the Regional Forester, sign the document describing the sourcing area.

(ii) *Formal review.* Institution by a sourcing area holder of a formal review of the sourcing area occurs if the informal review process does not result in agreement among the parties, and the sourcing area holder submits a sourcing area application to the Office of the Administrative Law Judges, pursuant to 36 CFR 223.190, within 10 working days after the meeting convened by the Regional Forester as part of the informal process.

(2) *Initiation of review by agency.* If the Forest Service wishes to begin a review of a sourcing area, the Regional Forester of the region in which the manufacturing facility being sourced is located shall begin an informal review, pursuant to 36 CFR 223.191(e). If no agreement is reached in the informal review process, the Regional Forester of the region in which the manufacturing facility being sourced is located shall transmit to the Office of Administrative Law Judges any submissions received during the informal review process, within 5 working days of the meeting convened during the informal review (36 CFR 223.191(e)). Agreement is reached when all persons attending the

meeting convened by the Regional Forester to resolve differences as to the proper sourcing area, including the Regional Forester, sign the document describing the sourcing area. Institution by the Forest Service of a formal review of a sourcing area occurs when the Office of Administrative Law Judges receives the papers and documents submitted during the informal review process.

§ 1.413 Submission of a sourcing area application.

A sourcing area applicant shall send the application to the Office of Administrative Law Judges and shall, simultaneously, send a copy of the sourcing area application to the Forest Service Regional Forester of the region in which the manufacturing facility being sourced is located. Where the sourcing area application will cover purchases from more than one agency, application is to be made to the agency from which the applicant expects to purchase the preponderance of its Federal timber. The sourcing area applicant must also send a complete copy of the application to each agency concerned. The lead agency shall make the decision in consultation with, and upon cosignature of, the other agency(ies) concerned. Sourcing area applications must be signed by the persons making the request, or in the case of a corporation, by its chief executive officer, and must be notarized. The application shall be on company letterhead.

§ 1.414 Docket number.

Each proceeding, following its institution, shall be assigned a docket number by the Hearing Clerk, and thereafter the proceeding shall be referred to by such number. The Hearing Clerk shall notify the sourcing area applicant and the Regional Forester to whom the applicant submitted a copy of the application of the docket number and the name of the Judge to whom the case has been assigned. In a formal review of a sourcing area instituted by the Forest Service, the Hearing Clerk shall inform the sourcing area holder whose sourcing area is subject to the review and the Regional Forester who submitted the comments instituting the formal review of the docket number and the name of the Judge to whom the case has been assigned.

§ 1.415 Notification of proceedings.

The Regional Forester of the region in which the manufacturing facility being sourced is located shall notify prospective parties of the sourcing area application and/or the formal review of a sourcing area after receipt of the docket number and the name of the Judge to whom the proceeding has been assigned, pursuant to § 1.414 of these rules. Notification will consist of publication of a notice in newspapers of general circulation in the area included in the sourcing area application. The Regional Forester shall promptly notify the Hearing Clerk of the date of the publication and the notice. Additional notification will be made through agency mailing lists. Notification shall include the docket number, the name of the Judge to whom the case has been assigned and the mailing address of the Judge. In the case of a sourcing area review, notification will also state the reason for the review.

§ 1.416 Comment period.

Written comments on a sourcing area application or on a formal review of a sourcing area shall include the docket number and may be submitted to the Judge for 30 calendar days following publication of the notice. Persons submitting comments shall send a copy of the comments to the Regional Forester of the region in which the manufacturing facility being sourced is located. All comments must be received by the Judge and by the Regional Forester by the 30th day of the comment period.

§ 1.417 Review period.

(a) *Review of comments.* The sourcing area applicant, the sourcing area holder whose sourcing area is the subject of a formal review and other parties who submitted written comments will be allowed 10 working days from the close of the comment period to review the written comments at the Regional Forester's office during regular business hours.

(b) *Recommendation to Judge to approve or disapprove a sourcing area application.* During the 10 working day review period, parties who have submitted written comments on an application or on a formal review of a sourcing area may submit a written recommendation to the Judge, including an analysis of the facts and law as to why the Judge should approve or disapprove that application. A sourcing area applicant whose sourcing area application is the subject of the proceeding, and a sourcing area holder whose sourcing area is the subject of a formal review, may also submit a written recommendation to the Judge. The recommendation must be postmarked no later than the 10th working day of the review period.

(c) *Request for a hearing.* The sourcing area applicant, the sourcing area holder whose sourcing area is the subject of a formal review and persons who submitted written comments, or the attorney of record for a party in the proceeding, may review the comments and request a hearing within 10 working days after the comment period, pursuant to 36 CFR 233.190(h)(2). The request must be postmarked no later than the 10th working day of the review period. An attorney may file an appearance of record prior to the scheduled hearing. The request for a hearing shall be filed with the Judge. The hearing is for the purpose of supplementing the written record submitted prior to the hearing. The written record submitted prior to the hearing consists of papers and documents submitted during the 30 calendar day comment period, the 10 working day review period, and any motions submitted before the hearing. For purposes of a formal review of a sourcing area, the written record also consists of the papers and documents submitted during the informal review.

(1) *Contents of the notice of hearing.* The Judge shall issue a notice of hearing regarding a particular sourcing area application or regarding formal review of a sourcing area application or regarding formal review of a sourcing area to all parties of record for that application or formal review. The notice of hearing shall contain a reference to the authority under which the sourcing area is proposed or formally reviewed; shall define the scope of the hearing; shall contain a reference to the sourcing area that is the subject of the hearing; and shall state the date, time and place of such hearing; and shall state the date, time and place of such hearing; which shall be set with due regard for the necessity and convenience of the parties of record or their representatives. The Judge shall schedule a hearing no later than 21 calendar days after the 10 working day period for reviewing written comments ends. The Judge may consolidate requests for a hearing regarding the same application.

(2) *Giving notice of hearing.* The notice of hearing shall be served upon the parties of record for the sourcing area application at issue by the Hearing Clerk.

§ 1.418 Procedure upon no request for hearing.

If no hearing is requested by a party of record, the Judge shall issue an initial decision based on the written record and without further procedure or hearing. If no hearing is requested, the written record consists of papers and documents submitted during the 30-day comment period, the 10-day review period, and includes motions submitted before the Judge issues an initial decision. For purposes of a formal review of a sourcing area, the written record also consists of the papers and documents submitted during the informal review. Copies of the decision shall be served by the Hearing Clerk upon each of the parties of record.

§ 1.419 Amendment of a sourcing area application.

The sourcing area applicant may move to amend the sourcing area application with clarifying and technical amendments at any time prior to the Judge's initial determination if there is no hearing, or prior to the close of the hearing if there is a hearing.

§ 1.420 Consent recommendation.

Any time before the Judge files the decision, the parties of record may enter a consent recommendation. Such consent recommendation shall be filed with the Hearing Clerk, signed by the

parties with appropriate space for signature by the Judge. The consent recommendation shall contain an admission of the jurisdictional facts, the factual and legal basis for the recommended sourcing area, the consent to the issuance of the recommended decision as the final decision of the agency without further procedure and such other admissions or statements as may be recommended by the parties. The Judge shall review the recommendation to determine whether such recommendation conforms with the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*), 36 CFR 223.190, 36 CFR 223.191(e) and these procedures. If the recommendation conforms to the aforementioned Act, regulations, and procedures, the Judge may enter such decision without further procedure, unless an error is apparent on the face of the document. If the Judge enters the decision, such decision shall have the same force and effect as a decision issued after full hearing and shall become final upon issuance to become effective in accordance with the terms of the decision.

§ 1.421 Prehearing conferences and procedures.

(a) *Purpose and scope.* (1) Upon motion of a party of record or upon the Judge's own motion, the Judge may direct the parties or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing, when the Judge finds that the proceeding would be expedited by a prehearing conference. Reasonable notice of the time and place of the conference shall be given. The Judge may order each of the parties to furnish at or subsequent to the conference any or all of the following:

(i) An outline of a party's position;

(ii) The facts upon which the party will rely;

(iii) The legal theories upon which the party will rely;

(iv) Copies of or a list of documents which the party anticipates introducing at the hearing; and

(v) A list of anticipated witnesses who will testify on behalf of the party. At the discretion of the party furnishing such list of witnesses, the names of the witnesses need not be furnished if they are otherwise identified in some meaningful way such as a short statement of the type of evidence they will offer.

(2) The Judge shall not order any of the foregoing procedures that a party can show is inappropriate or unwarranted under the circumstances of the particular determination.

(3) At the conference, the following matters shall be considered:

(i) The simplification of issues;

(ii) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(iii) The limitation of the number of expert or other witnesses;

(iv) Negotiation, compromise, or settlement of issues;

(v) The exchange of copies of proposed exhibits;

(vi) The identification of documents or matters of which official notice may be requested;

(vii) A schedule to be followed by the parties for completion of the actions decided at the conference; and

(viii) Such other matters as may expedite and aid in the disposition of the proceeding.

(b) *Reporting.* A prehearing conference will not be stenographically reported unless so directed by the Judge.

(c) *Action in lieu of personal attendance at a conference.* In the event the Judge concludes that personal attendance by the Judge and the parties or counsel at a prehearing conference is unwarranted or impracticable, but determines that a conference would expedite the proceeding, the Judge may conduct such conference by telephone or correspondence.

(d) *Order.* Actions taken as a result of a conference shall be reduced to an appropriate written order, unless the Judge concludes that a stenographic report shall suffice, or if the Judge elects to make a statement on the record at the hearing summarizing the actions taken.

§ 1.422 Conduct of the hearing.

(a) *Time and place.* The hearing shall be held at the time and place fixed in the notice of hearing. If any change in

the time or place of the hearing is made, the Judge shall file with the Hearing Clerk a notice of such change, which notice shall be served upon the parties, unless it is made during the course of an oral script, or actual notice is given to the parties.

(b) *Appearances.* The parties may appear in person or by attorney of record in the proceeding. Any party who desires to be heard in person shall, before proceeding to testify, state his name, address, and occupation. If any such person is appearing through counsel, such person or such counsel shall, before proceeding to testify or otherwise to participate in the hearing, state for the record the authority to act as such counsel or representative, and the names, addresses, and occupations of such person and such counsel. Any such person or such counsel shall give such other information respecting his appearance as the Judge may request. Any person who appears as counsel must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

(c) *Failure to appear.* A party of record who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding. 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.

(d) *Order of proceeding.* The Judge shall determine the order in which the parties shall proceed.

(e) *Evidence*—(1) *In general.* (i) The testimony of witnesses at a hearing shall be on oath or affirmation and shall be subject to cross-examination. Cross-examination shall be permitted to the extent required for a full and true disclosure of the facts. The Judge may require that testimony on one issue raised by numerous parties be heard at one time.

(ii) Upon a finding of good cause, the Judge may order that any witness be examined separately and apart from all other witnesses except those who may be parties to the proceeding.

(iii) After a witness has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the party who called the witness, which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

(iv) Evidence which is immaterial, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

(2) *Objections.* (i) If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination or to any other ruling of the Judge, the party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the Judge.

(ii) Only objections made before the Judge may subsequently be relied upon in the proceeding.

(3) *Depositions.* The deposition of any witness shall be admitted in the manner provided in and subject to the provisions of §1.228 of these procedures.

(4) *Exhibits.* Unless the Judge finds that the furnishing of copies is impracticable, two copies of each exhibit shall be filed with the Judge. The party submitting the exhibit shall serve on every other party of record a copy of the exhibit, pursuant to §1.427(c) of these procedures. A true copy of an exhibit may be substituted for the original.

(5) *Official records or documents.* An official government record or document or entry therein, if admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same, and shall be prima facie evidence of the relevant facts stated therein. Such record or document shall be evidenced by an official publication thereof or a copy certified by a person having legal authority to make such certification.

(6) *Official notice.* Official notice shall be taken of such matters as are judicially noted by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided,* That the parties shall be given adequate notice of matters so noticed, and shall be

given adequate opportunity to show that such facts are erroneously noticed.

(7) *Offer of proof.* Whenever evidence is excluded by the Judge, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence excluded. If the evidence consists of a brief oral statement, it shall be included in the transcript in toto. If the evidence consists of an exhibit, it shall be marked for identification and inserted in the hearing record.

(f) *Transcript.* Hearings shall be recorded and transcribed verbatim. Transcripts thereof shall be made available to any person, at actual cost of duplication (5 U.S.C. App. 2, section 11).

§ 1.423 Post-hearing procedure.

(a) *Corrections to transcript.* (1) Within the period of time fixed by the Judge, any party may file a motion proposing corrections to the transcript.

(2) Unless a party files such motion in the manner prescribed, the transcript shall be presumed, except for obvious typographical errors, to be complete.

(3) As soon as practicable after the close of the hearing and after consideration of any timely objections filed as to the transcript, the Judge shall issue an order making any corrections to the transcript which the Judge finds are warranted, which corrections shall be entered onto the original transcript by the Hearing Clerk (without obscuring the origianl text).

(b) *Proposed findings of fact, conclusions, order, and brief.* Prior to the close of the hearing, each party may submit for consideration proposed findings of fact, conclusions, order, and brief in support thereof. A copy of each such document filed by a party shall be served upon each of the other parties.

(c) *Judge's decision.* (1) The Judge may, upon motion of any party or in his or her own discretion, issue a decision orally at the close of the hearing, or within 10 calendar days after the close of the hearing, or within 10 calendar days after submission of the record, if no hearing is requested.

(2) If the decision is announced orally, a copy thereof, excerpted from the transcript of the record, shall be furnished to the parties by the Hearing Clerk. Irrespective of the date such copy is mailed, the issuance date of the decision shall be the date the oral decision was announced.

(3) If the decision is in writing, it shall be filed with the Hearing Clerk and served upon the parties as provided in § 1.427.

(4) The Judge's decision shall become effective without further proceedings 21 calendar days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 21 calendar days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.426; *Provided, however*, that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

(5) The Judicial Officer shall issue a decision within 10 calendar days of the receipt of the response to the appeal.

§ 1.424 Motions and requests.

(a) *General.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties except motions and requests made on the record during the oral hearing.

(b) *Motions entertained.* No dispositive motions, including motions to dismiss on the pleadings and motions for summary judgment, shall be entertained unless specifically mentioned herein or allowed in the discretion of the Judge.

(c) *Contents.* All written motions and requests shall state the particular order, ruling, or action desired and the grounds therefore.

(d) *Response to motions and requests.* Within 5 days after service of any written motion or request, or within such shorter or longer period as may be fixed by the Judge, an opposing party may file a response to the motion or request. The other party shall have no right to reply to the response.

§ 1.425 Judges.

(a) *Assignment.* No Judge shall be assigned to serve in any proceeding who:

(1) Has any pecuniary interest in any matter or business involved in the proceeding;

(2) Is related within the third degree by blood or marriage to any party to the proceeding; or

(3) Has any conflict of interest which might impair the Judge's objectivity in the proceeding.

(b) *Disqualification of Judge.* (1) Any party to the proceeding may, by motion made to the Judge, request that the Judge withdraw from the proceeding because of an alleged disqualifying reason. Such motion shall set forth with particularity the grounds of alleged disqualification. The Judge may then either rule upon or certify the motion to the Secretary, but not both.

(2) A Judge shall withdraw from any proceeding for any reason deemed by the Judge to be disqualifying.

(c) *Powers.* Subject to review as provided elsewhere in this part, the Judge, in any assigned proceeding shall have power to:

(1) Rule upon motions and requests;

(2) Set the time and place of a prehearing conference and the hearing, adjourn the hearing from time to time, and change the time and place of hearing;

(3) Administer oaths and affirmations;

(4) Request the presence of and examine witnesses and receive relevant evidence at the hearing;

(5) Take or order the taking of depositions as authorized under these rules;

(6) Admit or exclude evidence;

(7) Hear oral argument on facts or law,

(8) Do all acts and take all measures necessary for the maintenance of order, including the exclusion of contumacious counsel or other persons;

(9) Request additional information from any party to aid in the Judge's determination; and

(10) Take all other actions authorized under these procedures.

(d) *Who may act in the absence of the Judge.* In case of the absence of the Judge or the Judge's inability to act, the powers and duties to be performed by the Judge under these rules of practice in connection with any assigned proceeding may, without abatement of the proceeding unless otherwise directed by the Chief Judge, be assigned to any other Judge.

§ 1.426 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 10 calendar days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in §1.422(e)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other rulings made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition. A party filing a petition of appeal to the Judicial Officer, and any brief in support thereof, shall serve the other parties to the proceeding with a copy of the petition and supporting brief. The copies of the petition and supporting brief shall be served on the parties to the proceeding with a copy of the petition and supporting brief. The copies of the petition and supporting brief shall be served on the parties to the proceeding on the same day as the petition and supporting brief are filed with the Judicial Officer.

(b) *Response to appeal petition.* Within 10 calendar days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised. A party filing a response to a petition of appeal to the Judicial Officer shall serve the other parties to the proceeding with a copy of the response. The copies of the response shall be served on the parties to the proceeding on the same day as

the response is filed with the Judicial Officer.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: The pleadings; motions and requests filed and rulings thereon; the transcript of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a prehearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Decision of the Judicial Officer on appeal.* The Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal within 4 months after the institution of the proceeding, pursuant to 16 U.S.C. 620b(c)(3). If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by a party as final for purposes of judicial review.

§ 1.427 Filing; identification of parties of record; service; and computation of time.

(a) *Filing; number of copies.* Except as otherwise provided in this section, all documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be filed in duplicate. Any document or paper required or authorized under the rules in this part to be filed with the Hearing Clerk shall, during the course of an oral hearing, be filed with the Judge.

(b) Parties of record shall receive a list from the Hearing Clerk of the names and addresses of all parties of record immediately after the close of the comment period.

(c) *Service; proof of service.* (1) Each party of record is responsible for serving on every other party and to the Judge all papers and documents submitted after the comment period. Service shall be made either:

(i) By delivering a copy of the document or paper to the individual to be served or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation or association to be served, or to the attorney of record representing such individual, partnership, corporation, organization, or association; or

(ii) By leaving a copy of the document or paper at the principal office or place of business or residence of such individual, partnership, corporation, organization, or association, or of the attorney or agent of record and mailing by regular mail another copy to such person at such address; or

(iii) By registering or certifying and mailing a copy of the document or paper, addressed to such individual, partnership, corporation, organization, or association, or to the attorney or agent of record, at the last known residence or principal office or place of business of such person: *Provided,* That if the registered or certified document or paper is returned undelivered because the addressee refused or failed to accept delivery, the document or paper shall be served by remailing it by regular mail; or

(iv) By mailing the document or paper by regular mail.

(2) Proof of service hereunder shall be made by the certificate of the person who actually made the service: *Provided,* that if the service is made by mail, as outlined in paragraph (b)(3) of this section, proof of service shall be made by the return post-office receipt, in the case of registered or certified mail, and if that service is made by regular mail, as outlined in paragraphs (b)(3) and (b)(4) of this section, proof of

service shall be made by the certificate of the person who mailed the matter by regular mail. The certificate and post-office receipt contemplated herein shall be filed with the Hearing Clerk, and made a part of the record of the proceeding. The Judge and the Hearing Clerk shall follow the procedures outlined in (c) for service of papers or documents signed by the Judge and/or the Hearing Clerk.

(d) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

(e) *Computations of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper except as provided in these rules; *Provided,* that, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

§ 1.428 Depositions.

(a) *Motion for taking deposition.* Upon the motion of a party to the proceeding, the Judge may, at any time after the filing of the submission, order the taking of testimony by deposition. The Motion shall be in writing, shall be filed with the Hearing Clerk, and shall set forth:

(1) The name and address of the proposed deponent;

(2) The name and address of the person (referred to hereafter in this section as the ''officer'') qualified under the regulations in this part to take depositions, before whom the proposed examination is to be made;

(3) The proposed time and place of the examination; and

(4) The reasons why such deposition should be taken, which shall be solely for the purpose of eliciting testimony which otherwise might not be available at the time of the hearing, for uses as provided in paragraph (g) of this section.

(b) *Judge's order for taking deposition.* (1) If the Judge finds that testimony may not be otherwise available at the hearing, the taking of the deposition may be ordered. The order shall be served upon the parties, and shall state:

(i) The time and place of the examination;

(ii) The name of the officer before whom the examination is to be made; and

(iii) The name of the deponent.

(2) The officer and the time and place need not be the same as those suggested in the motion.

(c) *Qualifications of officer.* The deposition shall be made before the Judge or before an officer authorized by the law of the United States or by the law of the place of the examination to administer oaths, or before an officer authorized by the Secretary to administer oaths.

(d) *Procedure on examinations.* (1) The deponent shall be subject to cross-examination. Objections to questions or documents shall be in short form, stating the grounds of objections relied upon. The questions propounded, together with all objections made (but not including argument or debate), shall be recorded verbatim. In lieu of oral examination, parties may transmit written questions to the officer prior to the examination and the officer shall propound such questions to the deponent.

(2) The applicant shall arrange for the examination of the witness either by oral examination, or by written questions upon agreement of the parties or as directed by the Judge. If the examination is conducted by means of written questions, copies of the questions shall be served upon the other party to the proceeding and filed with the officer and the other party may serve cross questions and file them with the officer at any time prior to the time of the examination.

(e) *Certification by officer.* The officer shall certify on the deposition that the deponent was duly sworn and that the deposition is a true record of the deponent's testimony. The officer shall then securely seal the deposition, together with one copy thereof (unless there are more than two parties in the

proceeding, in which case there should be another copy for each additional party), in an envelope and mail the same by registered or certified mail to the Hearing Clerk.

(f) *Corrections to the transcript.* (1) At any time prior to the hearing any party may file a motion proposing corrections to the transcript of the deposition.

(2) Unless a party files such a motion in the manner prescribed, the transcript shall be presumed, except for obvious typographical errors, to be a true, correct, and complete transcript of the testimony given in the deposition proceeding and to contain an accurate description or reference to all exhibits in connection therewith, and shall be deemed to be certified correct without further procedure.

(3) At any time prior to use of the deposition in accordance with paragraph (g) of this section and after consideration of any objections filed thereto, the Judge may issue an order making any corrections in the transcript which the Judge finds are warranted, which corrections shall be entered onto the original transcript by the Hearing Clerk (without obscuring the original text).

(g) *Use of deposition.* A deposition ordered and taken in accordance with the provisions of this section may be used in a proceeding under these rules if the Judge finds that the evidence is otherwise admissible and that the witness is dead; that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or that such exceptional circumstances exist as to make it desirable, in the interests of justice, to allow the deposition to be used. If the party upon whose motion the deposition was taken refuses to offer it in evidence, any other party may offer the deposition or any thereof in evidence. If only part of a deposition is offered in evidence by a party, an adverse party may require the introduction of any other part which ought in fairness to be considered with the part introduced and any party may introduce any other parts.

§ 1.429 *Ex parte* communications.

(a) At no stage of the proceeding between its institution and issuance of the final decision shall an employee of the Department who is or may reasonably be expected to be involved in the decisional process of the proceeding discuss *ex parte* the merits of the proceeding with any person having an interest in the proceeding, or with any representative of such person: *Provided,* That, procedural matters and status reports shall not be included within this limitation; and *Provided further,* That an employee of the Department who is or may be involved in the decisional process of the proceeding may discuss the merits of the proceeding if all parties of record have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record.

(b) No interested person shall make or knowingly cause to be made to the Judge an *ex parte* communication relevant to the merits of the proceeding.

(c) If the Judge reviews an *ex parte* communication in violation of this section, the one who receives the communication shall place in the public record of the proceeding:

(1) All such written communication;

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

(3) All written responses, and memoranda stating the substance of all oral responses thereto.

(d) Upon receipt of a communication knowingly 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 and the policy of the underlying statute, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(e) To the extent consistent with the interests of justice and the policy of the underlying statute, a violation of this section shall be sufficient grounds for a decision adverse to the party who knowingly commits a violation of this section or who knowingly causes such a violation to occur.

(f) For purposes of this section *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 it shall not include requests for status reports on any matter or the proceeding.

Subpart N—Policy With Regard to Indemnification of Department of Agriculture Employees

AUTHORITY: 5 U.S.C. 301.

SOURCE: 69 FR 28042, May 18, 2004, unless otherwise noted.

§ 1.501 Policy on employee indemnification.

(a) Indemnification, under the context of this section, shall be the policy whereby the Department of Agriculture compensates an employee for the legal consequences of conduct, taken within the scope of his or her employment, giving rise to a verdict, judgment, or other monetary award rendered against the employee.

(b) The Department of Agriculture may indemnify a Department employee (which for the purposes of this regulation shall include a former employee) for any verdict, judgment, or other monetary award rendered against such employee, provided the Secretary or the Secretary's designee determines, in his or her discretion, that the conduct giving rise to such verdict, judgment, or award was taken within the scope of his or her employment with the Department, and such indemnification is in the interest of the United States.

(c) The Department of Agriculture may pay for the settlement or compromise of a personal damage claim against a Department employee by the payment of available funds, at any time, provided that the Secretary or the Secretary's designee determines, in his or her discretion, that the alleged conduct giving rise to the personal damage claim was taken within the scope of the employee's employment, and such settlement or compromise is in the interest of the United States.

(d) Absent exceptional circumstances, as determined by the Secretary or his or her designee, the Department will not entertain a request to agree to indemnify or pay for a settlement of a personal damage claim before entry of an adverse judgment, verdict, or other monetary award.

(e) When a Department employee becomes aware that an action has been filed against the employee in his or her individual capacity as a result of conduct taken within the scope of his or her employment, the employee should immediately notify his or her supervisor that such an action is pending. The supervisor shall promptly thereafter notify the Office of the General Counsel.

(f) A Department employee may request indemnification to satisfy a verdict, judgment, or monetary award entered against the employee or to satisfy the requirements of a settlement proposal. The employee shall submit a written request, with appropriate documentation that includes a copy of the verdict, judgment, award or settlement proposal, as appropriate, to the head of his or her employing component, who shall thereupon submit it to the General Counsel, in a timely manner, a recommended disposition of the request. The Office of the General Counsel shall seek the views of the Department of Justice. The Office of the General Counsel shall forward the employee's request, the employing component's recommendation, and the General Counsel's recommendation, along with the time frame in which a decision is needed, to the Secretary or his or her designee for decision. The Secretary or his or her designee will decide promptly whether to indemnify or pay for a settlement of a personal damage claim.

(g) Any payment under this section to indemnify a Department employee for a personal damage verdict, judgment, or award or to settle a personal damage claim shall be contingent upon the availability of appropriated funds of the employing component of the United States Department of Agriculture.

Subpart O—Conditions in FERC Hydropower Licenses

AUTHORITY: 16 U.S.C. 797(e), 811, 823d.

SOURCE: 80 FR 17181, Mar. 31, 2015, unless otherwise noted.

GENERAL PROVISIONS

§ 1.601 What is the purpose of this subpart, and to what license proceedings does it apply?

(a) *Hearing process.* (1) The regulations in §§ 1.601 through 1.660 contain rules of practice and procedure applicable to hearings on disputed issues of material fact with respect to mandatory conditions that the Department of Agriculture, Forest Service (Forest Service) may develop for inclusion in a hydropower license issued under subchapter I of the Federal Power Act (FPA), 16 U.S.C. 791 *et seq.* The authority to develop these conditions is granted by FPA section 4(e), 16 U.S.C. 797(e), which authorizes the Secretary of Agriculture to condition hydropower licenses issued by the Federal Energy Regulatory Commission (FERC).

(2) The hearing process under this part does not apply to recommendations that the Forest Service may submit to FERC under FPA section 10(a), 16 U.S.C. 803(a).

(3) The FPA also grants the Department of Commerce and the Department of the Interior the authority to develop mandatory conditions and prescriptions for inclusion in a hydropower license. Where the Forest Service and either or both of these other Departments develop conditions or prescriptions to be included in the same hydropower license and where the Departments agree to consolidate the hearings under § 1.623:

(i) A hearing conducted under this subpart will also address disputed issues of material fact with respect to any condition or prescription developed by one of the other Departments; or

(ii) A hearing requested under this subpart will be conducted by one of the other Departments, pursuant to 43 CFR 45.1 *et seq.* or 50 CFR 221.1 *et seq.*, as applicable.

(4) The regulations in §§ 1.601 through 1.660 will be construed and applied to each hearing process to achieve a just and speedy determination, consistent with adequate consideration of the issues involved and the provisions of § 1.660(a).

(b) *Alternatives process.* The regulations in §§ 1.670 through 1.674 contain rules of procedure applicable to the submission and consideration of alternative conditions under FPA section 33, 16 U.S.C. 823d. That section allows any party to the license proceeding to propose an alternative to a condition deemed necessary by the Forest Service under section 4(e).

(c) *Reserved authority.* Where the Forest Service has notified or notifies FERC that it is reserving its authority to develop one or more conditions at a later time, the hearing and alternatives processes under this subpart for such conditions will be available if and when the Forest Service exercises its reserved authority.

(d) *Applicability.* (1) This subpart applies to any hydropower license proceeding for which the license had not been issued as of November 17, 2005, and for which one or more preliminary conditions have been or are filed with FERC before FERC issues the license.

(2) This subpart also applies to any exercise of the Forest Service's reserved authority under paragraph (c) of this section with respect to a hydropower license issued before or after November 17, 2005.

§ 1.602 What terms are used in this subpart?

As used in this subpart:

ALJ means an administrative law judge appointed under 5 U.S.C. 3105 and assigned to preside over the hearing process under this subpart.

Alternative means a condition that a license party other than the Forest Service or another Department develops as an alternative to a preliminary condition from the Forest Service or another Department, under FPA sec. 33, 16 U.S.C. 823d.

Condition means a condition under FPA sec. 4(e), 16 U.S.C. 797(e), for the adequate protection and utilization of a reservation.

Day means a calendar day.

Department means the Department of Agriculture, Department of Commerce, or Department of the Interior.

Discovery means a prehearing process for obtaining facts or information to assist a party in preparing or presenting its case.

Ex parte communication means an oral or written communication to the ALJ that is made without providing all parties reasonable notice and an opportunity to participate.

FERC means the Federal Energy Regulatory Commission.

Forest Service means the USDA Forest Service.

FPA means the Federal Power Act, 16 U.S.C. 791 *et seq.*

Hearing Clerk means the Hearing Clerk, OALJ, USDA, 1400 Independence Ave., SW., Washington, DC 20250; phone: 202–720–4443, facsimile: 202–720–9776.

Intervention means a process by which a person who did not request a hearing under §1.621 can participate as a party to the hearing under §1.622.

License party means a party to the license proceeding, as that term is defined at 18 CFR 385.102(c).

License proceeding means a proceeding before FERC for issuance of a license for a hydroelectric facility under 18 CFR part 4 or 5.

Material fact means a fact that, if proved, may affect a Department's decision whether to affirm, modify, or withdraw any condition or prescription.

Modified condition or prescription means any modified condition or prescription filed by a Department with FERC for inclusion in a hydropower license.

NEPA document means an environmental document as defined at 40 CFR 1508.10 to include an environmental assessment, environmental impact statement (EIS), finding of no significant impact, and notice of intent to prepare an EIS. Such documents are issued to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq., and the CEQ Regulations Implementing the Procedural Requirements of NEPA (40 CFR parts 21500–1508).*

NFS means the National Forest System and refers to:

(1) Federal land managed by the Forest Service; and

(2) The Deputy Chief of the National Forest System, located in the Forest Service's Washington, DC, office.

Office of Administrative Law Judges (OALJ) is the office within USDA in which ALJs conduct hearings under the regulations in this subpart.

Party means, with respect to USDA's hearing process:

(1) A license party that has filed a timely request for a hearing under:

(i) Section 1.621; or

(ii) Either 43 CFR 45.21 or 50 CFR 221.21, with respect to a hearing process consolidated under §1.623;

(2) A license party that has filed a timely notice of intervention and response under:

(i) Section 1.622; or

(ii) Either 43 CFR 45.22 or 50 CFR 221.22, with respect to a hearing process consolidated under §1.623;

(3) The Forest Service; and

(4) Any other Department that has filed a preliminary condition or prescription, with respect to a hearing process consolidated under §1.623.

Person means an individual; a partnership, corporation, association, or other legal entity; an unincorporated organization; and any Federal, State, Tribal, county, district, territorial, or local government or agency.

Preliminary condition or prescription means any preliminary condition or prescription filed by a Department with FERC for potential inclusion in a hydropower license.

Prescription means a fishway prescribed under FPA sec. 18, 16 U.S.C. 811, to provide for the safe, timely, and effective passage of fish.

Representative means a person who:

(1) Is authorized by a party to represent the party in a hearing process under this subpart; and

(2) Has filed an appearance under §1.610.

Reservation has the same meaning as the term ''reservations'' in FPA sec. 3(2), 16 U.S.C. 796(2).

Secretary means the Secretary of Agriculture or his or her designee.

Senior Department employee has the same meaning as the term ''senior employee'' in 5 CFR 2637.211(a).

USDA means the United States Department of Agriculture.

You refers to a party other than a Department.

§ 1.603 How are time periods computed?

(a) *General.* Time periods are computed as follows:

(1) The day of the act or event from which the period begins to run is not included.

(2) The last day of the period is included.

(i) If that day is a Saturday, Sunday, or Federal holiday, the period is extended to the next business day.

(ii) The last day of the period ends at 5 p.m. at the place where the filing or other action is due.

(3) If the period is less than 7 days, any Saturday, Sunday, or Federal holiday that falls within the period is not included.

(b) *Extensions of time.* (1) No extension of time can be granted to file a request for a hearing under § 1.621, a notice of intervention and response under § 1.622, an answer under § 1.625, or any document under §§ 1.670 through 1.674.

(2) An extension of time to file any other document under this subpart may be granted only upon a showing of good cause.

(i) To request an extension of time, a party must file a motion under § 1.635 stating how much additional time is needed and the reasons for the request.

(ii) The party must file the motion before the applicable time period expires, unless the party demonstrates extraordinary circumstances that justify a delay in filing.

(iii) The ALJ may grant the extension only if:

(A) It would not unduly prejudice other parties; and

(B) It would not delay the decision under § 1.660.

§ 1.604 What deadlines apply to the trial-type hearing and alternatives processes?

(a) The following table summarizes the steps in the trial-type hearing process under this subpart and indicates the deadlines generally applicable to each step. If the deadlines in this table are in any way inconsistent with the deadlines as set by other sections of this subpart or by the ALJ, the deadlines as set by those other sections or by the ALJ control.

Process step	Process day	Must generally be completed	See section
(1) Forest Service files preliminary condition(s) with FERC.	0	.....	1.620.
(2) License party files request for hearing ..	30	Within 30 days after Forest Service files preliminary condition(s) with FERC.	1.621(a).
(3) Any other license party files notice of intervention and response.	50	Within 20 days after deadline for filing requests for hearing.	1.622(a).
(4) NFS refers case to ALJ office for hearing and issues referral notice to parties.	85	Within 55 days after deadline for filing requests for hearing.	1.626(a).
(5) Parties may meet and agree to discovery (optional step).	86–91	Before deadline for filing motions seeking discovery.	1.641(a).
(6) ALJ office sends docketing notice, and ALJ issues notice setting date for initial prehearing conference.	90	Within 5 days after effective date of referral notice.	1.630.
(7) Party files motion seeking discovery from another party.	92	Within 7 days after effective date of referral notice.	1.641(d).
(8) Other party files objections to discovery motion or specific portions of discovery requests.	99	Within 7 days after service of discovery motion.	1.641(e).
(9) Parties meet to discuss discovery and hearing schedule.	100–104	Before date set for initial prehearing conference.	1.640(d).
(10) ALJ conducts initial prehearing conference.	105	On or about 20th day after effective date of referral notice.	1.640(a).
(11) ALJ issues order following initial prehearing conference.	107	Within 2 days after initial prehearing conference.	1.640(g).
(12) Party responds to interrogatories from another party as authorized by ALJ.	120–22	Within 15 days after ALJ's order authorizing discovery during or following initial prehearing conference.	1.643(c).
(13) Party responds to requests for documents, etc., from another party as authorized by ALJ.	120–22	Within 15 days after ALJ's order authorizing discovery during or following initial prehearing conference.	1.645(c).
(14) Parties complete all discovery, including depositions, as authorized by ALJ.	130	Within 25 days after initial prehearing conference.	1.641(i).
(15) Parties file updated lists of witnesses and exhibits.	140	Within 10 days after deadline for completion of discovery.	1.642(b).

Process step	Process day	Must generally be completed	See section
(16) Parties file written direct testimony	140	Within 10 days after deadline for completion of discovery.	1.652(a).
(17) Parties complete prehearing preparation and ALJ commences hearing.	155	Within 25 days after deadline for completion of discovery.	1.650(a).
(18) ALJ closes hearing record	160	When ALJ closes hearing	1.658.
(19) Parties file post-hearing briefs	175	Within 15 days after hearing closes	1.659(a).
(20) ALJ issues decision	190	Within 30 days after hearing closes	1.660(a).

(b) The following table summarizes the steps in the alternatives process under this subpart and indicates the deadlines generally applicable to each step. If the deadlines in this table are in any way inconsistent with the deadlines as set by other sections of this subpart, the deadlines as set by those other sections control.

Process step	Process day	Must generally be completed	See section
(1) Forest Service files preliminary condition(s) with FERC.	0	.....	1.620.
(2) License party files alternative condition(s).	30	Within 30 days after Forest Service files preliminary condition(s) with FERC.	1.671(a).
(3) ALJ issues decision on any hearing request.	190	Within 30 days after hearing closes (see previous table).	1.660(a).
(4) License party files revised alternative condition(s) if authorized.	210	Within 20 days after ALJ issues decision	1.672(a).
(5) Forest Service files modified condition(s) with FERC.	300	Within 60 days after the deadline for filing comments on FERC's draft NEPA document.	1.673(a).

HEARING PROCESS

REPRESENTATIVES

§ 1.610 Who may represent a party, and what requirements apply to a representative?

(a) *Individuals.* A party who is an individual may either represent himself or herself in the hearing process under this subpart or authorize an attorney to represent him or her.

(b) *Organizations.* A party that is an organization or other entity may authorize one of the following to represent it:

(1) An attorney;

(2) A partner, if the entity is a partnership;

(3) An officer or agent, if the entity is a corporation, association, or unincorporated organization;

(4) A receiver, administrator, executor, or similar fiduciary, if the entity is a receivership, trust, or estate; or

(5) An elected or appointed official or an employee, if the entity is a Federal, State, Tribal, county, district, territorial, or local government or component.

(c) *Appearance.* An individual representing himself or herself and any other representative must file a notice of appearance. The notice must:

(1) Meet the form and content requirements for documents under § 1.611;

(2) Include the name and address of the party on whose behalf the appearance is made;

(3) If the representative is an attorney, include a statement that he or she is a member in good standing of the bar of the highest court of a state, the District of Columbia, or any territory or commonwealth of the United States (identifying which one); and

(4) If the representative is not an attorney, include a statement explaining his or her authority to represent the entity.

(d) *Lead representative.* If a party has more than one representative, the ALJ may require the party to designate a lead representative for service of documents under § 1.613.

(e) *Disqualification.* The ALJ may disqualify any representative for misconduct or other good cause.

DOCUMENT FILING AND SERVICE

§ 1.611 What are the form and content requirements for documents under this subpart?

(a) *Form.* Each document filed in a case under §§ 1.610 through 1.660 must:

(1) Measure 8½ by 11 inches, except that a table, chart, diagram, or other attachment may be larger if folded to 8½ by 11 inches and attached to the document;

(2) Be printed on just one side of the page (except that service copies may be printed on both sides of the page);

(3) Be clearly typewritten, printed, or otherwise reproduced by a process that yields legible and permanent copies;

(4) Use 11 point font size or larger;

(5) Be double-spaced except for footnotes and long quotations, which may be single-spaced;

(6) Have margins of at least 1 inch; and

(7) Be bound on the left side, if bound.

(b) *Caption.* Each document filed under §§ 1.610 through 1.660 must begin with a caption that sets forth:

(1) The name of the case under §§ 1.610 through 1.660 and the docket number, if one has been assigned;

(2) The name and docket number of the license proceeding to which the case under §§ 1.610 through 1.660 relates; and

(3) A descriptive title for the document, indicating the party for whom it is filed and the nature of the document.

(c) *Signature.* The original of each document filed under §§ 1.610 through 1.660 must be signed by the representative of the person for whom the document is filed. The signature constitutes a certification by the representative that he or she has read the document; that to the best of his or her knowledge, information, and belief, the statements made in the document are true; and that the document is not being filed for the purpose of causing delay.

(d) *Contact information.* Below the representative's signature, the document must provide the representative's name, mailing address, street address (if different), telephone number, facsimile number (if any), and electronic mail address (if any).

§ 1.612 Where and how must documents be filed?

(a) *Place of filing.* Any documents relating to a case under §§ 1.610 through 1.660 must be filed with the appropriate office, as follows:

(1) Before NFS refers a case for docketing under § 1.626, any documents must be filed with NFS by directing them to the ''Deputy Chief, NFS.''

(i) For delivery by regular mail, address to USDA Forest Service, Attn: Lands Staff, Mail Stop 1124, 1400 Independence Ave. SW., Washington, DC 20250–1124.

(ii) For delivery by hand or private carrier, deliver to USDA Forest Service, Yates Bldg. (4 SO), 201 14th Street SW., Washington, DC (SW. corner of 14th Street and Independence Ave. SW.); phone (202) 205–1248; facsimile (703) 605–5117. Hand deliverers must obtain an official date-time-stamp from Lands Staff.

(2) The Forest Service will notify the parties of the date on which NFS refers a case for docketing under § 1.626. After that date, any documents must be filed with:

(i) The Hearing Clerk, if OALJ will be conducting the hearing. The Hearing Clerk's address, telephone number, and facsimile number are set forth in § 1.602; or

(ii) The hearings component of or used by another Department, if that Department will be conducting the hearing. The name, address, telephone number, and facsimile number of the appropriate hearings component will be provided in the referral notice from the Forest Service.

(b) *Method of filing.* (1) A document must be filed with the appropriate office under paragraph (a) of this section using one of the following methods:

(i) By hand delivery of the original document and two copies;

(ii) By sending the original document and two copies by express mail or courier service; or

(iii) By sending the document by facsimile if:

(A) The document is 20 pages or less, including all attachments;

(B) The sending facsimile machine confirms that the transmission was successful; and

(C) The original of the document and two copies are sent by regular mail on the same day.

(2) Parties are encouraged, and may be required by the ALJ, to supplement any filing by providing the appropriate office with an electronic copy of the document on compact disc or other suitable media. With respect to any supporting material accompanying a request for hearing, a notice of intervention and response, or an answer, the party may submit in lieu of an original and two hard copies:

(i) An original; and

(ii) One copy on a compact disc or other suitable media.

(c) *Date of filing.* A document under this subpart is considered filed on the date it is received. However, any document received after 5 p.m. at the place where the filing is due is considered filed on the next regular business day.

(d) *Nonconforming documents.* If any document submitted for filing under this subpart does not comply with the requirements of this subpart or any applicable order, it may be rejected.

§ 1.613 What are the requirements for service of documents?

(a) *Filed documents.* Any document related to a case under §§1.610 through 1.660 must be served at the same time the document is delivered or sent for filing. Copies must be served as follows:

(1) A complete copy of any request for a hearing under §1.621 must be delivered or sent to FERC and each license party, using one of the methods of service in paragraph (c) of this section or under 18 CFR 385.2010(f)(3) for license parties that have agreed to receive electronic service.

(2) A complete copy of any notice of intervention and response under §1.622 must be:

(i) Delivered or sent to FERC, the license applicant, any person who has filed a request for hearing under §1.621, and the Forest Service office that submitted the preliminary conditions to FERC, using one of the methods of service in paragraph (c) of this section; and

(ii) Delivered or sent to any other license party using one of the methods of service in paragraph (c) of this section or under 18 CFR 385.2010(f)(3) for license parties that have agreed to receive electronic service, or by regular mail.

(3) A complete copy of any answer or notice under §1.625 and any other document filed by any party to the hearing process must be delivered or sent to every other party to the hearing process, using one of the methods of service in paragraph (c) of this section.

(b) *Documents issued by the Hearing Clerk or ALJ.* A complete copy of any notice, order, decision, or other document issued by the Hearing Clerk or the ALJ under §§1.610 through 1.660 must be served on each party, using one of the methods of service in paragraph (c) of this section.

(c) *Method of service.* Unless otherwise agreed to by the parties and ordered by the ALJ, service must be accomplished by one of the following methods:

(1) By hand delivery of the document;

(2) By sending the document by express mail or courier service for delivery on the next business day;

(3) By sending the document by facsimile if:

(i) The document is 20 pages or less, including all attachments;

(ii) The sending facsimile machine confirms that the transmission was successful; and

(iii) The document is sent by regular mail on the same day; or

(4) By sending the document, including all attachments, by electronic means if the party to be served has consented to that means of service in writing. However, if the serving party learns that the document did not reach the party to be served, the serving party must re-serve the document by another method set forth in paragraph (c) of this section (including another electronic means, if the party to be served has consented to that means in writing).

(d) *Certificate of service.* A certificate of service must be attached to each document filed under §§1.610 through 1.660. The certificate must be signed by the party's representative and include the following information:

(1) The name, address, and other contact information of each party's representative on whom the document was served;

(2) The means of service, including information indicating compliance

with paragraph (c)(3) or (c)(4) of this section, if applicable; and

(3) The date of service.

Initiation of Hearing Process

§ 1.620 What supporting information must the Forest Service provide with its preliminary conditions?

(a) *Supporting information.* (1) When the Forest Service files its preliminary conditions with FERC, it must include a rationale for each condition, explaining why the Forest Service deems the condition necessary for the adequate protection and utilization of the affected NFS lands, and an index to the Forest Service's administrative record that identifies all documents relied upon.

(2) If any of the documents relied upon are not already in the license proceeding record, the Forest Service must:

(i) File them with FERC at the time it files its preliminary conditions; and

(ii) Provide copies to the license applicant.

(b) *Service.* The Forest Service will serve copies of its preliminary conditions on each license party.

§ 1.621 How do I request a hearing?

(a) *General.* To request a hearing on disputed issues of material fact with respect to any preliminary condition filed by the Forest Service, you must:

(1) Be a license party; and

(2) File with NFS, at the appropriate address provided in §1.612(a)(1), a written request for a hearing:

(i) For a case under §1.601(d)(1), within 30 days after the Forest Service files a preliminary condition with FERC; or

(ii) For a case under §1.601(d)(2), within 60 days after the Forest Service files a preliminary condition with FERC.

(b) *Content.* Your hearing request must contain:

(1) A numbered list of the factual issues that you allege are in dispute, each stated in a single, concise sentence;

(2) The following information with respect to each issue:

(i) The specific factual statements made or relied upon by the Forest Service under §1.620(a) that you dispute;

(ii) The basis for your opinion that those factual statements are unfounded or erroneous; and

(iii) The basis for your opinion that any factual dispute is material.

(3) With respect to any scientific studies, literature, and other documented information supporting your opinions under paragraphs (b)(2)(ii) and (b)(2)(iii) of this section, specific citations to the information relied upon. If any such document is not already in the license proceeding record, you must provide a copy with the request; and

(4) A statement indicating whether or not you consent to service by electronic means under §1.613(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* Your hearing request must also list the witnesses and exhibits that you intend to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, you must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony.

(2) For each exhibit listed, you must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b)(2) of this section may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

§ 1.622 How do I file a notice of intervention and response?

(a) *General.* (1) To intervene as a party to the hearing process, you must:

(i) Be a license party; and

(ii) File with NFS, at the appropriate address provided in §1.612(a)(1), a notice of intervention and a written response to any request for a hearing within 20 days after the deadline in §1.621(a)(2).

(2) A notice of intervention and response must be limited to one or more of the issues of material fact raised in the hearing request and may not raise additional issues.

(b) *Content.* In your notice of intervention and response you must explain

your position with respect to the issues of material fact raised in the hearing request under §1.621(b).

(1) If you agree with the information provided by the Forest Service under §1.620(a) or by the requester under §1.621(b), your response may refer to the Forest Service's explanation or the requester's hearing request for support.

(2) If you wish to rely on additional information or analysis, your response must provide the same level of detail with respect to the additional information or analysis as required under §1.621(b).

(3) Your notice of intervention and response must also indicate whether or not you consent to service by electronic means under §1.613(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* Your response and notice must also list the witnesses and exhibits that you intend to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, you must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony; and

(2) For each exhibit listed, you must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b) of this section (excluding citations to scientific studies, literature, and other documented information supporting your opinions) may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

§ 1.623 Will hearing requests be consolidated?

(a) *Initial Department coordination.* If NFS has received a copy of a hearing request, it must contact the other Departments and determine:

(1) Whether any of the other Departments has also filed a preliminary condition or prescription relating to the license with FERC; and

(2) If so, whether the other Department has also received a hearing request with respect to the preliminary condition or prescription.

(b) *Decision on consolidation.* Where more than one Department has received a hearing request, the Departments involved must decide jointly:

(1) Whether the cases should be consolidated for hearing under paragraphs (c)(3)(ii) through (iv) of this section; and

(2) If so, which Department will conduct the hearing on their behalf.

(c) *Criteria.* Cases will or may be consolidated as follows:

(1) All hearing requests with respect to any conditions from the same Department will be consolidated for hearing.

(2) All hearing requests with respect to any prescriptions from the same Department will be consolidated for hearing.

(3) All or any portion of the following may be consolidated for hearing, if the Departments involved determine that there are common issues of material fact or that consolidation is otherwise appropriate:

(i) Two or more hearing requests with respect to any condition and any prescription from the same Department;

(ii) Two or more hearing requests with respect to conditions from different Departments;

(iii) Two or more hearing requests with respect to prescriptions from different Departments; or

(iv) Two or more hearing requests with respect to any condition from one Department and any prescription from another Department.

§ 1.624 Can a hearing process be stayed to allow for settlement discussions?

(a) Prior to referral to the ALJ, the hearing requester and the Forest Service may by agreement stay the hearing process under this subpart for a period not to exceed 120 days to allow for settlement discussions, if the stay period and any subsequent hearing process (if required) can be accommodated within the time frame established for the license proceeding.

(b) Any stay of the hearing process will not affect the deadline for filing a notice of intervention and response, if any, pursuant to §1.622(a)(1)(ii).

§ 1.625 How will the Forest Service respond to any hearing requests?

(a) *General.* NFS will determine whether to answer any hearing request under §1.621 on behalf of the Forest Service.

(b) *Content.* If NFS answers a hearing request:

(1) For each of the numbered factual issues listed under §1.621(b)(1), NFS's answer must explain the Forest Service's position with respect to the issues of material fact raised by the requester, including one or more of the following statements as appropriate:

(i) That the Forest Service is willing to stipulate to the facts as alleged by the requester;

(ii) That the Forest Service believes the issue listed by the requester is not a factual issue, explaining the basis for such belief;

(iii) That the Forest Service believes the issue listed by the requester is not material, explaining the basis for such belief; or

(iv) That the Forest Service agrees that the issue is factual, material, and in dispute.

(2) NFS's answer must also indicate whether the hearing request will be consolidated with one or more other hearing requests under §1.623 and, if so:

(i) Identify any other hearing request that will be consolidated with this hearing request; and

(ii) State which Department will conduct the hearing and provide contact information for the appropriate Department hearings component.

(3) If the Forest Service plans to rely on any scientific studies, literature, and other documented information that are not already in the license proceeding record, a copy of each item must be provided with NFS's answer.

(4) NFS's answer must also indicate whether or not the Forest Service consents to service by electronic means under §1.613(c)(4) and, if so, by what means.

(c) *Witnesses and exhibits.* NFS's answer must also contain a list of the Forest Service's witnesses and exhibits that the Forest Service intends to present at the hearing, other than solely for impeachment purposes.

(1) For each witness listed, the Forest Service must provide:

(i) His or her name, address, telephone number, and qualifications; and

(ii) A brief narrative summary of his or her expected testimony.

(2) For each exhibit listed, the Forest Service must specify whether it is in the license proceeding record.

(d) *Page limits.* (1) For each disputed factual issue, the information provided under paragraph (b)(1) of this section may not exceed two pages.

(2) For each witness, the information provided under paragraph (c)(1) of this section may not exceed one page.

(e) *Notice in lieu of answer.* If NFS elects not to answer a hearing request:

(1) The Forest Service is deemed to agree that the issues listed by the requester are factual, material, and in dispute;

(2) The Forest Service may file a list of witnesses and exhibits with respect to the request only as provided in §1.642(b); and

(3) NFS must include with its case referral under §1.623 a notice in lieu of answer containing the information required by paragraph (b)(2) of this section, if the hearing request will be consolidated with one or more other hearing requests under §1.623, and the statement required by paragraph (b)(4) of this section.

§ 1.626 What will the Forest Service do with any hearing requests?

(a) *Case referral.* Within 55 days after the deadline in §1.621(a)(2) or 35 days after the expiration of any stay period under §1.624, whichever is later, NFS will refer the case for a hearing as follows:

(1) If the hearing is to be conducted by USDA, NFS will refer the case to the OALJ.

(2) If the hearing is to be conducted by another Department, NFS will refer the case to the hearings component used by that Department.

(b) *Content.* The case referral will consist of the following:

(1) Two copies of any preliminary condition under §1.620;

(2) The original and one copy of any hearing request under §1.621;

(3) The original and one copy of any notice of intervention and response under §1.622;

(4) The original and one copy of any answer or notice in lieu of answer under §1.625; and

(5) The original and one copy of a referral notice under paragraph (c) of this section.

(c) *Notice.* At the time NFS refers the case for a hearing, it must provide a referral notice that contains the following information:

(1) The name, address, telephone number, and facsimile number of the Department hearings component that will conduct the hearing;

(2) The name, address, and other contact information for the representative of each party to the hearing process;

(3) An identification of any other hearing request that will be consolidated with this hearing request; and

(4) The effective date of the case referral to the appropriate Department hearings component.

(d) *Delivery and service.* (1) NFS must refer the case to the appropriate Department hearings component by one of the methods identified in §1.612(b)(1)(i) and (b)(1)(ii).

(2) The Forest Service must serve a copy of the referral notice on FERC and each party to the hearing by one of the methods identified in §1.613(c)(1) and (c)(2).

§1.627 What regulations apply to a case referred for a hearing?

(a) If NFS refers the case to the OALJ, these regulations will continue to apply to the hearing process.

(b) If NFS refers the case to the Department of Interior's Office of Hearing and Appeals, the regulations at 43 CFR 45.1 *et seq.* will apply from that point on.

(c) If NFS refers the case to the Department of Commerce's designated ALJ office, the regulations at 50 CFR 221.1 *et seq.* will apply from that point on.

General Provisions Related to Hearings

§1.630 What will OALJ do with a case referral?

Within 5 days after the effective date stated in the referral notice under §1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4):

(a) The Hearing Clerk must:

(1) Docket the case;

(2) Assign an ALJ to preside over the hearing process and issue a decision; and

(3) Issue a docketing notice that informs the parties of the docket number and the ALJ assigned to the case; and

(b) The ALJ must issue a notice setting the time, place, and method for conducting an initial prehearing conference under §1.640. This notice may be combined with the docketing notice under paragraph (a)(3) of this section.

§1.631 What are the powers of the ALJ?

The ALJ will have all powers necessary to conduct a fair, orderly, expeditious, and impartial hearing process relating to Forest Service's or other Department's condition or prescription that has been referred to the ALJ for hearing, including the powers to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas under §1.647;

(c) Shorten or enlarge time periods set forth in these regulations, except that the deadline in §1.660(a)(2) can be extended only if the ALJ must be replaced under §1.632 or 1.633;

(d) Rule on motions;

(e) Authorize discovery as provided for in §§1.641 through 1.647;

(f) Hold hearings and conferences;

(g) Regulate the course of hearings;

(h) Call and question witnesses;

(i) Exclude any person from a hearing or conference for misconduct or other good cause;

(j) Summarily dispose of any hearing request or issue as to which the ALJ determines there is no disputed issue of material fact;

(k) Issue a decision consistent with §1.660(b) regarding any disputed issue of material fact; and

(l) Take any other action authorized by law.

§1.632 What happens if the ALJ becomes unavailable?

(a) If the ALJ becomes unavailable or otherwise unable to perform the duties described in §1.631, the Hearing Clerk will designate a successor.

(b) If a hearing has commenced and the ALJ cannot proceed with it, a successor ALJ may do so. At the request

of a party, the successor ALJ may recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. The successor ALJ may, within his or her discretion, recall any other witness.

§ 1.633 Under what circumstances may the ALJ be disqualified?

(a) The ALJ may withdraw from a case at any time the ALJ deems himself or herself disqualified.

(b) At any time before issuance of the ALJ's decision, any party may move that the ALJ disqualify himself or herself for personal bias or other valid cause.

(1) The party must file the motion promptly after discovering facts or other reasons allegedly constituting cause for disqualification.

(2) The party must file with the motion an affidavit or declaration setting forth the facts or other reasons in detail.

(c) The ALJ must rule upon the motion, stating the grounds for the ruling.

(1) If the ALJ concludes that the motion is timely and meritorious, he or she must disqualify himself or herself and withdraw from the case.

(2) If the ALJ does not disqualify himself or herself and withdraw from the case, the ALJ must continue with the hearing process and issue a decision.

§ 1.634 What is the law governing ex parte communications?

(a) Ex parte communications with the ALJ or his or her staff are prohibited in accordance with 5 U.S.C. 554(d).

(b) This section does not prohibit ex parte inquiries concerning case status or procedural requirements, unless the inquiry involves an area of controversy in the hearing process.

§ 1.635 What are the requirements for motions?

(a) *General.* Any party may apply for an order or ruling on any matter related to the hearing process by presenting a motion to the ALJ. A motion may be presented any time after the Hearing Clerk issues a docketing notice under § 1.630.

(1) A motion made at a hearing may be stated orally on the record, unless the ALJ directs that it be reduced to writing.

(2) Any other motion must:

(i) Be in writing;

(ii) Comply with the requirements of §§ 1.610 through 1.613 with respect to form, content, filing, and service; and

(iii) Not exceed 15 pages, including all supporting arguments.

(b) *Content.* (1) Each motion must state clearly and concisely:

(i) Its purpose and the relief sought;

(ii) The facts constituting the grounds for the relief sought; and

(iii) Any applicable statutory or regulatory authority.

(2) A proposed order must accompany the motion.

(c) *Response.* Except as otherwise required by this part, any other party may file a response to a written motion within 10 days after service of the motion. The response may not exceed 15 pages, including all supporting arguments. When a party presents a motion at a hearing, any other party may present a response orally on the record.

(d) *Reply.* Unless the ALJ orders otherwise, no reply to a response may be filed.

(e) *Effect of filing.* Unless the ALJ orders otherwise, the filing of a motion does not stay the hearing process.

(f) *Ruling.* The ALJ will rule on the motion as soon as practicable, either orally on the record or in writing. He or she may summarily deny any dilatory, repetitive, or frivolous motion.

Prehearing Conferences and Discovery

§ 1.640 What are the requirements for prehearing conferences?

(a) *Initial prehearing conference.* The ALJ will conduct an initial prehearing conference with the parties at the time specified in the notice under § 1.630, on or about the 20th day after the effective date stated in the referral notice under § 1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4).

(1) The initial prehearing conference will be used:

(i) To identify, narrow, and clarify the disputed issues of material fact and exclude issues that do not qualify for

review as factual, material, and disputed;

(ii) To consider the parties' motions for discovery under §1.641 and to set a deadline for the completion of discovery;

(iii) To discuss the evidence on which each party intends to rely at the hearing;

(iv) To set deadlines for submission of written testimony under §1.652 and exchange of exhibits to be offered as evidence under §1.654; and

(v) To set the date, time, and place of the hearing.

(2) The initial prehearing conference may also be used:

(i) To discuss limiting and grouping witnesses to avoid duplication;

(ii) To discuss stipulations of fact and of the content and authenticity of documents;

(iii) To consider requests that the ALJ take official notice of public records or other matters;

(iv) To discuss the submission of written testimony, briefs, or other documents in electronic form; and

(v) To consider any other matters that may aid in the disposition of the case.

(b) *Other conferences.* The ALJ may in his or her discretion direct the parties to attend one or more other prehearing conferences, if consistent with the need to complete the hearing process within 90 days. Any party may by motion request a conference.

(c) *Notice.* The ALJ must give the parties reasonable notice of the time and place of any conference. A conference will ordinarily be held by telephone, unless the ALJ orders otherwise.

(d) *Preparation.* (1) Each party's representative must be fully prepared to discuss all issues pertinent to that party that are properly before the conference, both procedural and substantive. The representative must be authorized to commit the party that he or she represents respecting those issues.

(2) Before the date set for the initial prehearing conference, the parties' representatives must make a good faith effort:

(i) To meet in person, by telephone, or by other appropriate means; and

(ii) To reach agreement on discovery and the schedule of remaining steps in the hearing process.

(e) *Failure to attend.* Unless the ALJ orders otherwise, a party that fails to attend or participate in a conference, after being served with reasonable notice of its time and place, waives all objections to any agreements reached in the conference and to any consequent orders or rulings.

(f) *Scope.* During a conference, the ALJ may dispose of any procedural matters related to the case.

(g) *Order.* Within 2 days after the conclusion of each conference, the ALJ must issue an order that recites any agreements reached at the conference and any rulings made by the ALJ during or as a result of the conference.

§1.641 How may parties obtain discovery of information needed for the case?

(a) *General.* By agreement of the parties or with the permission of the ALJ, a party may obtain discovery of information to assist the party in preparing or presenting its case. Available methods of discovery are:

(1) Written interrogatories as provided in §1.643;

(2) Depositions of witnesses as provided in paragraph (h) of this section; and

(3) Requests for production of designated documents or tangible things or for entry on designated land for inspection or other purposes.

(b) *Criteria.* Discovery may occur only as agreed to by the parties or as authorized by the ALJ during a prehearing conference or in a written order under §1.640(g). The ALJ may authorize discovery only if the party requesting discovery demonstrates:

(1) That the discovery will not unreasonably delay the hearing process;

(2) That the information sought:

(i) Will be admissible at the hearing or appears reasonably calculated to lead to the discovery of admissible evidence;

(ii) Is not already in the license proceeding record or otherwise obtainable by the party;

(iii) Is not cumulative or repetitious; and

(iv) Is not privileged or protected from disclosure by applicable law;

(3) That the scope of the discovery is not unduly burdensome;

(4) That the method to be used is the least burdensome method available;

(5) That any trade secrets or proprietary information can be adequately safeguarded; and

(6) That the standards for discovery under paragraphs (f) through (h) of this section have been met, if applicable.

(c) *Motions.* A party may initiate discovery:

(1) Pursuant to an agreement of the parties; or

(2) By filing a motion that:

(i) Briefly describes the proposed method(s), purpose, and scope of the discovery;

(ii) Explains how the discovery meets the criteria in paragraphs (b)(1) through (b)(6) of this section; and

(iii) Attaches a copy of any proposed discovery request (written interrogatories, notice of deposition, or request for production of designated documents or tangible things or for entry on designated land).

(d) *Timing of motions.* A party must file any discovery motion under paragraph (c)(2) of this section within 7 days after the effective date stated in the referral notice under §1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4).

(e) *Objections.* (1) A party must file any objections to a discovery motion or to specific portions of a proposed discovery request within 7 days after service of the motion.

(2) An objection must explain how, in the objecting party's view, the discovery sought does not meet the criteria in paragraphs (b)(1) through (6) of this section.

(f) *Materials prepared for hearing.* A party generally may not obtain discovery of documents and tangible things otherwise discoverable under paragraph (b) of this section if they were prepared in anticipation of or for the hearing by or for another party's representative (including the party's attorney, expert, or consultant).

(1) If a party wants to discover such materials, it must show:

(i) That it has substantial need of the materials in preparing its own case; and

(ii) That the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

(2) In ordering discovery of such materials when the required showing has been made, the ALJ must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.

(g) *Experts.* Unless restricted by the ALJ, a party may discover any facts known or opinions held by an expert through the methods set out in paragraph (a) of this section concerning any relevant matters that are not privileged. Such discovery will be permitted only if:

(1) The expert is expected to be a witness at the hearing; or

(2) The expert is relied on by another expert who is expected to be a witness at the hearing, and the party shows:

(i) That it has a compelling need for the information; and

(ii) That it cannot practicably obtain the information by other means.

(h) *Limitations on depositions.* (1) A party may depose an expert or non-expert witness only if the party shows that the witness:

(i) Will be unable to attend the hearing because of age, illness, or other incapacity; or

(ii) Is unwilling to attend the hearing voluntarily, and the party is unable to compel the witness's attendance at the hearing by subpoena.

(2) Paragraph (h)(1)(ii) of this section does not apply to any person employed by or under contract with the party seeking the deposition.

(3) A party may depose a senior Department employee only if the party shows:

(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the deposition would not significantly interfere with the employee's ability to perform his or her government duties.

(4) Unless otherwise stipulated to by the parties or authorized by the ALJ upon a showing of extraordinary circumstances, a deposition is limited to 1 day of 7 hours.

(i) *Completion of discovery.* All discovery must be completed within 25 days after the initial prehearing conference.

§ 1.642 When must a party supplement or amend information it has previously provided?

(a) *Discovery.* A party must promptly supplement or amend any prior response to a discovery request if it learns that the response:

(1) Was incomplete or incorrect when made; or

(2) Though complete and correct when made, is now incomplete or incorrect in any material respect.

(b) *Witnesses and exhibits.* (1) Within 10 days after the date set for completion of discovery, each party must file an updated version of the list of witnesses and exhibits required under §1.621(c), §1.622(c), or §1.625(c).

(2) If a party wishes to include any new witness or exhibit on its updated list, it must provide an explanation of why it was not feasible for the party to include the witness or exhibit on its list under §1.621(c), §1.622(c), or §1.625(c).

(c) *Failure to disclose.* (1) A party will not be permitted to introduce as evidence at the hearing testimony from a witness or other information that it failed to disclose under §1.621(c), §1.622(c), or §1.625(c), or paragraph (a) or (b) of this section.

(2) Paragraph (c)(1) of this section does not apply if the failure to disclose was substantially justified or is harmless.

(3) A party may object to the admission of evidence under paragraph (c)(1) of this section before or during the hearing.

(4) The ALJ will consider the following in determining whether to exclude evidence under paragraphs (c)(1) through (3) of this section:

(i) The prejudice to the objecting party;

(ii) The ability of the objecting party to cure any prejudice;

(iii) The extent to which presentation of the evidence would disrupt the orderly and efficient hearing of the case;

(iv) The importance of the evidence; and

(v) The reason for the failure to disclose, including any bad faith or willfulness regarding the failure.

§ 1.643 What are the requirements for written interrogatories?

(a) *Motion; limitation.* Except upon agreement of the parties:

(1) A party wishing to propound interrogatories must file a motion under §1.641(c); and

(2) A party may propound no more than 25 interrogatories, counting discrete subparts as separate interrogatories, unless the ALJ approves a higher number upon a showing of good cause.

(b) *ALJ order.* The ALJ will issue an order under §1.641(b) with respect to any discovery motion requesting the use of written interrogatories. The order will:

(1) Grant the motion and approve the use of some or all of the proposed interrogatories; or

(2) Deny the motion.

(c) *Answers to interrogatories.* Except upon agreement of the parties, the party to whom the proposed interrogatories are directed must file its answers to any interrogatories approved by the ALJ within 15 days after issuance of the order under paragraph (b) of this section.

(1) Each approved interrogatory must be answered separately and fully in writing.

(2) The party or its representative must sign the answers to interrogatories under oath or affirmation.

(d) *Access to records.* A party's answer to an interrogatory is sufficient when:

(1) The information may be obtained from an examination of records, or from a compilation, abstract, or summary based on such records;

(2) The burden of obtaining the information from the records is substantially the same for all parties;

(3) The answering party specifically identifies the individual records from which the requesting party may obtain the information and where the records are located; and

(4) The answering party provides the requesting party with reasonable opportunity to examine the records and make a copy, compilation, abstract, or summary.

§ 1.644 What are the requirements for depositions?

(a) *Motion and notice.* Except upon agreement of the parties, a party wishing to take a deposition must file a motion under § 1.641(c). Any notice of deposition filed with the motion must state:

(1) The time and place that the deposition is to be taken;

(2) The name and address of the person before whom the deposition is to be taken;

(3) The name and address of the witness whose deposition is to be taken; and

(4) Any documents or materials that the witness is to produce.

(b) *ALJ order.* The ALJ will issue an order under § 1.641(b) with respect to any discovery motion requesting the taking of a deposition. The order will:

(1) Grant the motion and approve the taking of the deposition, subject to any conditions or restrictions the ALJ may impose; or

(2) Deny the motion.

(c) *Arrangements.* If the parties agree to or the ALJ approves the taking of the deposition, the party requesting the deposition must make appropriate arrangements for necessary facilities and personnel.

(1) The deposition will be taken at the time and place agreed to by the parties or indicated in the ALJ's order.

(2) The deposition may be taken before any disinterested person authorized to administer oaths in the place where the deposition is to be taken.

(3) Any party that objects to the taking of a deposition because of the disqualification of the person before whom it is to be taken must do so:

(i) Before the deposition begins; or

(ii) As soon as the disqualification becomes known or could have been discovered with reasonable diligence.

(4) A deposition may be taken by telephone conference call, if agreed to by the parties or approved in the ALJ's order.

(d) *Testimony.* Each witness deposed must be placed under oath or affirmation, and the other parties must be given an opportunity for cross-examination.

(e) *Representation of witness.* The witness being deposed may have counsel or another representative present during the deposition.

(f) *Recording and transcript.* Except as provided in paragraph (g) of this section, the deposition must be stenographically recorded and transcribed at the expense of the party that requested the deposition.

(1) Any other party may obtain a copy of the transcript at its own expense.

(2) Unless waived by the deponent, the deponent will have 3 days after receiving the transcript to read and sign it.

(3) The person before whom the deposition was taken must certify the transcript following receipt of the signed transcript from the deponent or expiration of the 3-day review period, whichever occurs first.

(g) *Video recording.* The testimony at a deposition may be recorded on videotape, subject to any conditions or restrictions that the parties may agree to or the ALJ may impose, at the expense of the party requesting the recording.

(1) The video recording may be in conjunction with an oral examination by telephone conference held under paragraph (c)(4) of this section.

(2) After the deposition has been taken, the person recording the deposition must:

(i) Provide a copy of the videotape to any party that requests it, at the requesting party's expense; and

(ii) Attach to the videotape a statement identifying the case and the deponent and certifying the authenticity of the video recording.

(h) *Use of deposition.* A deposition may be used at the hearing as provided in § 1.653.

§ 1.645 What are the requirements for requests for documents or tangible things or entry on land?

(a) *Motion.* Except upon agreement of the parties, a party wishing to request the production of designated documents or tangible things or entry on designated land must file a motion under § 1.641(c). A request may include any of the following that are in the possession, custody, or control of another party:

(1) The production of designated documents for inspection and copying, other than documents that are already in the license proceeding record;

(2) The production of designated tangible things for inspection, copying, testing, or sampling; or

(3) Entry on designated land or other property for inspection and measuring, surveying, photographing, testing, or sampling either the property or any designated object or operation on the property.

(b) *ALJ order.* The ALJ will issue an order under §1.641(b) with respect to any discovery motion requesting the production of documents or tangible things or entry on land for inspection, copying, or other purposes. The order will:

(1) Grant the motion and approve the use of some or all of the proposed requests; or

(2) Deny the motion.

(c) *Compliance with order.* Except upon agreement of the parties, the party to whom any approved request for production is directed must permit the approved inspection and other activities within 15 days after issuance of the order under paragraph (a) of this section.

§1.646 What sanctions may the ALJ impose for failure to comply with discovery?

(a) Upon motion of a party, the ALJ may impose sanctions under paragraph (b) of this section if any party:

(1) Fails to comply with an order approving discovery; or

(2) Fails to supplement or amend a response to discovery under §1.642(a).

(b) The ALJ may impose one or more of the following sanctions:

(1) Infer that the information, testimony, document, or other evidence withheld would have been adverse to the party;

(2) Order that, for the purposes of the hearing, designated facts are established;

(3) Order that the party not introduce into evidence, or otherwise rely on to support its case, any information, testimony, document, or other evidence:

(i) That the party improperly withheld; or

(ii) That the party obtained from another party in discovery;

(4) Allow another party to use secondary evidence to show what the information, testimony, document, or other evidence withheld would have shown; or

(5) Take other appropriate action to remedy the party's failure to comply.

§1.647 What are the requirements for subpoenas and witness fees?

(a) *Request for subpoena.* (1) Except as provided in paragraph (a)(2) of this section, any party may request by written motion that the ALJ issue a subpoena to the extent authorized by law for the attendance of a person, the giving of testimony, or the production of documents or other relevant evidence during discovery or for the hearing.

(2) A party may request a subpoena for a senior Department employee only if the party shows:

(i) That the employee's testimony is necessary in order to provide significant, unprivileged information that is not available from any other source or by less burdensome means; and

(ii) That the employee's attendance would not significantly interfere with the ability to perform his or her government duties.

(b) *Service.* (1) A subpoena may be served by any person who is not a party and is 18 years of age or older.

(2) Service must be made by hand delivering a copy of the subpoena to the person named therein.

(3) The person serving the subpoena must:

(i) Prepare a certificate of service setting forth:

(A) The date, time, and manner of service; or

(B) The reason for any failure of service; and

(ii) Swear to or affirm the certificate, attach it to a copy of the subpoena, and return it to the party on whose behalf the subpoena was served.

(c) *Witness fees.* (1) A party who subpoenas a witness who is not a party must pay him or her the same fees and mileage expenses that are paid witnesses in the district courts of the United States.

(2) A witness who is not a party and who attends a deposition or hearing at

the request of any party without having been subpoenaed is entitled to the same fees and mileage expenses as if he or she had been subpoenaed. However, this paragraph does not apply to Federal employees who are called as witnesses by the Forest Service or another Department.

(d) *Motion to quash.* (1) A person to whom a subpoena is directed may request by motion that the ALJ quash or modify the subpoena.

(2) The motion must be filed:

(i) Within 5 days after service of the subpoena; or

(ii) At or before the time specified in the subpoena for compliance, if that is less than 5 days after service of the subpoena.

(3) The ALJ may quash or modify the subpoena if it:

(i) Is unreasonable;

(ii) Requires production of information during discovery that is not discoverable; or

(iii) Requires disclosure of irrelevant, privileged, or otherwise protected information.

(e) *Enforcement.* For good cause shown, the ALJ may apply to the appropriate United States District Court for the issuance of an order compelling the appearance and testimony of a witness or the production of evidence as set forth in a subpoena that has been duly issued and served.

Hearing, Briefing, and Decision

§ 1.650 When and where will the hearing be held?

(a) Except as provided in paragraph (b) of this section, the hearing will be held at the time and place set at the initial prehearing conference under § 1.640, generally within 25 days after the date set for completion of discovery.

(b) On motion by a party or on the ALJ's initiative, the ALJ may change the date, time, or place of the hearing if he or she finds:

(1) That there is good cause for the change; and

(2) That the change will not unduly prejudice the parties and witnesses.

§ 1.651 What are the parties' rights during the hearing?

Each party has the following rights during the hearing, as necessary to assure full and accurate disclosure of the facts:

(a) To present testimony and exhibits, consistent with the requirements in §§ 1.621(c), 1.622(c), 1.625(c), 1.642(b), and 1.652;

(b) To make objections, motions, and arguments; and

(c) To cross-examine witnesses and to conduct re-direct and re-cross examination as permitted by the ALJ.

§ 1.652 What are the requirements for presenting testimony?

(a) *Written direct testimony.* Unless otherwise ordered by the ALJ, all direct hearing testimony for each party's initial case must be prepared and submitted in written form. The ALJ will determine whether rebuttal testimony, if allowed, must be submitted in written form.

(1) Prepared written testimony must:

(i) Have line numbers inserted in the left-hand margin of each page;

(ii) Be authenticated by an affidavit or declaration of the witness;

(iii) Be filed within 10 days after the date set for completion of discovery; and

(iv) Be offered as an exhibit during the hearing.

(2) Any witness submitting written testimony must be available for cross-examination at the hearing.

(b) *Oral testimony.* Oral examination of a witness in a hearing, including on cross-examination or redirect, must be conducted under oath and in the presence of the ALJ, with an opportunity for all parties to question the witness.

(c) *Telephonic testimony.* The ALJ may by order allow a witness to testify by telephonic conference call.

(1) The arrangements for the call must let each party listen to and speak to the witness and each other within the hearing of the ALJ.

(2) The ALJ will ensure the full identification of each speaker so the reporter can create a proper record.

(3) The ALJ may issue a subpoena under § 1.647 directing a witness to testify by telephonic conference call.

§ 1.653 How may a party use a deposition in the hearing?

(a) *In general.* Subject to the provisions of this section, a party may use in the hearing any part or all of a deposition taken under §1.644 against any party who:

(1) Was present or represented at the taking of the deposition; or

(2) Had reasonable notice of the taking of the deposition.

(b) *Admissibility.* (1) No part of a deposition will be included in the hearing record, unless received in evidence by the ALJ.

(2) The ALJ will exclude from evidence any question and response to which an objection:

(i) Was noted at the taking of the deposition; and

(ii) Would have been sustained if the witness had been personally present and testifying at a hearing.

(3) If a party offers only part of a deposition in evidence:

(i) An adverse party may require the party to introduce any other part that ought in fairness to be considered with the part introduced; and

(ii) Any other party may introduce any other parts.

(c) *Videotaped deposition.* If the deposition was recorded on videotape and is admitted into evidence, relevant portions will be played during the hearing and transcribed into the record by the reporter.

§ 1.654 What are the requirements for exhibits, official notice, and stipulations?

(a) *General.* (1) Except as provided in paragraphs (b) through (d) of this section, any material offered in evidence, other than oral testimony, must be offered in the form of an exhibit.

(2) Each exhibit offered by a party must be marked for identification.

(3) Any party who seeks to have an exhibit admitted into evidence must provide:

(i) The original of the exhibit to the reporter, unless the ALJ permits the substitution of a copy; and

(ii) A copy of the exhibit to the ALJ.

(b) *Material not offered.* If a document offered as an exhibit contains material not offered as evidence:

(1) The party offering the exhibit must:

(i) Designate the matter offered as evidence;

(ii) Segregate and exclude the material not offered in evidence, to the extent practicable; and

(iii) Provide copies of the entire document to the other parties appearing at the hearing.

(2) The ALJ must give the other parties an opportunity to inspect the entire document and offer in evidence any other portions of the document.

(c) *Official notice.* (1) At the request of any party at the hearing, the ALJ may take official notice of any matter of which the courts of the United States may take judicial notice, including the public records of any Department party.

(2) The ALJ must give the other parties appearing at the hearing an opportunity to show the contrary of an officially noticed fact.

(3) Any party requesting official notice of a fact after the conclusion of the hearing must show good cause for its failure to request official notice during the hearing.

(d) *Stipulations.* (1) The parties may stipulate to any relevant facts or to the authenticity of any relevant documents.

(2) If received in evidence at the hearing, a stipulation is binding on the stipulating parties.

(3) A stipulation may be written or made orally at the hearing.

§ 1.655 What evidence is admissible at the hearing?

(a) *General.* (1) Subject to the provisions of §1.642(b), the ALJ may admit any written, oral, documentary, or demonstrative evidence that is:

(i) Relevant, reliable, and probative; and

(ii) Not privileged or unduly repetitious or cumulative.

(2) The ALJ may exclude evidence if its probative value is substantially outweighed by the risk of undue prejudice, confusion of the issues, or delay.

(3) Hearsay evidence is admissible. The ALJ may consider the fact that evidence is hearsay when determining its probative value.

(4) The Federal Rules of Evidence do not directly apply to the hearing, but may be used as guidance by the ALJ and the parties in interpreting and applying the provisions of this section.

(b) *Objections.* Any party objecting to the admission or exclusion of evidence must concisely state the grounds. A ruling on every objection must appear in the record.

§ 1.656 What are the requirements for transcription of the hearing?

(a) *Transcript and reporter's fees.* The hearing will be transcribed verbatim.

(1) The Forest Service will secure the services of a reporter and pay the reporter's fees to provide an original transcript to the OALJ on an expedited basis.

(2) Each party must pay the reporter for any copies of the transcript obtained by that party.

(b) *Transcript corrections.* (1) Any party may file a motion proposing corrections to the transcript. The motion must be filed within 5 days after receipt of the transcript, unless the ALJ sets a different deadline.

(2) Unless a party files a timely motion under paragraph (b)(1) of this section, the transcript will be presumed to be correct and complete, except for obvious typographical errors.

(3) As soon as practicable after the close of the hearing and after consideration of any motions filed under paragraph (b)(1) of this section, the ALJ will issue an order making any corrections to the transcript that the ALJ finds are warranted.

§ 1.657 Who has the burden of persuasion, and what standard of proof applies?

(a) Any party who has filed a request for a hearing has the burden of persuasion with respect to the issues of material fact raised by that party.

(b) The standard of proof is a preponderance of the evidence.

§ 1.658 When will the hearing record close?

(a) The hearing record will close when the ALJ closes the hearing, unless he or she directs otherwise.

(b) Evidence may not be added after the hearing record is closed, but the transcript may be corrected under §1.656(b).

§ 1.659 What are the requirements for post-hearing briefs?

(a) *General.* (1) Each party may file a post-hearing brief within 15 days after the close of the hearing.

(2) A party may file a reply brief only if requested by the ALJ. The deadline for filing a reply brief, if any, will be set by the ALJ.

(3) The ALJ may limit the length of the briefs to be filed under this section.

(b) *Content.* (1) An initial brief must include:

(i) A concise statement of the case;

(ii) A separate section containing proposed findings regarding the issues of material fact, with supporting citations to the hearing record;

(iii) Arguments in support of the party's position; and

(iv) Any other matter required by the ALJ.

(2) A reply brief, if requested by the ALJ, must be limited to any issues identified by the ALJ.

(c) *Form.* (1) An exhibit admitted in evidence or marked for identification in the record may not be reproduced in the brief.

(i) Such an exhibit may be reproduced, within reasonable limits, in an appendix to the brief.

(ii) Any pertinent analysis of an exhibit may be included in a brief.

(2) If a brief exceeds 20 pages, it must contain:

(i) A table of contents and of points made, with page references; and

(ii) An alphabetical list of citations to legal authority, with page references.

§ 1.660 What are the requirements for the ALJ's decision?

(a) *Timing.* The ALJ must issue a decision within the shorter of the following time periods:

(1) 30 days after the close of the hearing under §1.658; or

(2) 120 days after the effective date stated in the referral notice under §1.626(c)(4), 43 CFR 45.26(c)(4), or 50 CFR 221.26(c)(4).

(b) *Content.* (1) The decision must contain:

(i) Findings of fact on all disputed issues of material fact;

(ii) Conclusions of law necessary to make the findings of fact (such as rulings on materiality and on the admissibility of evidence); and

(iii) Reasons for the findings and conclusions.

(2) The ALJ may adopt any of the findings of fact proposed by one or more of the parties.

(3) The decision will not contain conclusions as to whether any preliminary condition or prescription should be adopted, modified, or rejected, or whether any proposed alternative should be accepted or rejected.

(c) *Service.* Promptly after issuing his or her decision, the ALJ must:

(1) Serve the decision on each party to the hearing;

(2) Prepare a list of all documents that constitute the complete record for the hearing process (including the decision) and certify that the list is complete; and

(3) Forward to FERC the complete record for the hearing process, along with the certified list prepared under paragraph (c)(2) of this section, for inclusion in the record for the license proceeding. Materials received in electronic form, *e.g.*, as attachments to electronic mail, should be transmitted to FERC in electronic form. However, for cases in which a settlement was reached prior to a decision, the entire record need not be transmitted to FERC. In such situations, only the initial pleadings (hearing requests with attachments, any notices of intervention and response, answers, and referral notice) and any dismissal order of the ALJ need be transmitted.

(d) *Finality.* The ALJ's decision under this section with respect to the disputed issues of material fact will not be subject to further administrative review. To the extent the ALJ's decision forms the basis for any condition or prescription subsequently included in the license, it may be subject to judicial review under 16 U.S.C. 825*l*(b).

ALTERNATIVES PROCESS

§ 1.670 How must documents be filed and served under this subpart?

(a) *Filing.* (1) A document under this subpart must be filed using one of the methods set forth in § 1.612(b).

(2) A document is considered filed on the date it is received. However, any document received after 5 p.m. at the place where the filing is due is considered filed on the next regular business day.

(b) *Service.* (1) Any document filed under this subpart must be served at the same time the document is delivered or sent for filing. A complete copy of the document must be delivered or sent to each license party and FERC, using:

(i) One of the methods of service in § 1.613(c); or

(ii) Regular mail.

(2) The provisions of § 1.613(d) regarding a certificate of service apply to service under this subpart.

§ 1.671 How do I propose an alternative?

(a) *General.* To propose an alternative condition, you must:

(1) Be a license party; and

(2) File a written proposal with NFS, at the appropriate address provided in § 1.612(a)(1):

(i) For a case under § 1.601(d)(1), within 30 days after the Forest Service files its preliminary conditions with FERC; or

(ii) For a case under § 1.601(d)(2), within 60 days after the Forest Service files its proposed conditions with FERC.

(b) *Content.* Your proposal must include:

(1) A description of the alternative, in an equivalent level of detail to the Forest Service's preliminary condition;

(2) An explanation of how the alternative will provide for the adequate protection and utilization of the reservation;

(3) An explanation of how the alternative, as compared to the preliminary condition, will:

(i) Cost significantly less to implement; or

(ii) Result in improved operation of the project works for electricity production;

(4) An explanation of how the alternative will affect:

(i) Energy supply, distribution, cost, and use;

(ii) Flood control;

(iii) Navigation;

(iv) Water supply;

(v) Air quality; and

(vi) Other aspects of environmental quality; and

(5) Specific citations to any scientific studies, literature, and other documented information relied on to support your proposal, including any assumptions you are making (*e.g.*, regarding the cost of energy or the rate of inflation). If any such document is not already in the license proceeding record, you must provide a copy with the proposal.

§ 1.672 May I file a revised proposed alternative?

(a) Within 20 days after issuance of the ALJ's decision under §1.660, you may file with NFS, at the appropriate address provided in §1.612(a)(1), a revised proposed alternative condition if:

(1) You previously filed a proposed alternative that met the requirements of §1.671; and

(2) Your revised proposed alternative is designed to respond to one or more findings of fact by the ALJ.

(b) Your revised proposed alternative must:

(1) Satisfy the content requirements for a proposed alternative under §1.671(b); and

(2) Identify the specific ALJ finding(s) to which the revised proposed alternative is designed to respond and how the revised proposed alternative differs from the original alternative.

(c) Filing a revised proposed alternative will constitute a withdrawal of the previously filed proposed alternative.

§ 1.673 When will the Forest Service file its modified condition?

(a) Except as provided in paragraph (b) of this section, if any license party proposes an alternative to a preliminary condition or prescription under §1.671,the Forest Service will do the following within 60 days after the deadline for filing comments on FERC's draft NEPA document under 18 CFR 5.25(c):

(1) Analyze under §1.674 any alternative condition proposed under §1.671 or 1.672; and

(2) File with FERC:

(i) Any condition the Forest Service adopts as its modified condition; and

(ii) The Forest Service's analysis of the modified condition and any proposed alternative.

(b) If the Forest Service needs additional time to complete the steps set forth in paragraphs (a)(1) and (2) of this section, it will so inform FERC within 60 days after the deadline for filing comments on FERC's draft NEPA document under 18 CFR 5.25(c).

§ 1.674 How will the Forest Service analyze a proposed alternative and formulate its modified condition?

(a) In deciding whether to accept an alternative proposed under §1.671 or §1.672, the Forest Service must consider evidence and supporting material provided by any license party or otherwise reasonably available to the Forest Service, including:

(1) Any evidence on the implementation costs or operational impacts for electricity production of the proposed alternative;

(2) Any comments received on the Forest Service's preliminary condition;

(3) Any ALJ decision on disputed issues of material fact issued under §1.660 with respect to the preliminary condition;

(4) Comments received on any draft or final NEPA documents; and

(5) The license party's proposal under §1.671 or §1.672.

(b) The Forest Service must accept a proposed alternative if the Forest Service determines, based on substantial evidence provided by any license party or otherwise available to the Forest Service, that the alternative:

(1) Will, as compared to the Forest Service's preliminary condition:

(i) Cost significantly less to implement; or

(ii) Result in improved operation of the project works for electricity production; and

(2) Will provide for the adequate protection and utilization of the reservation.

(c) For purposes of paragraphs (a) and (b) of this section, the Forest Service will consider evidence and supporting material provided by any license party by the deadline for filing comments on FERC's NEPA document under 18 CFR 5.25(c).

(d) When the Forest Service files with FERC the condition that the Forest Service adopts as its modified condition under §1.673(a)(2), it must also file:

(1) A written statement explaining:

(i) The basis for the adopted condition;

(ii) If the Forest Service is not accepting any pending alternative, its reasons for not doing so; and

(iii) If any alternative submitted under §1.671 was subsequently withdrawn by the license party, that the alternative was withdrawn; and

(2) Any study, data, and other factual information relied on that is not already part of the licensing proceeding record.

(e) The written statement under paragraph (d)(1) of this section must demonstrate that the Forest Service gave equal consideration to the effects of the condition adopted and any alternative not accepted on:

(1) Energy supply, distribution, cost, and use;

(2) Flood control;

(3) Navigation;

(4) Water supply;

(5) Air quality; and

(6) Preservation of other aspects of environmental quality.

§ 1.675 Has OMB approved the information collection provisions of this subpart?

Yes. This subpart contains provisions in §§1.670 through 1.674 that would collect information from the public. It therefore requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA). According to the PRA, a Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number that indicates OMB approval. OMB has reviewed the information collection in this rule and approved it under OMB control number 1094–0001.

Subpart P—Rules of Practice and Procedure Governing Formal Rulemaking Proceedings Instituted by the Secretary

AUTHORITY: 5 U.S.C. 301.

SOURCE: 82 FR 51149, Nov. 3, 2017, unless otherwise noted.

§ 1.800 Words in the singular form.

Words in this subpart in the singular form shall be deemed to import the plural, and vice versa, as the context may require.

§ 1.801 Scope and applicability of this subpart.

Except for proceedings covered by 7 CFR part 900, and by 7 CFR part 1200, the rules of practice and procedure in this subpart shall be applicable to all formal rulemaking proceedings.

§ 1.802 Definitions.

As used in this subpart:

Administrator means the Administrator of the Agency administering the statute involved, or any officer or employee of the Agency to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act for the Administrator.

Department means the U.S. Department of Agriculture.

FEDERAL REGISTER means the publication provided for by the Federal Register Act, approved July 26, 1935 (44 U.S.C. 1501–1511), and acts supplementing and amending it.

Hearing means that part of the proceeding that involves the submission of evidence.

Hearing clerk means the Hearing Clerk, U.S. Department of Agriculture, Washington, DC

Judge means any administrative law Judge appointed pursuant to 5 U.S.C. 3105 or any presiding official appointed by the Secretary, and assigned to conduct the proceeding.

Party means:

(1) Any employee or contractor of the Department acting in an official capacity; or

(2) A person who intends to cross examine a witness at the hearing and has notified the person named in the notice of hearing by specified dates of his or her intent to participate in the hearing as a ''party'' pursuant to §1.804.

Proceeding means a proceeding before the Secretary arising under a statute in which the Secretary uses formal rulemaking procedures as set forth in this subpart.

Secretary means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act for the Secretary.

Witness means any person who:

(1) Has notified the person named in the notice of hearing by the specified date of his or her intent to participate in the hearing as a witness pursuant to §1.804; and

(2) Who submits written direct testimony on the proposed regulations pursuant to §1.807; and

(3) Testifies orally at the hearing.

[82 FR 51149, Nov. 3, 2017, as amended at 84 FR 51939, Oct. 1, 2019]

§ 1.803 Institution of proceedings.

(a) *Filing and contents of the notice of hearing.* A proceeding under this subpart shall be instituted by the Secretary or designee through filing the notice of hearing with the hearing clerk.The notice of hearing shall state:

(1) The legal authority under which the rule is proposed.

(2) The scope and nature of the hearing, including witness instructions for testifying, including the means and timing of the submission of pre-hearing documents, and scheduling, as necessary.

(3) The terms or substance of the proposed rule or a description of the subjects and issues involved.

(4) The time and place of such hearing.

(5) The final date for notification of intent to participate as a party or witness in the hearing pursuant to §1.804.

(6) The person to whom notification of intent to participate as a party or witness is to be provided pursuant to §1.804, and the means by which such notifications are to be provided.

(7) Any alternative procedures established pursuant to paragraph (d) of this section.

(b) *Giving notice of hearing.* (1) The Administrator shall give or cause to be given notice of hearing in the following manner:

(i) By publication of the notice of hearing in the FEDERAL REGISTER.

(ii) By posting of the notice of hearing to the USDA Web site.

(2) Legal notice of the hearing shall be deemed to be given if notice is given in the manner provided by paragraph (b)(1)(i) of this section.

(c) *Record of notice.* A copy of the notice of hearing published in the FEDERAL REGISTER pursuant to paragraph (b)(1)(i) of this section shall be filed with the hearing clerk and submitted to the Judge at the hearing.

(d) *Alternative procedures.* The Administrator may establish alternative procedures for the proceeding that are in addition to or in lieu of one or more procedures in this subpart, provided that the procedures are consistent with 5 U.S.C. 556 and 557. The alternative procedures must be described in the notice of hearing, as required in paragraph (a)(7) of this section.

§ 1.804 Notification by interested persons.

(a) Any person desiring to participate as a party or witness at the hearing shall notify the person named in the notice of hearing, as prescribed in the notice of hearing, on or before the date specified in the notice of hearing. A person may be both a party and a witness.

(b) The notification must clearly state whether the interested person is participating at the hearing as a party, witness, or both.

(c) If a party or witness will be participating with or through a representative or counsel, the notification must so state and provide the name of the representative or counsel.

(d) Persons who fail to comply with this section and any specified instructions in the notice of hearing shall be deemed to have waived their right to participate in the hearing. Failure to

comply with this section shall result in the exclusion of any filed written testimony.

§ 1.805 Docket number.

Each proceeding, immediately following its institution, shall be assigned a docket number by the hearing clerk and thereafter the proceeding may be referred to by such number.

§ 1.806 Judge.

(a) *Assignment.* No Judge who has any pecuniary interest in the outcome of a proceeding shall serve as Judge in such proceeding.

(b) *Power of Judge.* Subject to review by the Secretary, as provided elsewhere in this subpart, the Judge in any proceeding shall have power to:

(1) Rule upon motions and requests;

(2) Change the time and place of hearings, and adjourn the hearing from time to time or from place to place;

(3) Administer oaths and affirmations and take affidavits;

(4) Examine and cross-examine witnesses and receive evidence;

(5) Admit or exclude evidence;

(6) Hear oral argument on facts or law; and

(7) Do all acts and take all measures necessary for the maintenance of order at the hearings and the efficient conduct of the proceeding.

(c) *Who may act in absence of the Judge.* In case of the absence of the Judge or that Judge's inability to act, the powers and duties to be performed by the Judge under this subpart in connection with a proceeding may, without abatement of the proceeding unless otherwise ordered by the Secretary, be assigned to any other Judge.

(d) *Disqualification of Judge.* The Judge may at any time withdraw as Judge in a proceeding if such Judge deems himself or herself to be disqualified. Upon the filing by an interested person in good faith of a timely and sufficient affidavit of personal bias or disqualification of a Judge, the Secretary shall determine the matter as a part of the record and decision in the proceeding, after making such investigation or holding such hearings, or both, as the Secretary may deem appropriate in the circumstances.

§ 1.807 Direct testimony submitted as written documents.

Any person desiring to participate as a witness at the hearing shall submit direct testimony as written documents as prescribed by the following:

(a) Direct testimony by a witness, including accompanying exhibits, must be submitted as specified in the notice of the hearing pursuant to §1.803. Exhibits constituting part of such direct testimony, referred to in the direct testimony and made a part thereof must be attached to the direct testimony. Direct testimony submitted with exhibits must state the issue(s) to which the exhibit relates; if no such statement is made, the Judge, at the hearing, shall determine the relevance of the exhibit to the issues published in the FEDERAL REGISTER.

(b) The direct testimony submitted shall contain:

(1) A concise statement of the witness' interest in the proceeding and his or her position regarding the issues presented. If the direct testimony is presented by a witness who is not a party, the witness shall state the witness' relationship to the party on behalf of whom the testimony is proffered; and

(2) Facts that are relevant and material.

(c) Copies of all direct testimony, including accompanying exhibits, must be submitted as prescribed by the notice of hearing.

(d) Upon receipt, direct testimony shall be assigned a number and stamped with that number and the docket number.

§ 1.808 Motions and requests.

(a) *General.* (1) Parties shall file all motions and requests with the hearing clerk except that those made during the course of the hearing may be filed with the Judge or may be stated orally and made a part of the transcript.

(2) Except as provided in §1.816(b), such motions and requests shall be addressed to, and ruled on by, the Judge if made prior to certification of the transcript pursuant to §1.811 or by the Secretary if made thereafter.

(b) *Certification to Secretary.* The Judge may, in his or her discretion, submit or certify to the Secretary for

decision any motion, request, objection, or other question addressed to the Judge.

§ 1.809 Conduct of the hearing.

(a) *Time and place.* The hearing shall be held at the time and place established in the notice of hearing. If the Judge subsequently changes the time or place, the Judge shall file a notice of such changes with the hearing clerk, and the Administrator shall give or cause to be given notice in the FEDERAL REGISTER in the same manner as provided in § 1.803. If the change in time or place of hearing is made less than five days prior to the date previously established for the hearing, the Judge, either in addition to, or in lieu of, causing the notice of the change to be given, shall announce the change at the time and place previously established for the hearing.

(b) *Appearances*—(1) *Right to appear.* Any interested person shall be given an opportunity to appear, as a witness, with or without, authorized counsel or representative, and to be heard with respect to matters relevant and material to the proceeding, provided that such interested person complies with §§ 1.804, 1.807, and any alternative procedures included in the hearing notice pursuant to § 1.803. In addition to compliance with any witness instructions set forth in the notice of hearing, any witness who desires to be heard in person at any hearing shall, before proceeding to testify do so under oath or affirmation.

(2) *Appearance with or through counsel or representative.* (i) A witness may appear with counsel or a representative if the witness identifies the counsel or representative in the notification submitted pursuant to § 1.804.

(ii) The counsel or representative shall, before proceeding with the witness testimony, state for the record the authority to act as such counsel or representative, and the names, addresses, and occupations of such counsel or representative.

(iii) The witness or his or her counsel or representative shall give such other information respecting the witness' appearance as the Judge may request.

(3) *Debarment of counsel or representative.* (i) Whenever, while a proceeding is pending before the Judge, such Judge finds that a person, acting as counsel or representative for any party or witness, is guilty of unethical or unprofessional conduct, the Judge may order that such person be precluded from further acting as counsel or representative in such proceeding.

(ii) Except as provided in paragraph (b)(3)(iii) of this section, an appeal to the Secretary may be taken from any such order, but the proceeding shall not be delayed or suspended pending disposition of the appeal.

(iii) In case the Judge has ordered that a person be precluded from further action as counsel or representative in the proceeding, the Judge within a reasonable time thereafter shall submit to the Secretary a report of the facts and circumstances surrounding such order and shall recommend what action the Secretary should take respecting the appearance of such person as counsel or representative in other proceedings before the Secretary. Thereafter the Secretary may, after notice and an opportunity for hearing, issue such order respecting the appearance of such person as counsel or representative in proceedings before the Secretary as the Secretary finds to be appropriate.

(4) *Failure to appear.* If any interested person, who complied with §§ 1.804, 1.807, fails to appear at the hearing, that person shall be deemed to have waived the right to be heard in the proceeding and such failure to appear shall result in the exclusion of that person's written testimony.

(c) *Order of procedure.* (1) The Judge shall, at the opening of the hearing prior to the taking of testimony, note as part of the record the notice of hearing as published in the FEDERAL REGISTER.

(2) Evidence shall then be received with respect to the matters specified in the notice of the hearing in such order as the Judge shall announce.

(d) *Evidence*—(1) *General.* The hearing shall be publicly conducted, and the testimony given at the hearing shall be reported verbatim.

(i) Every witness shall, before proceeding to testify, be sworn or make an affirmation.

(ii) When necessary, in order to prevent undue prolongation of the hearing, the Judge may:

(A) Limit the number of times any witness may testify to the same matter or the amount of corroborative or cumulative evidence.

(B) Limit cross examination of a witness by time, scope, or as appropriate, provided that the Judge announces the time limit at the beginning of the hearing, prior to the taking of testimony.

(iii) The Judge shall exclude from the record evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely.

(2) *Objections.* If a party objects to the admission or rejection of any evidence or to any other ruling of the Judge during the hearing, such party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the Judge. The ruling of the Judge on any objection shall be a part of the transcript. Only objections made before the Judge may subsequently be relied upon in the proceeding.

(3) Upon proper motion, the Judge may accept direct testimony submitted pursuant to §1.807 into evidence without a witness reading the direct testimony into evidence. Such direct testimony shall become a part of the record subject to exclusion of irrelevant and immaterial parts thereof. A party shall be deemed to have waived the right to introduce pre-hearing written direct testimony and documents if such party fails to present a witness to introduce those documents. The witness introducing direct testimony and documents shall do so under oath or affirmation and shall:

(i) State his or her name, address and occupation.

(ii) State qualifications for introducing the direct testimony. If an expert, the witness shall briefly state the scientific or technical training which qualifies the witness as an expert.

(iii) Identify the direct testimony and documents previously submitted pursuant to §1.807 of this subpart.

(iv) Submit to direct and cross examination determined to be necessary and appropriate by the Judge.

(4) *Cross examination.* For purposes of this section, the Administrator's or his or her representative's interest shall be considered adverse to all parties. The Judge may:

(i) Require the cross-examiner to outline the intended scope of the cross examination, which shall generally be limited to the scope of the direct testimony.

(ii) Prohibit parties from cross-examining witnesses unless the Judge has determined that the cross-examiner has an adverse interest on the facts at issue to the party or witness.

(iii) Limit the number of times any party or parties having a common interest may cross-examine an adverse witness on the same matter.

(5) *Proof and authentication of official records or documents.* An official record or document, when admissible for any purpose, shall be admissible as evidence without the presence of the person who made or prepared the same. The Judge shall exercise discretion in determining whether an official publication of such record or document shall be necessary, or whether a copy would be permissible. If permissible such a copy shall be attested to by the person having legal custody of it, and accompanied by a certificate that such person has the custody.

(6) *Exhibits.* (i) All written statements, documents, charts, tabulations, or data offered into evidence at the hearing shall, after identification by the witness or his or her counsel or representative and upon satisfactory showing of authenticity, relevancy, and materiality, be numbered as exhibits and received in evidence and made a part of the record.

(ii) Such exhibits shall be submitted in quadruplicate and in documentary form.

(7) *Official notice.* (i) Subject to paragraph (d)(7)(ii) of this section, official notice at the hearing may be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character.

(ii) Interested persons shall be given an adequate period of time, at the hearing or subsequent to it, of matters so noticed and shall be given adequate opportunity to show that such facts are inaccurate or are erroneously noticed.

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

(ii) The offer of proof shall consist of a brief statement describing the evidence to be offered. If the evidence consists of a brief oral statement, it shall be inserted into the transcript; if the evidence consists of an exhibit(s), it shall be inserted into the record for the purpose of an offer of proof. In such event, it shall be considered a part of the record if the Secretary determines that the Judge's ruling in excluding the evidence was erroneous.

(iii) The Judge shall not allow the insertion of such evidence in toto if the taking of such evidence will consume a considerable length of time at the hearing. In such event, if the Secretary determines that the Judge erred in excluding the evidence, and that such error was substantial, the hearing may be reopened to permit the taking of such evidence.

§ 1.810 Oral and written arguments.

(a) *Oral argument before the Judge.* Oral argument before the Judge shall be in the discretion of the Judge. Such argument, when permitted, may be limited by the Judge to any extent that the Judge finds necessary for the expeditious disposition of the proceeding and shall be made part of the transcript.

(b) *Briefs, proposed findings, and conclusions.* (1) The Judge shall announce at the hearing a reasonable period of time within which interested persons may file with the hearing clerk proposed findings and conclusions, and written arguments or briefs, based upon the evidence received at the hearing, citing, where practicable, the page or pages of the transcript of the testimony where such evidence appears.

(2) Factual material other than that adduced at the hearing or subject to official notice shall not be alluded to therein, and, in any case, shall not be considered in the formulation of the rule.

(3) If the person filing a brief desires the Secretary to consider any objection made by such person to a ruling of the Judge, as provided in §1.809(d), that person shall include in the brief a concise statement concerning each such objection, referring, where practicable, to the pertinent pages of the transcript.

§ 1.811 Certification of the transcript.

(a) The Judge shall notify the hearing clerk of the close of a hearing and of the time for filing transcript corrections, written arguments, briefs, proposed findings, and proposed conclusions.

(b)(1) After the hearing, the Administrator, shall transmit to the hearing clerk an original and three copies of the transcript of the testimony and the original and all copies of the exhibits not already on file with the hearing clerk.

(2) The Judge shall attach to the original transcript of the testimony a certificate stating that, to the best of the Judge's knowledge and belief, the transcript is a true transcript of the testimony given at the hearing, except in such particulars as the Judge shall specify, and that the exhibits transmitted are all the exhibits as introduced at the hearing with such exceptions as the Judge shall specify. A copy of such certificate shall be attached to each of the copies of the transcript of testimony.

(3) In accordance with such certificate the hearing clerk shall note upon the official record copy, and cause to be noted on other copies of the transcript, each correction detailed therein by adding or crossing out (but without obscuring the text as originally transcribed) at the appropriate place any words necessary to make the same conform to the correct meaning, as certified by the Judge.

(4) The hearing clerk shall obtain and file certifications to the effect that such corrections have been effectuated in copies other than the official record copy.

§ 1.812 Copies of the transcript.

(a) During the period in which the proceeding has an active status in the Department, a copy of the transcript and exhibits shall be kept on file with the hearing clerk where it shall be available for examination during official hours of business. Thereafter the

transcript and exhibits shall be made available by the hearing clerk for examination during official hours of business after prior request and reasonable notice to the hearing clerk.

(b) A copy of the transcripts of the hearing shall be made available to any person at actual cost of duplication.

§ 1.813 Administrator's recommended decision.

(a) *Preparation.* As soon as practicable following the termination of the period allowed for the filing of written arguments or briefs and proposed findings and conclusions the Administrator shall file with the hearing clerk a recommended decision.

(b) *Contents.* The Administrator's recommended decision shall include:

(1) A preliminary statement containing a description of the history of the proceedings, a brief explanation of the material issues of fact, law and proposed findings and conclusions about such issues, including the reasons or basis for such proposed findings.

(2) A ruling upon proposed findings or conclusions submitted by interested persons.

(3) An appropriate proposed rule effectuating the Administrator's recommendations.

(c) *Exceptions to recommended decision.* (1) Immediately following the filing of the recommended decision, the Administrator shall give notice thereof and opportunity to file exceptions thereto by publication in the FEDERAL REGISTER.

(2) Within the period of time specified in such notice, any interested person may file with the hearing clerk exceptions to the Administrator's proposed rule and a brief in support of such exceptions.

(3) Such exceptions shall be in writing, shall refer, where practicable, to the related pages of the transcript, and may suggest appropriate changes in the proposed rule.

(d) *Omission of recommended decision.* The procedure provided in this section may be omitted only if the Secretary finds on the basis of the record that due and timely execution of the Secretary's functions imperatively and unavoidably requires such omission.

§ 1.814 Submission to Secretary.

(a) Upon the expiration of the period allowed for filing exceptions or upon request of the Secretary, the hearing clerk shall transmit to the Secretary the record of the proceeding.

(b) Such record shall include:

(1) All motions and requests filed with the hearing clerk and rulings thereon.

(2) The certified transcript.

(3) Any proposed findings or conclusions or written arguments or briefs that may have been filed.

(4) The Administrator's recommended decision, if any.

(5) Filed exceptions.

§ 1.815 Decision by the Secretary.

After due consideration of the record, the Secretary shall render a decision. Such decision shall become a part of the record and shall include:

(a) A statement of findings and conclusions, including the reasons or basis for such findings, upon all the material issues of fact or law presented on the record.

(b) A ruling upon proposed findings and proposed conclusions not previously ruled upon in the record.

(c) A ruling upon exceptions filed by interested persons.

(d) Either a denial of the proposal to issue a rule, or, if the findings upon the record so warrant, a rule, the provisions of which shall be set forth and such rule shall be complete.

§ 1.816 Filing, extension of time, effective date of filing, and computation of time.

(a) *Number of copies.* Except as provided otherwise, all documents or papers required or authorized by the foregoing provisions hereof to be filed with the hearing clerk shall be filed in quadruplicate. Any documents or papers so required or authorized to be filed with the hearing clerk shall be filed with the Judge during the course of an oral hearing.

(b) *Extension of time.* (1) The time for filing of any document or paper required or authorized by the foregoing provisions to be filed may be extended by the Judge (before the record is so

certified by the Judge) or by the Administrator (after the record is so certified by the Judge but before it is transmitted to the Secretary), or by the Secretary (after the record is transmitted to the secretary) upon request filed, and if, in the judgment of the Judge, Administrator, or the Secretary, as the case may be, there is good reason for the extension.

(2) All rulings made pursuant to this paragraph shall be filed with the hearing clerk.

(c) *Effective date of filing.* Any document or paper required or authorized in this subpart to be filed shall be deemed to be filed at the time it is received by the Hearing Clerk.

(d) *Computation of time.* (1) Each day, including Saturdays, Sundays, and legal public holidays, shall be included in computing the time allowed for filing any document or paper.

(2) That when the time for filing a document or paper expires on a Saturday, Sunday, or legal public holiday, the time allowed for filing the document or paper shall be extended to include the following business day.

§ 1.817 Ex parte communications.

(a) For the purposes of this section, ex parte communication means any oral or written communication not on the public record with respect to which reasonable prior notice to all interested parties is not given, but which shall not include requests for status reports (including requests on procedural matters) on a proceeding.

(b) At no stage of the proceeding following the issuance of a notice of hearing and prior to the issuance of the Secretary's decision thereon shall an employee of the Department who is or may reasonably be expected to be involved in the decision process of the proceeding discuss ex parte the merits of the proceeding with any person having an interest in the proceeding or with any representative of such person. This prohibition does not include communications about:

(1) Procedural matters and status reports.

(2) The merits of the proceeding if all parties known to be interested in the proceeding have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record of the proceeding.

(c) No interested person outside the Department shall make or knowingly cause to be made to an employee of the Department who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding except as provided in paragraph (a) of this section.

(d) If an employee of the Department who is or may reasonably be expected to be involved in the decisional process of the proceeding receives or makes or knowingly causes to be made a communication prohibited by this section, the Department shall place on the public record of the proceeding:

(1) All such written communications;

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

(3) All written responses, and memoranda, stating the substance of all oral responses thereto.

(e) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Department may, to the extent consistent with the interest of justice and the policy of the underlying statute, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(f) This section does not constitute authority to withhold information from Congress.

§ 1.818 Additional documents to be filed with hearing clerk.

In addition to the documents or papers required or authorized by the foregoing provisions of this subpart to be filed with the hearing clerk, the hearing clerk shall receive for filing and shall have custody of all papers, reports, records, orders, and other documents which relate to the administration of any order and which the Secretary is required to issue or to approve.

§ 1.819 Hearing before Secretary.

(a) The Secretary may act in the place and stead of a Judge in any proceeding herein. When the Secretary so acts, the hearing clerk shall transmit the record to the Secretary at the expiration of the period provided for the filing of proposed findings of fact, conclusions, and orders, and the Secretary shall then, after due consideration of the record, issue the final decision in the proceeding.

(b) The Secretary may issue a tentative decision in which event the parties shall be afforded an opportunity to file exceptions before the issuance of the final decision.

Subpart Q—Review and Issuance of Agency Guidance Documents

SOURCE: 85 FR 34085, June 3, 2020 unless otherwise noted.

§ 1.900 General.

(a) This subpart governs all United States Department of Agriculture (USDA) employees and contractors involved with all phases of issuing USDA guidance documents.

(b) These procedures apply to all newly issued guidance documents and, in certain respects, guidance documents already in effect.

(c)(1) For purposes of this subpart, the term ''guidance document'' is defined as in Executive Order 13891 and means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation.

(2) The term is not confined to formal written documents; guidance documents may come in a variety of forms, including (but not limited to) letters, memoranda, circulars, bulletins, advisories, and may include video, audio, and Web-based formats. See Office of Management and Budget's (OMB) Bulletin 07–02, ''Agency Good Guidance Practices,'' 72 FR 3432, 3434, 3439 (January 25, 2007) (''OMB Good Guidance Bulletin'')

(d) ''Guidance document'' does not include the following:

(1) Rules promulgated pursuant to notice and comment under 5 U.S.C. 553 or similar statutory provisions;

(2) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);

(3) Rules of agency organization, procedure, or practice;

(4) Decisions of agency adjudications under 5 U.S.C. 554 or similar statutory provisions;

(5) Internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties;

(6) Internal executive branch legal advice or legal opinions addressed to executive branch officials;

(7) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (*e.g.*, case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (*e.g.*, guidance pertaining to the use, operation, or control of a government facility or property), and correspondence with individual persons or entities (*e.g.*, congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;

(8) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and presentations, editorials, media interviews, press materials, or congressional testimony that do not set forth for the first time a new policy or interpretation;

(9) Grant solicitations and awards; or

(10) Contract solicitations and awards.

(e) The term ''significant guidance document'' means a guidance document that may reasonably be anticipated to:

(1) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S. 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 of E.O. 12866.

(f) The term ''significant guidance document'' does not include the categories of documents excluded in writing by OMB's Office of Information and Regulatory Affairs (OIRA).

(g) Significant guidance documents must be reviewed by OIRA before issuance and must demonstrate compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Orders 12866, 13563, 13609, 13771, and 13777.

§ 1.901 Requirements for clearance.

Each USDA agency that issues a guidance document shall ensure that the guidance document satisfies the following requirements:

(a) The guidance document complies with all applicable statutes and regulations;

(b) The guidance document identifies or includes:

(1) The term ''guidance'' or its functional equivalent;

(2) The issuing agency and agency component, as applicable;

(3) A unique identifier, including, at a minimum, the date of issuance and title of the document and its Z–RIN, if applicable;

(4) The activity or entities to which the guidance document applies;

(5) Citations to applicable statutes and regulations;

(6) A statement noting whether the guidance document is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and

(7) A short summary of the subject matter covered in the guidance document at the top of the document.

(c) The guidance document does not use mandatory language, such as ''shall,'' ''must,'' ''required,'' or ''requirement,'' unless the language is describing an established statutory or regulatory requirement or is addressed to USDA employees or contractors and does not foreclose the Department's consideration of positions advanced by non-Federal entities.

(d) The guidance document is written in plain and understandable English;

(e) All guidance documents include a clear and prominent statement declaring that the contents of the document do not have the force and effect of law and are not meant to bind the public in any way, and the document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

§ 1.902 Public access to effective guidance documents.

Each USDA agency that issues guidance documents shall:

(a) Ensure all guidance documents in effect are on its website in a single, searchable, indexed database, and available to the public. Guidance documents that do not appear on the website are considered rescinded.

(b) Note on its website that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract.

(c) Maintain and advertise on its website a means for the public to comment electronically on any guidance documents that are subject to the notice-and comment procedures of this subpart and to submit requests electronically for issuance, reconsideration, modification, or rescission of guidance documents in accordance with this subpart.

(d) Designate an office to receive and address complaints from the public that a USDA agency is not following the requirements of OMB's Good Guidance Bulletin or is improperly treating a guidance document as a binding requirement.

§ 1.903 Good faith cost estimates.

(a) Each USDA agency that issues a guidance document shall, to the extent practicable, make a good faith effort to estimate the likely economic impact of the guidance document to determine whether the document might be significant.

(b) When a USDA agency is assessing or explaining whether it believes a guidance document is a ''significant guidance document,'' it shall, at a minimum, provide the same level of analysis that would be required for a determination of major/not major under the Congressional Review Act. When an agency determines that a guidance document will be significant, the agency shall conduct and publish an assessment of the potential costs and benefits of the regulatory action (which may entail a regulatory impact analysis) of the sort that would accompany a significant rulemaking, to the extent reasonably possible.

§ 1.904 Procedures for guidance documents identified as "significant" or "otherwise of importance to the Department's interests."

(a) For guidance documents proposed to be issued by an agency, if there is a reasonable possibility the guidance document may be considered ''significant'' or ''otherwise of importance to the Department's interests,'' or if the agency is uncertain whether the guidance document may qualify as such, the agency shall email a copy of the proposed guidance document (or a summary of it) to the Office of Budget and Program Analysis (OBPA) for review and further direction before issuance. Each proposed guidance document determined to be significant or otherwise of importance to the Department's interests must be approved by the Mission Area Under Secretary before issuance. In such instances, OBPA shall obtain a Z–RIN and coordinate submission of the proposed guidance document to departmental reviewers as deemed necessary. For purposes of this rule, even if not ''significant,'' a guidance document shall be considered ''otherwise of importance to the Department's interests'' if it may reasonably be anticipated to:

(1) Relate to a major program, policy, or activity of the Department or a high-profile issue pending for decision before the Department;

(2) Involve one of the Secretary's top policy priorities;

(3) Garner significant press or congressional attention; or

(4) Raise significant questions or concerns from constituencies of importance to the Department, such as Committees of Congress, States or Indian tribes, the White House or other departments of the Executive Branch, courts, consumer or public interest groups, or leading representatives of industry.

(b) USDA shall submit significant guidance documents to OMB for coordinated review. In addition, USDA may determine that it is appropriate to coordinate with OMB in the review of guidance documents that are otherwise of importance to the Department's interests.

(c) If the guidance document is determined by OMB to be not significant, the proposing agency shall issue the guidance document through its standard process.

[85 FR 34085, June 3, 2020, as amended at 85 FR 55359, Sept. 8, 2020]

§ 1.905 Designation procedures.

(a) To obtain a designation from OIRA, USDA agencies shall prepare and submit to OBPA a designation request for guidance documents. Designation requests must include the following information:

(1) A summary of the guidance document; and

(2) The agency's recommended designation of ''not significant,'' or ''significant,'' as well as a justification for that designation.

(b) OBPA shall seek a significance determination from OIRA for guidance documents, as appropriate, in the same manner as for rulemakings. Prior to publishing a guidance document, and with sufficient time to allow OIRA to review the document in the event that it is designated ''significant,'' USDA shall provide OIRA with an opportunity to review the designation request or the guidance document, if requested, to determine if it meets the definition of ''significant'' under Executive Order 13891.

§ 1.906 Notice-and-comment procedures.

(a) Except as provided in paragraph (b) of this section, a proposed USDA guidance document determined to be a ''significant guidance document'' shall

be subject to the following informal notice-and-comment procedures. The issuing agency shall publish a notice in the FEDERAL REGISTER announcing that a draft of the proposed guidance document is publicly available, shall post the draft guidance document on its website, shall invite public comment on the draft document for a minimum of 30 days, make the public comments available for public review on its website, and shall prepare and post a public response to major concerns raised in the comments, as appropriate, on its website, either before or when the guidance document is finalized and issued.

(b) The requirements of paragraph (a) of this section will not apply to any significant guidance document or categories of significant guidance documents for which OBPA finds, in consultation with OIRA, the proposing agency, and the Office of the Secretary, good cause that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding of good cause and a brief statement of reasons therefor in the guidance document issued).

(c) Where appropriate, the proposing agency may recommend to OBPA that a particular guidance document that is otherwise of importance to the Department's interests shall also be subject to the informal notice-and-comment procedures described in paragraph (a) of this section.

§ 1.907 Petitions for guidance.

Any person may petition a USDA agency to withdraw or modify a particular guidance document. Petitions may be submitted by postal mail to: Guidance Officer, Office of Budget and Program Analysis, USDA, 1400 Independence Avenue SW, Washington, DC 20250–1400. Email petitions may be sent to *OBPA-GuidanceInquiries@usda.gov*. The agency shall respond to all requests in a timely manner, but no later than 90 days after receipt of the request.

[85 FR 34085, June 3, 2020, as amended at 85 FR 55359, Sept. 8, 2020]

§ 1.908 Rescinded guidance.

No USDA agency may cite, use, or rely on guidance documents that are rescinded, except to establish historical facts.

§ 1.909 Exigent circumstances.

In emergency situations or when the issuing agency is required by statutory deadline or court order to issue guidance documents more quickly than this subpart's review procedures allow, the issuing agency shall coordinate with OBPA to notify OIRA as soon as possible and, to the extent practicable, shall comply with the requirements of this subpart at the earliest opportunity. Wherever practicable, the issuing agency shall schedule its proceedings to permit sufficient time to comply with the procedures set forth in this subpart.

§ 1.910 Reports to Congress and GAO.

Unless otherwise determined in writing, it is the policy of USDA that upon issuing a guidance document determined to be ''significant,'' the issuing agency shall submit a report to Congress and the Government Accountability Office in accordance with the procedures described in 5 U.S.C. 801 (the Congressional Review Act).

§ 1.911 No judicial review or enforceable rights.

This subpart is intended to improve the internal management of USDA. As such, it is for the use of USDA personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

PART 1a—LAW ENFORCEMENT AUTHORITIES

Sec.

AUTHORITY: Sec. 1337, Pub. L. 97–98; 5 U.S.C. 301; 5 U.S.C. App. I.