

# Proposed Rules

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

Dated: June 5, 2012.

**Brian Grosner,**  
General Manager.

[FR Doc. 2012-13978 Filed 6-7-12; 8:45 am]

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## DEFENSE NUCLEAR FACILITIES SAFETY BOARD

### 10 CFR Part 1703

#### Proposed FOIA Fee Schedule Update

**AGENCY:** Defense Nuclear Facilities Safety Board.

**ACTION:** Notice of proposed rulemaking; correction.

**SUMMARY:** This document corrects the **SUPPLEMENTARY INFORMATION** to the Board's proposed FOIA Fee Schedule Update published in the **Federal Register** of June 1, 2012. The document contained incorrect dates and references.

**FOR FURTHER INFORMATION CONTACT:** Brian Grosner, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., Suite 700, Washington, DC 20004-2901, (202) 694-7060.

#### Correction

In proposed rule FR Doc. 2012-13295, dated June 1, 2012 on page 32433 in the third column, the **SUPPLEMENTARY INFORMATION** section should read:

**SUPPLEMENTARY INFORMATION:** The FOIA requires each Federal agency covered by the Act to specify a schedule of fees applicable to processing of requests for agency records. 5 U.S.C. 552(a)(4)(A)(i). Pursuant to 10 CFR 1703.107(b)(6) of the Board's regulations, the Board's General Manager will update the FOIA Fee Schedule once every 12 months. Previous Fee Schedule Updates were published in the **Federal Register** and went into effect, most recently, on July 22, 2011, 76 FR 43819. The Board's proposed fee schedule is consistent with the guidance. The components of the proposed fees (hourly charges for search and review and charges for copies of requested documents) are based upon the Board's specific cost.

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 15 CFR Part 906

[Docket. No 101019524-2112-01]

RIN 0648-BA36

#### National Appeals Office Rules of Procedure

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** This proposed rule would establish procedures governing the National Appeals Office (NAO), a division of NMFS' Office of Management and Budget within NOAA. NAO's central mission is to provide an efficient means of adjudicating appeals by providing due process and consistency to NMFS' administrative decisions. This proposed rule would establish a process by which NMFS could review, and if necessary correct, decisions about certain limited access privilege programs under Section 303A of the Magnuson-Stevens Fishery Conservation and Management Act. The proposed procedures could also be used to adjudicate appeals from other offices that incorporate these rules into their regulations or otherwise notify potential appellants of the procedures' applicability to their proceedings.

**DATES:** NMFS invites interested persons to submit comments on this proposed rule. To ensure consideration, comments must be in writing and must be received by July 9, 2012.

**ADDRESSES:** You may submit comments, identified by NOAA-NMFS-2011-0266, by one of the following methods:

- *Electronic Submission:* Submit all electronic public comments via Federal e-Rulemaking Portal at [www.regulations.gov](http://www.regulations.gov). To submit comments via the e-Rulemaking Portal,

first click the "submit a comment" icon, then enter NOAA-NMFS-2011-0266 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the "Submit a Comment" icon on the right of that line.

- *Mail:* Submit written comments to Steven Goodman, National Appeals Office, Office of Management and Budget, NMFS, 1315 East West Hwy., Room 9553, Silver Spring, MD 20910.

- *Fax:* 301-713-2384; Attn: Steven Goodman.

*Instructions:* Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Steven Goodman, National Appeals Office, Office of Management & Budget, NMFS, 1315 East West Hwy., Room 9553, Silver Spring, MD 20910; [nmfs.nao.contact@noaa.gov](mailto:nmfs.nao.contact@noaa.gov); (301) 427-8774. (This is not a toll-free number.) Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the Federal Information Relay Service at (800) 877-8339.

#### SUPPLEMENTARY INFORMATION:

#### Background

In 2007, Congress added section 303A to the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Section 303A authorizes limited access privilege programs (LAPP) and requires NMFS to "include an appeals process for administrative review of the Secretary's decisions regarding initial

allocation of limited access privileges.” Most of the appeals processes currently used by NMFS pre-date the new MSA requirement. Further, the current infrastructure for LAPP appeals does not achieve optimum economies of scale, or efficient use of resources.

LAPPs may provide benefits to certain members of the public, while excluding others. Thus, a transparent, unbiased and clear appeals process is essential. LAPP applicants across the country should be provided with a uniform level of due process and consistent procedures for filing and deciding appeals. Further, a robust administrative appeals process provides a means for an agency to make corrections and avoid costly litigation. Accordingly, NMFS is proposing to adopt procedural regulations at 15 CFR part 906, which would designate NAO, a division within NMFS Office of Management and Budget, as adjudicator for all future appeals arising under section 303A of the MSA. NAO may also be used for other Department of Commerce adjudications if the proposed regulations are adopted by regulation or other means and potential appellants are given notice. For example, other programs that may opt into the NAO process may include the Alaska Charter Halibut Limited Access Program or the North Pacific Groundfish Observer Program.

NAO adjudicates initial administrative determinations, defined in the proposed rule as agency actions that directly and adversely affect an appellant. Typically, although not exclusively, NAO proceedings are for appeals of denials of permits or other limited access privileges. The proposed rule does not encompass proceedings made available pursuant to 15 CFR part 904. The regulations at 15 CFR part 904 are for administrative proceedings over cases involving a Notice of Violation and Assessment of civil penalty, permit sanctions, written warnings, or seizure and forfeiture of property for violating 34 statutes NOAA enforces. The regulations codified at 15 CFR part 904 provide distinct procedures, including a different administrative process that includes the agency as a party to an appeal.

The proposed action should avoid future unnecessary costs and redundancies through a centralized administrative appeals process for review of initial administrative determinations. A centralized system for adjudicating appeals is more cost effective than duplicating the appeals function in each region. Historically, administrative appeals were processed by NMFS’ regional offices. Each NMFS

region has had a different structure and process for resolving appeals.

The proposed action will promote consistency in decision making and responsiveness to due process considerations. A centralized office will use experienced, full-time adjudicators to decide appeals, and programs would benefit from their collective experience and institutional memory. A cadre of experienced and well-trained appellate officers would free other employees to use their time performing duties within their area of expertise. Under the current proposal, NAO could adjudicate appeals in one location. This will allow for economies of scale and freeing-up of resources for use in regional offices.

Typically, NAO will be used for informal administrative appeals. The proposed rule allows flexibility in determining what type and how many pre-hearing conferences are needed. An appellate officer has the discretion to hold a scheduling and/or pre-hearing conference if he or she thinks one is needed to materially advance the proceeding. An appellate officer’s discretion in determining whether to hold a scheduling and/or pre-hearing conference will be guided by the following: settlement, if allowed under applicable law; clarification of the issues under review; stipulations; hearing(s) date, time, and location; identification of witnesses for the hearing(s); development of the NAO case record, and; other matters that may aid in the disposition of the proceedings.

Hearings are also held at the discretion of an appellate officer or if the appellate officer considers such hearing will materially advance his or her evaluation of the issues under appeal. In determining whether to hold a hearing, an appellate officer’s discretion will be guided by whether the appellate officer believes oral testimony is required to resolve a material issue of fact or whether oral presentation is needed to probe a party’s position on a material issue of law. Conferences and hearings may be in person, but more likely, they will be held by telephone or by other electronic means. The rule does not bar face-to-face hearings, but it is not intended to require expenditure of funds in order for an appellant to participate, or at its discretion, the agency to participate, in a hearing.

The proposed regulations address operations as well as events that occur during the course of adjudicating an appeal filed with NAO. The proposed rule provides who may file, how and when to initiate an appeal, and what constitutes the agency record and transmittal for inclusion in the NAO

case record for the appeal. During a hearing and while the record is open, the appellate officer determines whether additional evidence should be admitted in the NAO case record. The proposed rule prohibits ex parte communications, but clarifies that non-substantive communications or communications about procedural matters are permissible. The proposed rule establishes time frames and deadlines for actions to ensure a reasonably expeditious review, and while that may be modified, that would not be the norm.

NAO will produce written decisions upholding or reversing the administrative determination under review. The proposed rule establishes parameters for written decisions. The appellant has the burden of proving by a preponderance of the evidence that he or she should prevail. Thus it is incumbent upon the appellant to garner and present evidence to support his or her claim.

Generally, under the proposed rule a decision issued by NAO becomes final 30 days after issuance. The effective date of the final decision is subject to delay for reconsideration by NAO, or review by a Regional Administrator of NMFS or other appropriate official. NAO will follow applicable federal law and policy which may include publishing NAO and Regional Administrator decisions on NAO’s Web site.

### **Classifications**

#### *Regulatory Flexibility Act*

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This regulation does not create any new regulatory requirements, but instead codifies procedural rules for certain administrative adjudication proceedings. The proposed rule would not create any new obligations for small entities; rather, it would ensure a standardized and centralized appeals process for decisions regarding initial allocation of limited access privileges. As a result, any potential economic impact on small entities would be nominal. While it is possible that a substantial number of small entities could participate in the adjudication proceedings, the procedures being established here would not have a significant economic impact on those entities. Implementing standardized rules could actually reduce the

economic burden on small entities by providing procedural certainty to the parties participating in the proceedings.

Because this proposed rule, if enacted, would not have a significant impact on a substantial number of small entities, an initial regulatory flexibility analysis is not required and none has been prepared.

#### *Executive Order 12866*

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

#### **List of Subjects in 15 CFR Part 906**

Administrative appeals,  
Administrative practice and procedure,  
Fisheries.

Dated: June 4, 2012.

**Alan D. Risenhoover,**

*Acting Deputy Assistant Administrator for  
Regulatory Programs, National Marine  
Fisheries Service.*

For reasons stated in the preamble, NMFS proposes to add 15 CFR part 906 as follows:

### **PART 906—NATIONAL APPEALS OFFICE RULES OF PROCEDURE**

Sec.

- 906.1 Purpose and scope.
- 906.2 Definitions.
- 906.3 Requesting an appeal and agency record.
- 906.4 General filing requirements.
- 906.5 Service.
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- 906.9 Exhibits.
- 906.10 Evidence.
- 906.11 Hearing.
- 906.12 Closing the evidentiary portion of the NAO case record.
- 906.13 Failure to appear.
- 906.14 Burden of proof.
- 906.15 Decisions.
- 906.16 Reconsideration.
- 906.17 Review by the Regional Administrator.
- 906.18 Implementation of final decisions.

**Authority:** 16 U.S.C. 1801 et seq.; 16 U.S.C. 1374, 1375 & 1416; 16 U.S.C. 1540; 16 U.S.C. 773f; 16 U.S.C. 973f; 16 U.S.C. 1174; 16 U.S.C. 2437; 16 U.S.C. 4013; 16 U.S.C. 5507; 16 U.S.C. 7009; 16 U.S.C. 3637; 16 U.S.C. 5103 & 5106; 16 U.S.C. 5154 & 5158; 16 U.S.C. 6905, and; 16 U.S.C. 5010.

#### **§ 906.1 Purpose and scope.**

(a) This part sets forth the procedures governing proceedings before the National Appeals Office (NAO). These procedures provide standard rules of practice for administrative adjudications by NAO.

(b) NAO will adjudicate appeals of initial administrative determinations in limited access privilege programs

developed under section 303A of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and approved after the effective date of these regulations. Those appeals are informal proceedings.

(c) The procedures contained in this part may be incorporated by reference in rules or regulations other than those promulgated pursuant to section 303A of the MSA. The Secretary may also request that NAO adjudicate appeals in any matter in controversy that requires findings of fact and conclusions of law, and other quasi-judicial matters that the Secretary deems appropriate, consistent with existing regulations. The Secretary shall provide notice to potential appellants and to any affected party in these other matters through regulations or actual notice.

#### **§ 906.2 Definitions.**

*Agency record* means all material and information, including electronic, the office that issued the initial administrative determination relied on or considered in reaching its decision, or which otherwise is related to the initial administrative determination.

*Appeal* means an appellant's petition to appeal an initial administrative determination and all administrative processes of the National Appeals Office related thereto.

*Appellant* means a person who receives an initial administrative determination and appeals it to the National Appeals Office.

*Appellate officer* means an individual designated by the Chief of the National Appeals Office to adjudicate the appeal. The term may include the Chief of the National Appeals Office.

*Day* means calendar day unless otherwise specified by the Chief of the National Appeals Office. When computing any time period specified under these rules, count every day, including intermediate Saturdays, Sundays, and legal holidays.

*Department* or *DOC* means the Department of Commerce.

*Ex parte communication* means any oral or written communication about the merits of a pending appeal between one party and the National Appeals Office with respect to which reasonable prior notice to all parties is not given. However, ex parte communication does not include inquiries regarding procedures, scheduling, and status.

*Initial Administrative Determination* or *IAD* means a determination made by an official of the National Marine Fisheries Services that directly and adversely affects a person's ability to hold, acquire, use, or be issued a limited access privilege. The term also includes

determinations issued pursuant to other federal law, for which review has been assigned to the National Appeals Office by the Secretary.

*NAO* means the National Appeals Office, an adjudicatory body within the Office of Management and Budget, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce. The term generally means all NAO personnel, including appellate officers.

*NAO case record* means the Agency record and all additional documents and other materials related to an appeal and maintained by NAO in a case file.

*NMFS* means the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce.

*National Oceanic and Atmospheric Administration* or *NOAA* means the National Oceanic and Atmospheric Administration, Department of Commerce.

*Party* means a person who files a petition for appeal with NAO. It can also mean an office that issued the IAD if that office participates in the NAO appeal.

*Person* means any individual (whether or not a citizen or national of the United States), corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, or local, or foreign government or entity of any such government.

*Regional Administrator* means the administrator of one of six regions of NMFS: Northeast, Southeast, Northwest, Southwest, Alaska, or Pacific Islands. The term also includes an official with similar authority within the DOC, such as the Director of NMFS' Office of Sustainable Fisheries.

*Representative* means an individual properly authorized by an Appellant in writing to act for the Appellant in conjunction with an appeal pending in NAO. The representative does not need to be a licensed attorney.

*Secretary* means the Secretary of Commerce or a designee.

#### **§ 906.3 Requesting an appeal and agency record.**

(a) *Who May File.* Any person who receives an initial administrative determination.

(b) *Petition to Appeal.* (1) To request an appeal, a person shall submit a written petition of appeal to NAO.

(2) The petition shall include a copy of the initial administrative determination the person wishes to appeal.

(3) In the petition, the person shall state how the initial administrative determination directly and adversely affects him or her, why he or she believes the initial administrative determination is wrong, and whether he or she requests a hearing or prefers that an appellate officer make a decision based on the NAO case record and without a hearing.

(i) Arguments not raised by the person in his or her petition to appeal will be deemed waived.

(ii) The petition may include additional documentation in support of the appeal.

(4) If a person requests a hearing, the written request must include a concise statement raising genuine and substantial issues of a material fact or law that cannot be resolved based on the documentary evidence.

(5) In the petition, a person shall state whether the person has a representative, and if so, the name, address, and telephone number for the representative.

(c) *Address of record.* In the petition the person shall identify the address of record. Documents directed to the appellant will be mailed to the address of record, unless the appellant provides NAO and other parties with any changes to his or her address in writing.

(1) The address of record may include a representative's address.

(2) NAO bears no responsibility if the appellant or his or her representative does not receive documents because appellant or his or her representative changes his or her address without proper notification to NAO.

(3) NAO bears no responsibility if the appellant or his or her representative fail to retrieve documents upon notification from the United States Postal Service or commercial carrier.

(4) NAO will presume that documents addressed to an address of record and properly mailed or given to a commercial carrier for delivery are received.

(d) *Place of filing.* The petition must be transmitted via facsimile. The facsimile number is: 301-713-2384. If the person filing the petition does not have access to a fax machine, he or she may file the petition by mail or commercial carrier to Chief, National Appeals Office, 1315 East-West Hwy., Room 9552, Silver Spring, MD 20910.

(e) *Time limitations.* A petition must be filed within 45 days after the date the initial administrative determination is issued unless a shorter or longer filing timeframe is explicitly specified in the regulations governing the initial administrative determination.

(f) *Agency record.* (1) Within 20 days of receipt of the copy of the petition to appeal, the office that issued the initial administrative determination that is the subject of the appeal shall transmit the agency record to NAO.

(2) The office that issued the initial administrative determination shall organize the pages of the agency record in chronological order.

(g) *Agency participation in appeal.* The office responsible for the initial administrative determination shall have 20 days from the date it receives a copy of the petition to appeal to provide NAO with written notice that it will be a party to the appeal.

#### § 906.4 General filing requirements.

(a) *Date of filing.* Filing refers to providing documents to NAO.

(1) All documents filed on behalf of an appellant or related to an appeal shall be submitted to NAO via facsimile.

(2) If the person filing does not have access to a fax machine, he or she may file by regular mail or commercial carrier to Chief, National Appeals Office, 1315 East-West Hwy., Room 9552, Silver Spring, MD 20910.

(3) A document transmitted to NAO is considered filed upon receipt of the entire submission by 5 p.m. Eastern Time at NAO.

(b) *Copies.* At the time of filing a submission to NAO, the filing party shall serve a copy thereof on every other party, unless otherwise provided for in these rules.

(c) *Retention.* All submissions to NAO become part of a NAO case record.

(d) *Computation of time.* When computing any time period specified under these rules, count every day, including intermediate Saturdays, Sundays, and legal holidays. If the date that ordinarily would be the last day for filing with NAO falls on a Saturday, Sunday, or Federal holiday, or a day NAO is closed, the filing period will include the first NAO workday after that date.

(e) *Extension of time.* (1) When a submission is required to be filed within a prescribed time, a party may request, in writing, an extension of time to file the submission, citing the specific reason or reasons for the need of an extension of time. A party may not request an extension of time to file the submission after the deadline to file the submission has passed.

(2) NAO may grant the extension if an appellate officer determines good cause for an extension of time has been established by the party.

#### § 906.5 Service.

(a) Service refers to providing documents to parties to an appeal. (1)

Service of documents may be made by first class mail (postage prepaid), facsimile, or commercial carrier, or by personal delivery to a party's address of record.

(2) Service of documents will be considered effective upon the date of postmark (or as otherwise shown for government-franked mail), facsimile transmission, delivery to a commercial carrier, or upon personal delivery.

(b) A party shall serve a copy of all documents to all other parties and shall file a copy of all documents with NAO the same business day.

(c) NAO may serve documents by electronic mail.

#### § 906.6 Ex parte communications.

(a) Communication with NAO, including appellate officers, concerning procedures, scheduling, and status is permissible.

(b) Ex parte communication between NAO and the parties about the merits of a pending appeal is not permissible unless all parties have been given reasonable notice and an opportunity to participate in the communication.

(c) If NAO receives an ex parte communication, NAO shall document the communication and any responses thereto in the NAO case record. If the ex parte communication was in writing, NAO shall place a copy of the communication in the NAO case record. If the ex parte communication was oral, NAO shall prepare a memorandum stating the substance of the oral communication, which will then be included in the NAO case record. NAO will provide copies of any such materials included in the NAO case record under this paragraph to the parties to the appeal.

(d) NAO may require a party to show cause why such party's claim or interest in the appeal should not be dismissed, denied, disregarded, or otherwise adversely affected because of an ex parte communication as described in paragraphs (b) and (c) of this section.

(e) This rule may be suspended by NAO during an alternative dispute resolution process.

#### § 906.7 Disqualification of appellate officer.

(a) An appellate officer shall disqualify him or herself if the appellate officer has a perceived or actual conflict of interest, a perceived or actual prejudice or bias, for other ethical reasons, or based on principles found in the American Bar Association Model Code of Judicial Conduct for Administrative Law Judges.

(b) Any party may request an appellate officer, at any time before the

filing of the appellate officer's decision, to withdraw on the ground of personal bias or disqualification, by filing a written motion with the appellate officer setting forth in detail the matters alleged to constitute grounds for disqualification.

(c) The appellate officer, orally or in writing, shall grant or deny the motion based on the American Bar Association Model Code of Judicial Conduct for Federal Administrative Law Judges and other applicable law or policy. If the motion is granted, the appellate officer will disqualify himself or herself and withdraw from the proceeding. If the motion is denied, the appellate officer will state the grounds for his or her ruling and proceed with his or her review.

#### **§ 906.8 Scheduling and pre-hearing conferences.**

(a) NAO may convene a scheduling and/or pre-hearing conference if, for example, an appellate officer in his or her discretion finds a conference will materially advance the proceeding.

(b) NAO shall notify the parties in writing 10 days prior to a conference unless the Chief of NAO orders a shorter period of time for providing notice or conducting a conference.

(c) The following will guide an appellate officer in determining whether to exercise his or her discretion to hold a scheduling and/or pre-hearing conference.

- (1) Settlement, if possible under applicable law;
- (2) Clarifying the issues under review;
- (3) Stipulations;
- (4) Hearing(s) date, time, and location;
- (5) Identifying witnesses for the hearing(s);
- (6) Development of the NAO case record, and;
- (7) Other matters that may aid in the disposition of the proceedings.

(d) NAO may record the conference.

(e) *Format.* At the discretion of the appellate officer, conferences may be conducted by telephone, in person, or by teleconference or similar electronic means.

(f) NAO may issue an order showing the matters disposed of in the conference and may include in the order other matters related to the appeal.

#### **§ 906.9 Exhibits.**

(a) The parties shall mark all exhibits in consecutive order in whole Arabic numbers and with a designation identifying the party submitting the exhibit(s).

(b) Parties shall exchange all exhibits that will be offered at the hearing at least 10 days before the hearing.

(c) Parties shall provide all exhibit(s) to NAO at least 10 days before the hearing.

(d) NAO may modify the timeframe for exchanging or submitting exhibits if an appellate officer determines good cause exists.

(e) NAO may deny the admission into evidence of exhibits that are not marked and exchanged pursuant to this rule.

(f) Each exhibit offered in evidence or marked for identification shall be filed and retained in the NAO case record.

#### **§ 906.10 Evidence.**

(a) The Federal Rules of Evidence do not apply to NAO proceedings.

(b) NAO will decide whether to admit evidence into the NAO case record.

(1) An appellate officer may exclude unduly repetitious, irrelevant, and immaterial evidence. An appellate officer may also exclude evidence to avoid undue prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence.

(2) An appellate officer may consider hearsay evidence.

(c) Copies of documents may be offered as evidence, provided they are of equal legibility and quality as the originals, and such copies shall have the same force and effect as if they were originals. If an appellate officer so directs, a party shall submit original documents to the appellate officer.

(d) An appellate officer may take official notice of Federal or State public records and of any matter of which courts may take judicial notice.

(e) An appellate officer may contact the program office that issued the initial administrative determination in the case before the appellate officer in order to obtain the interpretation(s) of the law and regulation(s) made by the program office and applied to the facts in the case. The program office will provide to NAO the interpretation(s) of the law and regulation(s) made by that office in the case.

#### **§ 906.11 Hearing.**

(a) *Procedures.* (1) An appellate officer in his or her discretion may order a hearing taking into account the information provided by an Appellant pursuant to § 906.3(b)(3) or if an appellate officer considers that a hearing will materially advance his or her evaluation of the issues under appeal. In exercising his or her discretion, an appellate officer may consider whether oral testimony is required to resolve a material issue of fact or whether oral presentation is needed to probe a party's position on a material issue of law. If an appellate officer determines that a

hearing is not necessary, then the appellate officer will base his or her decision on the NAO case record. In the absence of a hearing an appellate officer may, at his or her discretion, permit the parties to submit additional materials for consideration.

(2) If an appellate officer convenes a hearing, the hearing will be conducted in the manner determined by NAO most likely to obtain the facts relevant to the matter or matters at issue.

(3) NAO shall schedule the date, time and place for the hearing. NAO will notify the parties in writing of the hearing date, time and place at least 10 days prior to the hearing unless the Chief of NAO orders a shorter period for providing notice or conducting the hearing.

(4) At the hearing, all testimony will be under oath or affirmation administered by an appellate officer. In the event a party or a witness refuses to be sworn or refuses to answer a question, an appellate officer may state for the record any inference drawn from such refusal.

(5) An appellate officer may question the parties and the witnesses.

(6) An appellate officer will allow time for parties to present argument, question witnesses and other parties, and introduce evidence.

(7) Parties may not compel discovery or the testimony of any witness.

(b) *Recording.* An appellate officer may record the hearing.

(c) *Format.* At the discretion of NAO, hearings may be conducted by telephone, in person, or by teleconference or similar electronic means.

#### **§ 906.12 Closing the evidentiary portion of the NAO case record.**

(a) At the conclusion of the NAO proceedings, an appellate officer will establish the date upon which the evidentiary portion of the NAO case record will close. Once an appellate officer closes the evidentiary portion of the NAO case record, with or without a hearing, no further submissions or argument will be accepted into the NAO case record.

(b) NAO in its discretion may reopen the evidentiary portion of the NAO case record or request additional information from the parties at anytime.

#### **§ 906.13 Failure to appear.**

If any party fails to appear at a pre-hearing conference or hearing after proper notice, an appellate officer may:

- (a) Dismiss the case, or;
- (b) Deem the failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the

making of a decision based on the NAO case record.

#### § 906.14 Burden of proof.

On issues of fact, the appellant bears the burden of proving he or she should prevail by a preponderance of the evidence. Preponderance of the evidence is the relevant evidence in the NAO case record, considered as a whole, that a reasonable person would accept as sufficient to find a contested fact is more likely than not. Appellant has the obligation to obtain and present evidence to support the claims in his or her petition.

#### § 906.15 Decisions.

(a) After an appellate officer closes the evidentiary portion of the NAO case record, NAO will issue a written decision that is based on the NAO case record. In making a decision, NAO shall determine whether the appellant has shown by a preponderance of the evidence that the initial administrative determination is inconsistent with applicable laws and regulations. In making a decision, NAO shall give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing in the initial administrative determination.

(b) At any time before a decision is implemented pursuant to § 906.18, NAO may issue a corrected decision.

(c) NAO shall serve a copy of its decision upon the appellant and the Regional Administrator.

(d) Except as provided in §§ 906.16 and 906.17, NAO's decision takes effect 30 days after the date it is issued and, upon taking effect, is the final decision of the Department for the purposes of judicial review.

#### § 906.16 Reconsideration.

(a) Any party may file a motion for reconsideration of NAO's decision. The request must be filed with NAO within 10 calendar days after service of NAO's decision.

(b) The motion must be in writing and contain a detailed statement of an error of fact or law material to the decision.

(c) If an appellate officer grants the motion for reconsideration, then NAO will stay the effective date of its decision under reconsideration review.

(d) In response to a motion for reconsideration, NAO will either:

(1) Reject the motion because it does not meet the criteria of paragraph (a) or (b) of this section; or

(2) Issue a revised decision which will take effect 30 days after it is issued and is the final decision of the Department for the purposes of judicial review,

unless the Regional Administrator remands, reverses or modifies it pursuant to § 906.17.

#### § 906.17 Review by the Regional Administrator.

(a) Regional Administrator authority and procedures. (1) A decision issued pursuant to § 906.15 or revised decision issued pursuant to § 906.16 is subject to review by the Regional Administrator. After 10 days of the date of the decision issued by NAO, the Regional Administrator may remand, reverse, or modify NAO's decision. In reviewing NAO's findings of fact, the Regional Administrator may only consider the evidentiary record including arguments, claims, evidence of record and other documents of record which were before NAO when it rendered its decision.

(2) The Regional Administrator must provide a written decision explaining why NAO's decision has been remanded, reversed, or modified. The Regional Administrator must serve a copy of the remanded, reversed or modified decision on NAO and the appellant promptly.

(b) The Regional Administrator's written decision to reverse or modify NAO's decision is the final decision of the Department for the purposes of judicial review.

(c) If the Regional Administrator does not remand, reverse, or modify NAO's decision under paragraphs (a) and (b) of this section, NAO's decision is the final decision of the Department for the purposes of judicial review.

#### § 906.18 Implementation of final decisions.

The final decision shall be implemented by the office that issued the initial administrative determination within 30 days after issuance of the final decision to the extent practicable and consistent with program regulations.

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BILLING CODE 3510-22-P

## DEPARTMENT OF THE TREASURY

### Alcohol and Tobacco Tax and Trade Bureau

#### 27 CFR Part 9

[Docket No. TTB-2012-0004; Notice No. 129]

RIN 1513-AB46

### Proposed Establishment of the Indiana Uplands Viticultural Area and Modification of the Ohio River Valley Viticultural Area

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Alcohol and Tobacco Tax and Trade Bureau (TTB) proposes to establish the approximately 4,800-square mile "Indiana Uplands" viticultural area in south-central Indiana and proposes to modify the boundary of the established Ohio River Valley viticultural area, which would result in the elimination of a potential overlap with the proposed Indiana Uplands viticultural area. These proposals would result in an approximately 1,530 square mile region no longer being part of the Ohio River Valley viticultural area as the affected region would be included in the new Indiana Uplands viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. TTB invites comments on these proposals.

**DATES:** TTB must receive written comments on or before August 7, 2012.

**ADDRESSES:** You may send comments on this notice to one of the following addresses:

- <http://www.regulations.gov> (via the online comment form for this notice as posted within Docket No. TTB-2012-0004 at "Regulations.gov," the Federal e-rulemaking portal);

- *U.S. Mail:* Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044-4412; or

- *Hand delivery/courier in lieu of mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200E, Washington, DC 20005.

See the Public Participation section of this notice for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this notice, selected supporting materials, and any comments TTB receives about this proposal at <http://www.regulations.gov> within Docket No. TTB-2012-0004. A direct link to this docket is posted on the TTB Web site at [http://www.ttb.gov/wine/wine\\_rulemaking.shtml](http://www.ttb.gov/wine/wine_rulemaking.shtml) under Notice No. 129. You also may view copies of this notice, all related petitions, maps or other supporting materials, and any comments TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20005. Please call 202-453-2270 to make an appointment.

**FOR FURTHER INFORMATION CONTACT:** Elisabeth C. Kann, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G St. NW.,