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Title 15 —Commerce and Foreign Trade

Subtitle B —Regulations Relating to Commerce and Foreign Trade

Chapter IX —National Oceanic and Atmospheric Administration, Department of Commerce

Subchapter A —General Regulations

Part 906 National Appeals Office Rules of Procedure

- § 906.1 Purpose and scope.
- § 906.2 Definitions.
- § 906.3 Requesting an appeal and agency record.
- § 906.4 General filing requirements.
- § 906.5 Service.
- § 906.6 Ex parte communications.
- § 906.7 Disqualification of appellate officer.
- § 906.8 Scheduling and pre-hearing conferences.
- § 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 Final decision of the Department.

PART 906—NATIONAL APPEALS OFFICE RULES OF PROCEDURE

Authority: 16 U.S.C. 1801 *et seq.*; 16 U.S.C. 1374, 1375 and 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 and 5106; 16 U.S.C. 5154 and 5158; 16 U.S.C. 6905, and; 16 U.S.C. 5010.

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§ 906.1 Purpose and scope.

- (a) This part sets forth the procedures governing administrative adjudications before the National Appeals Office (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 in this part may be incorporated by reference in regulations other than those promulgated pursuant to section 303A of the MSA.
- (d) The Secretary of Commerce may 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 will provide notice to potential appellants and to any affected party in these other matters through regulations or actual notice.
- (e) The procedures in this part may not be used to seek review of the validity of statutes or regulations.

§ 906.2 Definitions.

As used in this part:

Agency record means all material and information, including electronic, the office that issued the initial administrative determination relied on or considered in reaching its initial administrative determination, 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 is the named recipient of 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. 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.

Department or DOC means the Department of Commerce.

Initial Administrative Determination or IAD means a determination made by an official of the National Marine Fisheries Service 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 and an office that issued the IAD if that office participates in the NAO appeal.

Regional Administrator means the administrator of one of five regions of NMFS: Northeast, Southeast, West Coast, 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.

§ 906.3 Requesting an appeal and agency record.

(a) **Who may file.** Any person who is the named recipient of 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 inconsistent with the law and regulations governing the initial administrative determination, 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 unless NAO permits amendments to the petition based on good cause for not raising the arguments in the original petition.

(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 changed his or her address and did not notify NAO.

(3) NAO bears no responsibility if the appellant or his or her representative fails 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 addressed to Chief, National Appeals Office, 1315 East-West Hwy., Silver Spring, MD 20910.
- (e) **Time limitations.**
 - (1) 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.
 - (2) A person may not request an extension of time to file a petition to appeal.
- (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 documents of the agency record in chronological order. Pages attached to a primary submission shall remain with the primary submission.
- (g) **Agency participation in appeal.** 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 may provide written notice to NAO that it will be a party to the appeal. An office issuing the initial administrative determination is not required to be a party.

§ 906.4 General filing requirements.

- (a) **Date of filing.** Filing refers to providing documents to NAO.
 - (1) Except for the agency record required under § 906.3(f), all documents filed on behalf of an appellant or related to an appeal shall be submitted to NAO via facsimile. The facsimile number is: 301-713-2384. If the person filing does not have access to a fax machine, he or she may file by regular mail or commercial carrier addressed to Chief, National Appeals Office, 1315 East-West Hwy., Silver Spring, MD 20910.
 - (2) 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) **Extension of time.** When a submission is required to be filed at NAO by a deadline, a party may request, in writing, an extension of time to file the submission, citing the specific reason(s) for the need for an extension. NAO may grant one extension of up to 30 days if an appellate officer determines the party has established good cause for an extension of time, taking into account whether the party timely requested the extension or the extent to which the party missed the deadline.

§ 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) *Ex parte communication* means any oral or written communication about the merits of a pending appeal between one party and the NAO 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.
- (b) Ex parte communication 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 include 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, and include the memorandum 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.
- (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.
- (e) NAO may suspend this section during an alternative dispute resolution process established by regulation or agency policy.
- (f) Communication with NAO, including appellate officers, concerning procedures, scheduling, and status is permissible.

§ 906.7 Disqualification of appellate officer.

- (a) An appellate officer shall disqualify himself 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 of conducting a conference. A party may request one change in the scheduled pre-hearing date. In determining whether to grant the request, NAO will consider whether the requesting party has shown good cause for the change in date.
- (c) In exercising his or her discretion whether to hold a scheduling and/or pre-hearing conference, an appellate officer may consider:
 - (1) Settlement, if authorized 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) **Recording.** 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 a written 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 5 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) An appellate officer 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 request, and the program office that issued the initial administrative determination in the case before the appellate officer will provide, the interpretation(s) of the law made by the program office and applied to the facts 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) and whether 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, whether oral presentation is needed to probe a party's position on a material issue of law, and whether a hearing was held previously for the same appeal. 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. A party can request one change in the scheduled hearing date. In determining whether to grant the request, NAO will consider whether the requesting party has shown good cause for the change in date.
 - (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 consistent with § 906.10.

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

(b) **Recording.** An appellate officer will record the hearing unless the appellant consents to proceed without a recording.

(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 any time prior to final agency action.

§ 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 shows that a contested fact is more likely to be true than not true. 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 the law and regulations governing the initial administrative determination. In making a decision, NAO shall give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the initial administrative determination.

(b) NAO shall serve a copy of its decision upon the appellant and the Regional Administrator. NAO will not provide the case record to the Regional Administrator when issuing its decision.

§ 906.16 Reconsideration.

(a) Any party may file a motion for reconsideration of an NAO decision issued under § 906.15. The request must be filed with NAO within 10 days after service of NAO's decision. A party shall not file more than one motion for reconsideration of an NAO decision.

- (b) The motion must be in writing and contain a detailed statement of an error of fact or law material to the decision. The process of reconsideration is not a forum for reiterating the appellant's objections to the initial administrative determination.
- (c) Arguments not raised by a party in his or her motion for reconsideration of a decision will be deemed waived.
- (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 and serve a copy of its revised decision upon the appellant and the Regional Administrator.
- (e) At any time prior to notifying the Regional Administrator pursuant to § 906.17(a), the NAO may issue a revised decision to make corrections and serve a copy of its revised decision upon the appellant and the Regional Administrator.

§ 906.17 Review by the Regional Administrator.

- (a) If NAO does not receive a timely motion for reconsideration pursuant to § 906.16(a), receives a timely motion and rejects it pursuant to § 906.16(d)(1), or issues a revised decision pursuant to § 906.16(d)(2) or (e), NAO will notify the Regional Administrator and the appellant, and provide a copy of the case record for its decision or revised decision to the Regional Administrator.
- (b) 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 that were before NAO when it rendered its decision or revised decision.
- (c) The Regional Administrator may take the following action within 30 days of service of NAO's notification and receipt of the case record under paragraph (a) of this section:
 - (1) Issue a written decision adopting, remanding, reversing, or modifying NAO's decision or revised decision.
 - (2) Issue a stay for no more than 90 days to prevent NAO's decision or revised decision from taking effect.
- (d) The Regional Administrator must provide a written decision explaining why an NAO decision or revised decision has been remanded, reversed, or modified. Consistent with § 906.18(b), the Regional Administrator may, but does not need to, issue a written decision to adopt an NAO decision or revised decision.
- (e) The Regional Administrator will serve a copy of any written decision or stay on NAO and the appellant.

§ 906.18 Final decision of the Department.

- (a) The Regional Administrator's written decision to adopt, reverse, or modify an NAO decision or revised decision pursuant to § 906.17(c) is the final decision of the Department for the purposes of judicial review.

- (b) If the Regional Administrator does not take action pursuant to § 906.17(c)(1), NAO's decision issued pursuant to § 906.15(a) or revised decision issued pursuant to § 906.16(d)(2) or (e) becomes the final decision of the Department for the purposes of judicial review 30 days after service of NAO's notification under § 906.17(a), or upon expiration of any stay issued by the Regional Administrator pursuant to § 906.17(c)(2).
- (c) The office that issued the initial administrative determination shall implement the final decision of the Department within 30 days of service of the final decision issued pursuant to § 906.18(a), or within 30 days of the decision becoming final pursuant to § 906.18(b), to the extent practicable.