

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

(g) Whenever a statute requires NOAA to take into consideration a respondent's ability to pay when assessing a penalty, NOAA will take into consideration information available to it concerning a respondent's ability to pay. In such case, the NOVA will advise, in accordance with section 904.102 of this part, that respondent may seek to have the penalty amount modified by Agency counsel on the basis that he or she does not have the ability to pay the penalty assessed. A request to have the penalty amount modified on this basis must be made in accordance with § 904.102 of this part and should be accompanied by supporting financial information. Agency counsel may request the respondent to submit such additional verifiable financial information as Agency counsel determines is necessary to evaluate the respondent's financial condition (such as by responding to a financial request form or written interrogatories, or by authorizing independent verification of respondent's financial condition). A respondent's failure to provide the requested information may serve as the basis for inferring that such information would not have supported the respondent's assertion of inability to pay the penalty assessed in the NOVA. If the respondent has requested a hearing on the offense alleged in the NOVA, the Agency must submit information on the respondent's financial condition so that the Judge may consider that information, along with any other factors required to be considered, in the Judge's de novo assessment of a penalty. Agency counsel may obtain such financial information through discovery procedures under § 904.240 of this part, or otherwise. A respondent's refusal or failure to respond to such discovery requests may serve as the basis for inferring that such information would have been adverse to any claim by respondent of inability to pay the assessed penalty, or result in respondent

ent being barred from asserting financial hardship.

[52 FR 10325, Mar. 31, 1987, as amended at 58 FR 58485, Nov. 2, 1993]

Subpart C—Hearing and Appeal Procedures

GENERAL

§ 904.200 Scope and applicability.

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

(b) Subject to the administrative direction of the Chief Administrative Law Judge, each Administrative Law Judge (Judge) assigned by the Chief Administrative Law Judge is delegated authority to make the initial or final decision of the Agency (whichever is made appropriate by regulation outside this subpart) in proceedings subject to the provisions of this subpart, and to take actions to promote the efficient and fair conduct of hearings as set out in this subpart. The Judge has no authority to rule on challenges to the validity of regulations promulgated by the Agency.

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

§ 904.201 Case docketing.

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

§ 904.202 Filing of documents.

(a) Pleadings, papers, and other documents in the proceeding must be filed

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in conformance with §904.3 directly with the Judge, with copies served on all other parties. Pleadings, papers, and other documents pertaining to administrative review under §904.273 must be filed with the Administrator, with copies served on all other parties.

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

§ 904.203 Appearances.

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

§ 904.204 Duties and powers of Judge.

The Judge has all powers and responsibilities necessary to preside over the parties and the proceeding, to hold pre-hearing conferences, to conduct the hearing, and to make the decision in accordance with these regulations and 5 U.S.C. 554 through 557, including, but not limited to, the authority and duty to do the following:

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

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

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

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(d) Administer oaths and affirmations to witnesses;

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

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

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

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

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

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

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

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

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

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

(o) Grant preliminary or interim relief.