

(b) An Agency employee or Judge who makes or receives a prohibited communication must place in the hearing record the communication and any response thereto, and the Judge or Administrator, as appropriate, may take action consistent with these rules, the applicable statute, and 5 U.S.C. 556(d) and 557(d).

(c) Agency counsel may not participate or advise in the decision of the Judge or the Administrator's review thereof except as witness or counsel in the proceeding in accordance with this subpart. In addition, the Judge may not consult any person or party on a fact in issue unless notice and opportunity for all parties to participate is provided.

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

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

POST-HEARING

§ 904.260 Official transcript.

(a) The official transcript of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith, will be filed with the Office of Administrative Law Judges. Transcripts of testimony will be available in any proceeding and will be supplied to the parties upon the payment of fees at the rate provided in the agreement with the reporter.

(b) The Judge may determine whether "ordinary copy," "daily copy," or other copy (as those terms are defined

by contract) will be necessary and required for the proper conduct of the proceeding.

§ 904.261 Post-hearing briefs.

(a) Unless a different schedule is established in the discretion of the Judge, including the procedure in paragraph (b) of this section, the parties may file proposed findings of fact and conclusions of law, together with supporting briefs, within 30 calendar days from service of the hearing transcript. Reply briefs may be submitted within 15 days after service of the proposed findings and conclusions to which they respond, unless the Judge sets a different schedule.

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

§ 904.262 Documents, copies and exhibits.

(a) If original documents have been received in evidence, a true copy thereof, or of such part as may be material or relevant, may be substituted in lieu of the original during the hearing or at its conclusion. The Judge may, in his or her discretion, and after notice to the other parties, allow the withdrawal of original exhibits or any part thereof by the party entitled thereto for the purpose of substituting copies. The substitution of true copies of exhibits, or any part thereof, may be required by the Judge in his or her discretion as a condition of granting permission for withdrawal of the original.

(b) Photographs may be substituted for physical evidence in the discretion of the Judge.

(c) Except upon the Judge's order, or upon request by a party, physical evidence will be retained after the hearing by the authorized enforcement officer responsible for the case.

DECISION

§ 904.270 Record of decision.

(a) The exclusive record of decision consists of the official transcript of

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

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

(c) Exhibits offered after the close of a hearing will not be admitted, unless the Judge specifically keeps open or reopens the record to admit them.

§ 904.271 Decision.

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

(1) Findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record, and the ruling on any proposed findings or conclusions presented by the parties;

(2) A statement of any facts noticed or relied upon in the decision; and

(3) Such other matters as the Judge considers appropriate.

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

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

(d) Unless the Judge orders a stay under §904.272, or unless a petition for discretionary review is filed or the Ad-

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ministrator issues an order to review upon his/her own initiative, an initial decision becomes effective as the final administrative decision of NOAA 30 days after service, unless otherwise provided by statute or regulations.

§ 904.272 Petition for reconsideration.

Unless an order of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided and the alleged errors or relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or decision. Neither the filing nor the granting of a petition for reconsideration may operate as a stay of an order or decision or its effectiveness date (including for purposes of §904.273) unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the proceeding may file an answer in support or in opposition. In the Judge's discretion, the hearing may be reopened to consider matters raised in a petition that could not reasonably have been foreseen prior to issuance of the order or decision.

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party may petition for review of an initial decision of the Judge within 30 days after the date the decision is served. The petition shall be addressed to the Administrator and filed at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue NW., Washington, DC 20230.

(b) Review by the Administrator of an initial decision is discretionary and is not a matter of right. A petition for review must be served upon all parties. If a party files a timely petition for discretionary review, or action to review is taken by the Administrator upon his or her own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator.