

Agricultural Marketing Service, USDA

§ 110.2

regulations in this part, unless the context requires otherwise, the following terms will be construed to mean:

European Community. The European Community (EC) consists of the initial 12 European countries and the updated and expanded membership of nations. The original EC members are Belgium, Britain, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal and Spain.

Horsemeat. That U.S. inspected and passed clean, wholesome muscle tissue of horses, which is skeletal or which is found in the tongue, in the diaphragm, in the heart, or in the esophagus, with or without the accompanying and overlying fat and the portions of sinews, nerves, and blood vessels, which normally accompany the muscle tissue and which are not separated from it in the process of dressing.

Trichinae. Round worms or nematodes of the genus *Trichinella*, which live as parasites in man, horses, rats, and other animals.

Trichinella spiralis. A small parasitic nematode worm which lives in the flesh of various animals, including the horse. When such infected meat is inadequately cooked and eaten by man, the live worm multiplies within the body and the larvae burrow their way into the muscles, causing a disease referred to as trichinosis.

§§ 98.102–98.600 [Reserved]

PARTS 99–109 [RESERVED]

PART 110—RECORDKEEPING ON RESTRICTED USE PESTICIDES BY CERTIFIED APPLICATORS; SURVEYS AND REPORTS

- Sec.
- 110.1 Scope.
- 110.2 Definitions.
- 110.3 Records, retention, and access to records.
- 110.4 Demonstration of compliance.
- 110.5 Availability of records to facilitate medical treatment.
- 110.6 Federal cooperation with States.
- 110.7 Penalties.
- 110.8 Rules of practice.
- 110.9 Miscellaneous.

AUTHORITY: 7 U.S.C. 136a(d)(1)(c), 136i–1, and 450; 7 CFR 2.17, 2.50.

SOURCE: 58 FR 19022, Apr. 9, 1993, unless otherwise noted.

§ 110.1 Scope.

This part sets forth the requirements for recordkeeping on restricted use pesticides by all certified applicators, both private applicators and commercial applicators.

§ 110.2 Definitions.

As used in this part, the following terms shall be construed, respectively, to mean:

Administrator. The Administrator of the Agricultural Marketing Service, United States Department of Agriculture, or any individual to whom the Administrator delegates authority to act in his or her behalf.

Authorized representative. Any person who is authorized to act on behalf of the Secretary or a State lead agency for the purpose of surveying records required to be kept under this part and enforcing this part.

Certification number. A number issued by EPA or a State to an individual who is authorized by EPA or the State to use or supervise the use of any restricted use pesticide.

Certified applicator. Any individual who is certified by EPA or the State to use or supervise the use of any restricted use pesticide covered by that individual's certification.

Commercial applicator. A certified applicator, whether or not the individual is a private applicator with respect to some uses, who uses or supervises the use of any restricted use pesticide for any purpose on any property other than as provided by the definition of private applicator.

Comparable. With respect to the records required to be kept under this part, similar to those required under EPA-approved State certification programs.

Complainant. The Administrator or an official of a cooperating State that deals with pesticide use or health or environmental issues related to the pesticide use, who institutes a proceeding pursuant to §110.8 of this part.

EPA. The United States Environmental Protection Agency.

EPA registration number. The number assigned to a product registered with

§ 110.3

7 CFR Ch. I (1-1-16 Edition)

EPA in accordance with sections 3 or 24c of the Federal Insecticide, Fungicide, and Rodenticide Act and implementing regulations, and borne on the label of the product.

Indian governing body. The governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

Licensed health care professional. A physician, nurse, emergency medical technician, or other qualified individual, licensed or certified by a State to provide medical treatment.

Medical emergency. A situation that requires immediate medical treatment or first aid to treat possible symptoms of pesticide poisoning or exposure.

Parties. Includes the Administrator or cooperating State agencies who institute proceedings against whom such proceedings are instituted, under § 110.8 of this part.

Person. Any individual, corporation, company, association, firm, partnership, society, or other legal entity.

Presiding officer. Any individual designated in writing by the Administrator to preside at a proceeding conducted pursuant to § 110.8 of this part.

Private applicator. A certified applicator who uses or supervises the use of any restricted use pesticide for purposes of producing any agricultural commodity:

(1) On property owned or rented by the applicator or the employer of the applicator; or

(2) If applied without compensation, other than trading of personal services between producers of agricultural commodities, on the property of another person.

Record. The legible recording of all required elements under section 110.3(a) (1) through (6) for the application of a federally restricted use pesticide.¹

Recordkeeping. The recording by the certified applicator, or the agent of the certified applicator, of the information required by § 110.3(a) and (b) concerning each restricted use pesticide applica-

tion, either electronically or manually in writing, and the maintenance of such records in a manner accessible to authorized representatives.

Respondent. The party proceeded against pursuant to § 110.8 of this part, restricted use pesticide. A pesticide that is federally classified for restricted use under section 3(d)(1)(c) of the Federal Insecticide, Fungicide, and Rodenticide Act.

Secretary. The Secretary of Agriculture, United States Department of Agriculture, or any individual to whom the Secretary delegates authority to act in his or her behalf.

State. A State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and any other territory or possession of the United States, or an Indian governing body.

State lead agency. The agency designated by a State to have access to the records required to be maintained under this part.

Supervise. To provide instruction and guidance in the application of restricted use pesticides and exercise control over an applicator of restricted use pesticides in accordance with standards prescribed by the EPA in 40 CFR part 171.

[58 FR 19022, Apr. 9, 1993, as amended at 60 FR 8123, Feb. 10, 1995]

§ 110.3 Records, retention, and access to records.

(a) Certified applicators of restricted use pesticides shall maintain records of the application of restricted use pesticides. Except as provided in paragraph (b) of this section, these records shall include the following information for each application:

(1) The brand or product name, and the EPA registration number of the restricted use pesticide that was applied;

(2) The total amount of the restricted use pesticide applied;

(3) The location of the application, the size of area treated, and the crop, commodity, stored product, or site to which a restricted use pesticide was applied. The location of the application may be recorded using any of the following designations:

¹Records can be handwritten on individual notes or forms, consist of invoices, be computerized, and or be maintained in record-keeping books.

Agricultural Marketing Service, USDA

§ 110.5

(i) County, range, township, and section;

(ii) An identification system utilizing maps and/or written descriptions which accurately identify location;

(iii) An identification system established by a United States Department of Agriculture agency which utilizes maps and numbering system to identify field locations; or

(iv) The legal property description.

(4) The month, day, and year on which the restricted use pesticide application occurred; and

(5) The name and certification number (if applicable) of the certified applicator who applied or who supervised the application of the restricted use pesticide.

(b) Certified applicators shall maintain records of the application of restricted use pesticides made on the same day in a total area of less than one-tenth ($\frac{1}{10}$) of an acre. Except for applications of restricted use pesticides in greenhouses and nurseries, to which the requirements of paragraph (a) of this section apply, these records shall include the following information for the application:

(1) The brand or product name, and the EPA registration number of the restricted use pesticide that was applied;

(2) The total amount of the restricted use pesticide applied;

(3) The location of the application, designated as "spot application," followed by a concise description of location and treatment; and

(4) The month, day, and year on which the restricted use pesticide application occurred.

(c) The information required in this section shall be recorded within 14 days following the pesticide application. However, whether or not the written record has been completed, the certified applicator shall provide the information to be recorded in accordance with § 110.5(a).

(d) The records required in this section shall be retained for a period of 2 years from the date of the restricted use pesticide application and be maintained in a manner that is accessible by authorized representatives.

(e) A commercial applicator shall, within 30 days of a restricted use pesticide application, provide a copy of

records required under this section or under State or Federal regulations (whichever is applicable) under which the commercial applicator is holding certification, to the person for whom the restricted use pesticide was applied.

(f) A certified applicator shall, upon oral request and presentation of credentials by an authorized representative, make available to the authorized representative the records required to be maintained under this section and permit the authorized representative to copy any of the records. The original of the records required to be maintained under this section shall be retained by the certified pesticide applicators.

(g) No Federal or State agency shall release information obtained under this part that would directly or indirectly reveal the identity of producers of commodities to which restricted use pesticides have been applied.

(h) Certified applicators who apply restricted use pesticides in States where they are required to maintain records on applications of restricted use pesticides, comparable to those for commercial applicators in that State, and such records are maintained in accordance with State requirements, are not subject to paragraphs (a), (b), and (c) of this section.

[58 FR 19022, Apr. 9, 1993, as amended at 60 FR 8123, Feb. 10, 1995]

§ 110.4 Demonstration of compliance.

The Secretary is authorized to inspect and copy any record required to be maintained by this part in order to determine whether a certified applicator is complying with this part.

§ 110.5 Availability of records to facilitate medical treatment.

(a) When the attending licensed health care professional, or an individual acting under the direction of the attending licensed health care professional, determines that any record of the application of any restricted use pesticide required to be maintained under § 110.3 is necessary to provide medical treatment or first aid to an individual who may have been exposed to the restricted use pesticide for which the record is or will be maintained, the

§ 110.6

7 CFR Ch. I (1-1-16 Edition)

certified applicator required to maintain the record shall promptly provide the record information and any available label information. If it is determined by the attending licensed health care professional, or an individual acting under the direction of the attending licensed health care professional, to be a medical emergency, the record information of the restricted use pesticide, relating to the medical emergency, shall be provided immediately.

(b)(1) The attending licensed health care professional, or an individual acting under the direction of the attending licensed health care professional, may utilize and release the record or record information obtained under paragraph (a) of this section when necessary to provide medical treatment or first aid to an individual who may have been exposed to the restricted use pesticide for which the record is or will be maintained.

(2) The attending licensed health care professional may release the record or record information to appropriate federal or state agencies that deal with pesticide use or any health issue related to the use of pesticides when necessary to prevent further injury or illness.

(3) A licensed health care professional may release the record or record information to submit pesticide poisoning incident reports to appropriate state or federal agencies.

[60 FR 8123, Feb. 10, 1995]

§ 110.6 Federal cooperation with States.

(a) For the purpose of carrying out this part, the Administrator may enter into agreements with States.

(b) The Administrator may, after entering a State-Federal cooperative agreement with a State, utilize employees and facilities of the State to carry out any provisions of this part in that State. This State-Federal cooperative agreement shall specify:

(1) The agency of the State that is designated as the State lead agency;

(2) The responsibilities of State agencies for the enforcement of this part and the imposition of penalties under this part;

(3) The qualifications required of the State employees administering and enforcing this part;

(4) That the State-Federal cooperative agreement may be terminated at any time by the mutual agreement of the parties to the agreement;

(5) That the State-Federal cooperative agreement may be terminated by either party by giving written notice to the other party at least 90 days before a specified date of termination; and

(6) The provisions for liaison between the State and the Administrator concerning the administration and enforcement of this part as may be agreed by the Administrator and the State.

(c) If at any time the Administrator shall determine that the State lead agency or other State agencies charged with carrying out the terms of the State-Federal cooperative agreement are unable or unwilling to carry out the terms of the agreement, or, if for any reason the Administrator or State shall determine that the agreement is no longer in effect, the Administrator shall administer and enforce this part in the State.

(d) If a State shall notify the Administrator of its readiness to enter into a State-Federal cooperative agreement prior to passage of State legislation and regulations governing recordkeeping by certified applicators of restricted use pesticides, the Administrator may enter into a State-Federal cooperative agreement with the State on an annual basis.

(e) For a State to be eligible for Federal technical or financial assistance under a State-Federal cooperative agreement, the State requirements for recordkeeping by all certified applicators of restricted use pesticides must be comparable to the recordkeeping requirements under this part.

§ 110.7 Penalties.

Any certified applicator who violates 7 U.S.C. 136i-1(a), (b), or (c) or this part shall be subject to a civil penalty of not more than the amount specified in section §3.91(b)(1)(i)(A) of this title in the case of the first offense, and in the case of subsequent offenses, be subject to a civil penalty of not less than the

amount specified in § 3.91(b)(1)(i)(B) of this title for each violation, except that the civil penalty shall be less than the amount specified in § 3.91(b)(1)(i)(B) of this title if the Administrator determines that the certified applicator made a good faith effort to comply with 7 U.S.C. 136i-1(a), (b), and (c) and this part.

[70 FR 29579, May 24, 2005]

§ 110.8 Rules of practice.

(a) *Notice of violation.* If there is reason to believe that a person has violated or is violating any provision of this part, the complainant may file with the Presiding Officer a notice of violation signed by the complainant. The notice of violation shall state:

- (1) The date of issuance of the notice of violation;
- (2) The nature of the proceeding;
- (3) The identification of the complainant and respondent;
- (4) The legal authority under which the proceeding is instituted;
- (5) The allegations of fact and provisions of law which constitute the basis for the proceeding;
- (6) The amount of the proposed civil penalty; and
- (7) The name, mailing address, and telephone number of the Presiding Officer.

(b) *Answer.* Within 30 days after the service of the notice of violation, the respondent shall file with the Presiding Officer an answer signed by the respondent or by the attorney of record in the proceeding. The answer shall:

- (1) Admit, deny, or explain each of the allegations in the notice of violation and set forth any defense asserted by the respondent; or
- (2) State that the respondent admits all the facts alleged in the notice of violation; or
- (3) State that the respondent admits the jurisdictional allegations in the notice of violation 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 30 days after service of the notice of violation shall be deemed, for purposes of the proceeding, an admission of the allegations in the notice of violation, and failure to deny or other-

wise respond to an allegation in the notice of violation shall be deemed, for purposes of the proceeding, an admission of the allegation, unless the complainant and respondent have agreed to a consent decision pursuant to paragraph (e) of this section.

(d) *Amendment of notice of violation or answer.* At any time prior to the filing of a motion for a hearing, the notice of violation or answer may be amended with the consent of the complainant and respondent or as authorized by the Presiding Officer upon a showing of good cause.

(e) *Consent decision.* At any time before the Presiding Officer files the decision, the complainant and respondent may agree to the entry of a consent decision. The agreement shall be in the form of a decision signed by the complainant and respondent with appropriate space for signature by the Presiding Officer, 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 to by the complainant and respondent. The Presiding Officer shall enter such decision without further procedure, unless an error is apparent on the face of the document. The consent decision shall have the same force and effect as a decision issued after a full hearing, shall become final upon issuance, and shall become effective in accordance with the terms of the decision.

(f) *Procedure upon failure to file an answer or admission of facts.* The failure to file an answer with the Presiding Officer, or the admission by the answer of all the material allegations of fact contained in the notice of violation, shall constitute a waiver of hearing. Upon such admission or failure to submit an answer, complainant shall file with the Presiding Officer a proposed decision, along with a motion for the adoption of the proposed decision both of which shall be served upon the respondent by the Presiding Officer. Within 20 days after service of the motion and proposed decision, the respondent may file with the Presiding Officer objections to the motion and proposed decision. If the Presiding Officer finds that meritorious objections have been filed,

complainant's motion shall be denied with supporting reasons. If meritorious objections are not filed, the Presiding Officer shall issue a decision without further procedure or hearing. Copies of the decision or denial of complainant's motion shall be served by the Presiding Officer upon the respondent and the complainant and may be appealed pursuant to paragraph (1) of this section. 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 of the decision upon the respondent, unless there is an appeal to the Administrator by the complainant or respondent, pursuant to paragraph (1) of this section.

(g) *Conferences.* (1) Upon motion of the complainant or respondent, the Presiding Officer may direct the complainant and respondent or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing, when the Presiding Officer finds that the proceeding would be expedited by a conference. Reasonable notice of the time and place of the conference shall be given. The Presiding Officer may order the complainant or respondent 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) 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 Presiding Officer shall not order a party to furnish the information or documents listed in paragraph (g)(1) (i) through (iv) of this section if the party can show that providing the particular information or document is inappropriate or unwarranted under the circumstances of the particular case.

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

- (i) The simplification of issues;
- (ii) The necessity of amendments to the notice of violation or answer;
- (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.

(4) A conference will not be stenographically reported unless so directed by the Presiding Officer.

(5) In the event the Presiding Officer concludes that personal attendance by the Presiding Officer and the parties or counsel at a conference is unwarranted or impractical, but determines that a conference would expedite the proceeding, the Presiding Officer may conduct the conference by telephone or correspondence.

(6) Actions taken as a result of a conference shall be reduced to a written appropriate order, unless the Presiding Officer concludes that a stenographic report shall suffice, or, the Presiding Officer elects to make a statement on the record at the hearing summarizing the actions taken.

(h) *Procedure for hearing*—(1) *Request for hearing.* The complainant or respondent may request a hearing on the facts by including such a request in the notice of violation or answer, or by a separate request, in writing, filed with the Presiding Officer within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of a hearing. 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 filed with the Presiding Officer or upon the Presiding Officer's own motion.

(2) *Time and place.* If any material issue of fact is joined by the pleading, the Presiding Officer, upon motion of any of the parties stating that the matter is at issue and is ready for hearing, shall set a time and place for hearing as soon as feasible with due regard for the public interest and the convenience and necessity of the parties. The Presiding Officer shall issue a notice stating the time and place of hearing. If any change in the time or place of the hearing is made, the Presiding Officer shall issue a notice of this change, which notice shall be served upon the complainant and respondent, unless it is made during the course of an oral hearing and made a part of the transcript, or actual notice is given to the parties.

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

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

(5) *Failure to appear.* 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. The failure by the respondent to appear at the hearing shall also constitute an admission of all the material allegations of fact contained in the notice of

violation. The complainant shall have an election whether to follow the procedure set forth in paragraph (f) of this section or whether to present evidence, in whole or in part, in the form of affidavits, exhibits, or by oral testimony before the Presiding Officer. 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 Presiding Officer's decision and to appeal to the Administrator pursuant to paragraph (1) of this section.

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

(7) *Evidence.* (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 Presiding Officer may order that any witness be examined separately and apart from all other witnesses except those who are parties to the proceeding.

(iii) 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.

(8) *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 Presiding Officer, the party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the Presiding Officer.

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

(9) *Exhibits.* Unless the Presiding Officer finds that the furnishing of copies is impracticable, four copies of each exhibit shall be filed with the Presiding Officer: *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.

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

(11) *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.

(12) *Offer of proof.* Whenever evidence is excluded by the Presiding Officer, 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, the statement shall be included in the transcript in its entirety. 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 and hearing record if the Administrator, upon appeal, decides the Presiding Officer's ruling excluding the evidence was erroneous and prejudicial. If the Administrator, upon appeal, decides the Presiding Officer's ruling excluding the evidence was erroneous and prejudicial and that it would be appropriate to have such evidence considered a part of the hearing record, the Administrator may direct that the hearing be reopened to permit the taking of such evidence or for any purpose in connection with the excluded evidence.

(13) *Transcript.* Hearings shall be recorded and transcribed verbatim.

(i) *Post-hearing procedure—(1) Corrections to transcript.* (i) Within the period of time fixed by the Presiding Officer,

any party may file a motion proposing corrections to the transcript.

(ii) Unless a party files a motion proposing corrections to the transcript in the time fixed by the Presiding Officer, the transcript shall be presumed, except for obvious typographical errors, to be a true, correct, and complete transcript 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 Presiding Officer.

(iii) As soon as practicable after the close of the hearing and after consideration of any timely objection filed as to the transcript, the Presiding Officer shall issue an order making any corrections to the transcript which the Presiding Officer finds are warranted, which corrections shall be entered on to the original transcript by the Presiding Officer without obscuring the original text.

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

(3) *Presiding Officer's decision.* (i) The Presiding Officer shall issue a decision within 30 days after the hearing, or, if any party submits proposed findings of fact, conclusions, order, and a brief in support thereof in accordance with paragraph (i)(2) of this section, 30 days after the last such submission. The Presiding Officer's decision shall include the Presiding Officer's findings of the fact, conclusions of law, and the reasons or basis for the findings of fact and conclusions of law.

(ii) The Presiding Officer's decision shall become effective without further proceedings 35 days after the date of service of the decision upon the respondent, unless there is an appeal to the Administrator by a party to the proceeding pursuant to paragraph (1) of this section.

(j) *Motions and requests*—(1) *General.* All motions and requests shall be filed with the Presiding Officer, and served upon all the parties, except:

(i) requests for extensions of time pursuant to paragraph (m)(3) of this section; and

(ii) motions and requests made on the record during the oral hearing. The Presiding Officer shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Presiding Officer's decision pursuant to paragraph (l) of this section except motions directly relating to the appeal. Thereafter, the Administrator will rule on any motions and requests, as well as the motions directly relating to the appeal.

(2) *Motions entertained.* (i) Any motion will be entertained other than a motion to dismiss on the pleading. (A motion by the complainant seeking the voluntary dismissal of the notice of violation may be entertained by the Presiding Officer or the Administrator.)

(ii) All motions and requests concerning the notice of violation must be made within the time allowed for filing an answer, except motions by the complainant seeking voluntary dismissal of the notice of violation.

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

(4) *Response to motions and requests.* Within 10 days after service of any written motion or request, or within a shorter or longer period as may be fixed by the Presiding Officer or the Administrator, 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 Presiding Officer or the Administrator, in their discretion, may order that a reply be filed.

(k) *Presiding Officer*—(1) *Assignment.* No Presiding Officer shall be assigned to serve in any proceeding who:

(i) Has any pecuniary interest in any matter or business involved in the proceeding;

(ii) Is related within the third degree by blood or marriage to any party to the proceeding; or

(iii) Has any conflict of interest which might impair the Presiding Officer's objectivity in the proceeding.

(2) *Disqualification of Presiding Officer.*

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

(ii) A Presiding Officer shall withdraw from any proceeding for any reason deemed by the Presiding Officer to be disqualifying.

(3) *Powers.* The Presiding Officer, in any assigned proceeding, shall have power to:

(i) Rule upon motions and requests;

(ii) Set the time and place of a conference and the hearing, adjourn the hearing from time to time, and change the time and place of hearing;

(iii) Administer oaths and affirmations;

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

(v) Admit or exclude evidence;

(vi) Hear oral argument on facts or law;

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

(viii) Take all other actions authorized under this section.

(l) *Appeal to the Administrator*—(1) *Filing of petition.* Within 30 days after receiving notice of the Presiding Officer's decision, a party who disagrees with the decision, or any part of the Presiding Officer's decision, or any ruling by the Presiding Officer or a party who alleges a deprivation of rights, may appeal the Presiding Officer's decision or rulings to the Administrator by filing an appeal petition with the Administrator. As provided in paragraph (h)(8) of this section, objections regarding evidence or a limitation regarding examination or cross examination or other ruling made before the Presiding Officer may be relied upon in an appeal. The appeal petition shall state

the name and address of the person filing the appeal petition. Each issue set forth in the appeal petition, and the arguments on each issue, 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 of the argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

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

(3) *Transmittal of record.* Whenever an appeal to the Presiding Officer's decision is filed and a response to the appeal has been filed or time for filing a response has expired, the Presiding Officer shall transmit to the Administrator the record of the proceeding. The record shall include: the pleading; motions and requests filed and rulings on such motions and requests; the transcript of the testimony taken at the hearing, together with the exhibits filed in connection with the hearing; any documents or papers filed in connection with a 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 Presiding Officer's decision; and such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding.

(4) *Decision of the Administrator on appeal.* As soon as practicable after the receipt of the record from the Presiding Officer, the Administrator, 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 Administrator decides that no change or modification of the Presiding Officer's decision is warranted, the Administrator may adopt the Presiding Officer's decision as the final order in the proceeding, pre-

serving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

(m) *Filing; service; extensions of time; and computation of time—(1) Filing; number of copies.* Except as otherwise provided in this section, all documents or papers required or authorized by this section to be filed with the Presiding Officer or Administrator 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.

(2) *Service; proof of service.* Copies of all documents or papers required or authorized by this section to be filed with the Presiding Officer or Administrator shall be served upon the parties by the person with whom such documents or papers are filed. 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 any director of the corporation or association to be served, or to the attorney of record representing such person; 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 of record representing such person 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 of record representing such person, 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 mailing it by regular mail. Proof of service under this paragraph shall be made by the certificate of the person who actually made the service: *Provided*, That if the service be made by mail, under paragraph (m)(2)(iii) of this section, proof of service shall be made by the return

Agricultural Marketing Service, USDA

§ 110.9

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. Any certificate or post-office receipt returned to the Presiding Officer or Administrator shall be filed by the Presiding Officer or Administrator, and made a part of the record of the proceeding.

(3) *Extensions of time.* The time for the filing of any document or paper required or authorized under this section to be filed may be extended by the Presiding Officer or the Administrator as provided in paragraph (j) of this section, if in the judgment of the Presiding Officer or the Administrator, 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.

(4) *Effective date of filing.* Any document or paper required or authorized under this section to be filed shall be deemed to be filed at the time when it reaches the person with whom the document or paper must be filed.

(5) *Computation of time.* Saturdays, Sundays, and 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 holiday, such period shall be extended to include the next following business day.

(n) *Ex parte communications.* (1) At no stage of the proceeding between its institution and the issuance of the final decision shall the Presiding Officer or Administrator 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 rep-

resentative of such person: *Provided*, That the Presiding Officer or Administrator 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 such discussion shall be included in the record.

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

(3) If the Presiding Officer of the Administrator receives an *ex parte* communication in violation of this paragraph (n), the individual who receives the communication shall place in the public record of the proceeding:

- (i) Any such written communication;
- (ii) Memoranda stating the substance of such oral communication; and
- (iii) Any written response, and memoranda stating the substance of any oral response to the *ex parte* communication.

(4) 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.

§ 110.9 Miscellaneous.

In accordance with Section 3507 of the Paperwork Reduction Act of 1980 (44 U.S.C. 3507), the recordkeeping provisions in this rule have been approved by the Office of Management and Budget (OMB) and there are no new requirements. The assigned OMB control number is 0581-AA39.

PARTS 111-159 [RESERVED]