

to dismiss an appeal pursuant to paragraph (d)(2) of this section by a three-Member panel, or by a single Board Member. The Chairman may determine who from among the Board Members is authorized to exercise the authority under this paragraph and the designation may be changed by the Chairman as he deems appropriate. Except as provided in this part for review by the Board en banc or by the Attorney General, or for consideration of motions to reconsider or reopen, an order dismissing any appeal pursuant to this paragraph (d)(2) shall constitute the final decision of the Board. If the single Board Member to whom the case is assigned determines that the case is not appropriate for summary dismissal, the case will be assigned for review and decision pursuant to paragraph (a) of this section.

\* \* \* \* \*

3. Section 3.2 is amended by adding a new paragraph (b)(3) to read as follows:

**§ 3.2 Reopening or reconsideration before the Board of Immigration Appeals.**

\* \* \* \* \*

(b) \* \* \*

(3) A motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred.

Dated: October 6, 1999.

**Janet Reno,**

*Attorney General.*

[FR Doc. 99-26887 Filed 10-15-99; 8:45 am]

BILLING CODE 4410-30-P

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 9 CFR Part 3

[Docket No. 95-029-2]

#### Animal Welfare; Perimeter Fence Requirements

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are amending the Animal Welfare regulations to require that a perimeter fence be placed around outdoor housing facilities for marine mammals and certain other regulated animals. Although it has been our policy that such fences should be in place around outdoor housing facilities for such animals, there have been no provisions in the regulations

specifically requiring their use. Adding the perimeter fence requirement to the regulations for these additional categories of animals will serve to protect the safety of the animals and provide for their well-being.

**DATES:** *Effective date:* November 17, 1999.

*Compliance date:* May 17, 2000.

**FOR FURTHER INFORMATION CONTACT:** Dr. Barbara Kohn, Staff Veterinarian, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737-1234; (301) 734-7833.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Animal Welfare regulations contained in 9 CFR chapter I, subchapter A, part 3 (referred to below as the regulations), provide specifications for the humane handling, care, treatment, and transportation, by regulated entities, of animals covered by the Animal Welfare Act (the Act) (7 U.S.C. 2131, *et seq.*). The regulations in part 3 are divided into six subparts, subparts A through F, each of which contains facility and operating standards, animal health and husbandry standards, and transportation standards for a specific category of animals. These categories are: (A) Cats and dogs, (B) guinea pigs and hamsters, (C) rabbits, (D) nonhuman primates, (E) marine mammals, and (F) animals other than cats, dogs, guinea pigs, hamsters, rabbits, nonhuman primates, and marine mammals.

On May 6, 1997, we published in the **Federal Register** (62 FR 24611-24614, Docket No. 95-029-1) a proposal to amend the regulations in subparts E and F of the regulations by requiring that perimeter fences be placed around outdoor housing facilities for marine mammals and for other animals covered by the regulations, other than cats, dogs, guinea pigs, hamsters, and rabbits.

We proposed the following minimum perimeter fence heights:

| Type of facility                          | Minimum perimeter fence height (feet) |
|---|---------------------------------------|
| Marine Mammals, other than                |                                       |
| Polar Bears .....                         | 6                                     |
| Polar Bears .....                         | 8                                     |
| Other Nondangerous Animals ..             | 6                                     |
| Other Potentially Dangerous Animals ..... | 8                                     |

In our proposed rule, we stated that the perimeter fence would act as a secondary containment system for the animals in the facility when appropriate, reasonably restrict animals and unauthorized persons from entering

the facilities or having contact with the animals, and prevent exposure to diseases. We intended these requirements to protect the safety and provide for the well-being of the animals.

We also proposed a minimum distance of 3 feet between the perimeter fence and any primary enclosure to prevent physical contact between animals inside the enclosure and animals and persons outside the perimeter fence.

We solicited comments concerning our proposal for 60 days ending July 7, 1997. We received 23 comments by that date. They were from exhibitors, exhibitor and trade associations, wildlife associations, animal parks, humane organizations, and a Federal government agency, among others. The comments are discussed below by topic.

#### Primary Enclosure and Perimeter Fencing

Several commenters opposed the installation of a perimeter fence around each primary enclosure. Some were concerned that the perimeter fence would obscure the public's view of the animals or detract from the aesthetic draw of the facilities and decrease the number of visitors. Another commenter stated that the perimeter fence would interfere with the ability of the public to have physical contact with animals in petting zoos. One commenter expressed concern that the perimeter fence would conflict with the Americans with Disabilities Act by impairing access to areas around the primary enclosures.

We believe these commenters misunderstood the proposal. The perimeter fence would surround the area or areas where the outdoor housing facilities are located. Each individual primary enclosure would not have to be surrounded by a second fence. Therefore, a perimeter fence would not obstruct the public's view of the animals, hinder the petting of the animals at petting zoos, or impair access to the primary enclosures by people with disabilities.

#### Height of the Perimeter Fence

One commenter asked how we determined that a perimeter fence should be 8 feet high for potentially dangerous animals and 6 feet high for marine mammals other than polar bears. This commenter stated that the required heights were arbitrary and had no scientific basis. Several commenters stated that an 8-foot fence would not provide security against the escape of large felines or the entry of unwanted animals or people and pointed out that certain animals and people would be

able to climb the perimeter fence. An additional commenter stated that a 3½- or 4-foot perimeter fence would be sufficient to keep unauthorized people away from the animals. Several commenters requested alternative security methods to accomplish the goals set out in the proposal. Another commenter stated that our rule should allow for alternative measures that may not require structural changes to a facility.

Perimeter fences are intended to provide reasonable protection to animals from the unauthorized entry of persons and other animals, protect animals from exposure to disease, and serve as a secondary containment structure if one of the animals escapes from its primary enclosure. As indicated in our proposal, perimeter fence requirements have been our policy for many years with satisfactory results. The perimeter fence height requirements are based on our experience of more than 20 years with the protection and secondary containment of animals at regulated facilities. Perimeter fences are not designed to prevent all escapes or to keep out all persons that are determined to gain access to a facility. Some potentially dangerous animals may be able to climb or jump over an 8-foot fence. However, these animals' primary enclosures should be constructed sufficiently to prevent their escape. In the event of an escape, the perimeter fence would act as a secondary containment system to impede escape from the facility.

If a facility wants to use a lower perimeter fence than required by the regulations, the lower fence would have to be approved in writing by the Administrator. Approval by the Administrator of a lower perimeter fence would only be given if the lower fence, in conjunction with the facility's alternative security measures, would provide the same or an enhanced degree of protection from access by animals and unauthorized persons, disease exposure, and animal escape.

With respect to alternative methods of accomplishing the goals identified in the proposal, § 3.103(c)(1) and (c)(2) and § 3.127(d)(1) and (d)(2) of this rule offer alternatives to a perimeter fence. A perimeter fence is not required if the outside walls of the primary enclosure are made of sturdy, durable material, which may include certain types of concrete, wood, plastic, metal, or glass, and are high enough and constructed in a manner that restricts entry by animals and unauthorized persons and the Administrator gives written approval. In addition, a perimeter fence is not

required if the outdoor housing facility is protected by an effective natural barrier that restricts the marine mammals or other animals, as the case may be, to the facility and restricts entry by animals and unauthorized persons and the Administrator gives written approval.

We agree that there are other alternative security measures a facility could employ that would provide the same or an enhanced protection. Therefore, in this final rule, §§ 3.103(c)(3) and 3.127(d)(3) provide that a perimeter fence is not required where appropriate alternative security measures are employed and the Administrator provides written approval.

In this final rule, we are also replacing the phrase "impenetrable natural barrier" in §§ 3.103(c)(2) and 3.127(d)(2) with the phrase "effective natural barrier." An effective natural barrier to prevent the entry of unwanted animals and persons is more attainable than an impenetrable natural barrier.

Several commenters stated that the existing requirements for farm animals are sufficient as a secondary containment system and as a means of preventing the unauthorized entry of animals and people into the primary enclosures. These commenters stated that farm animals, such as goats, sheep, horses, cows, and donkeys, should be excluded from the perimeter fencing requirements.

We agree that the use of perimeter fencing may not be necessary at all times to provide safety to farm animals. Therefore, we have decided to add a new paragraph (d)(5) to § 3.127 to provide an exclusion for facilities housing only farm animals, such as, but not limited to, goats, sheep, horses (for regulated purposes), cows, pigs, or donkeys, where effective and customary containment and security measures are in place for those animals.

Several commenters maintained that it was unnecessary to require an 8-foot perimeter fence, rather than a 6-foot fence, at facilities that contain elephants because elephants cannot climb or jump a fence. One commenter stated that the height of the fence would not keep elephants contained.

Although elephants do not jump or climb well, they do rear up, and we believe that an 8-foot fence is appropriate. Of course, we recognize that a lower fence may be adequate in some circumstances. The rule provides a procedure for the approval of alternative measures.

One commenter stated that an 8-foot fence should be required for all marine mammals and potentially dangerous

animals, mainly to prevent the entry of unauthorized persons. Another commenter stated that a 6-foot fence is sufficient for all animals except large felines, such as tigers, lions, leopards, and cougars, and would keep unwanted people or animals out. This commenter and several others also stated that there may be zoning problems within communities for the placement of fences higher than 6 feet.

A perimeter fence must be high enough to reasonably be expected to keep animals and unauthorized persons out of the facility and to act as a secondary containment system should an animal escape from its primary enclosure. Based on our experience of more than 20 years with the protection and secondary containment of animals at regulated facilities, a fence measuring at least 8 feet in height is necessary for potentially dangerous animals. As we stated in the proposal, potentially dangerous animals may be subject to possibly dangerous, or lethal, recapture and control methods if they escape captivity. One of the purposes of a perimeter fence for potentially dangerous animals is to act as a secondary containment system and reduce the possibility that the animals will escape from the facility and be harmed during recapture and control. We believe that, with the exception of polar bears, marine mammals are not considered potentially dangerous animals for the purposes of the perimeter fence requirements. Most marine mammals are either confined to their pools (cetaceans) or cannot climb or jump over a 6-foot fence. Therefore, we do not feel that an 8-foot fence is necessary for marine mammals such as seals, sea lions, walruses, dolphins, whales, sea otters, or manatees. Moreover, as explained earlier, we recognize that a lower fence may be appropriate in some circumstances. The rule provides for the use of a lower fence with the written approval of the Administrator. If local zoning requirements preclude a perimeter fence of the required height, then alternative measures would have to be employed.

Several commenters questioned whether a fence 8 feet in height would prevent small animals, such as dogs, skunks and raccoons, from tunneling under or climbing over the fence. Some stated that small rodents, birds, insects, and bats can transmit disease and would not be deterred by the perimeter fence. Another commenter requested documentation that demonstrates that the proposed perimeter fence requirement would help prevent animals, especially marine mammals, from being exposed to disease.

We realize that the perimeter fence may not prevent a determined animal from entering the facility. We also realize that small rodents, birds, insects, and bats may get under or over a perimeter fence and transmit diseases. There are a number of ways a facility can deal with these issues, including the use of effective pest control programs for nuisance or potentially hazardous insects, birds, or other animals. This rule is intended to supplement such control measures by minimizing exposure to unwanted animals. A perimeter fence will help restrict small animals' access to animals in a facility. Exclusion of these small animals will help prevent confined animals from being exposed to diseases such as rabies and distemper and to vectors such as ticks and fleas. The use of a perimeter fence as a disease control measure is based on epidemiological considerations, disease transmission theories, and our experience of more than 20 years with the protection of animals at regulated facilities. Obviously, fencing as a disease control measure is more significant in some circumstances than others and indeed may be insignificant in some circumstances.

One commenter requested the number of polar bears that have escaped from a facility within the last 5 years. This commenter also wanted to know if any polar bears were killed during recapture or control. The commenter maintained that the proposed perimeter fence requirements for polar bears were overly cautious and unwarranted. Another commenter stated that perimeter fencing should be required only if there is a known problem or history of problems at the facility.

We are promulgating this rule, in part, to prevent possible problems due to the escape of animals and not as a response to the escape of an animal. Our experience of more than 20 years with the protection and secondary containment of animals at regulated facilities has shown that the use of perimeter fences is effective as a secondary containment system and as a means of protecting animals from the entry of other animals and unauthorized persons. The purpose of the Animal Welfare regulations is to provide for the humane handling, care, treatment, and transportation of regulated animals with the intent of preventing problems whenever possible rather than waiting for problems to occur. We do not believe that polar bears are less dangerous than other bears or that they should be treated differently in the context of this rule.

Several commenters requested that the perimeter fence requirements apply only to small, urban establishments because a 6-foot perimeter fence may draw attention to a facility and prompt unauthorized people to attempt to enter the facility. We do not believe that a perimeter fence would make a facility less secure and, accordingly, do not adopt this suggestion.

Several commenters asked how APHIS determined that a minimum space of 3 feet between the primary enclosure and the perimeter fence was sufficient. One commenter stated that the distance was arbitrary, and another commenter stated that 3 feet was insufficient to prevent a person from sticking a pole or other object through a fence to injure an animal or allow adequate room for routine maintenance and repair.

The proposal identified 3 feet as the minimum distance between the perimeter fence and any primary enclosure. This distance is based on APHIS' experience at Animal Welfare Act regulated facilities. In addition, this distance incorporates the minimum distance that allows safe cleaning of the area between the perimeter fence and any primary enclosures. This distance also provides sufficient distance to prevent casual contact between someone or something outside the perimeter fence and the animal within its primary enclosure.

One commenter stated that the best way to prevent an animal's escape is to use double-gated and locked entrances rather than perimeter fencing. The commenter also suggested that we require all facilities to use double-gated and locked entrances.

We do not believe it is necessary to require one type of primary enclosure containment system. We require all primary enclosures to be of sufficient strength to contain the animals. The perimeter fence or an approved alternative should be designed to prevent the entry of animals and unauthorized persons, protect against disease exposure, and act as a secondary containment system.

#### **Temporary Versus Permanent Facilities**

Several commenters questioned whether a perimeter fence is necessary only for a permanent facility at which an animal is housed or if it is also necessary for locations where traveling animal shows temporarily house animals. Some of these commenters maintained that the regulations should not include locations where traveling animal shows temporarily house animals. One commenter stated that the

regulations should include requirements for marine mammals in traveling shows.

The intent of the Act is to provide for the humane handling, care, treatment, and transportation of animals covered by the Act at all times. This includes animals that are traveling and temporarily housed outdoors. The proposed rule applied to all outdoor housing facilities for marine mammals and certain other regulated animals, and did not exclude temporary traveling facilities. However, for temporary traveling facilities, equivalent alternatives may be more practical and less burdensome than perimeter fencing. Further, unlike the situation for operators of permanent facilities, it would be difficult for traveling exhibitors to obtain advance approval for their alternative security measures at each site. Accordingly, the proposed rule is modified to provide flexibility to traveling facilities. This final rule provides in § 3.103(c)(4) for marine mammals and § 3.127(d)(4) for certain other animals that alternative security measures may be used without prior approval. However, if the alternative measures used by the traveling exhibitor are found to be insufficient during an inspection, the exhibitor will be required to employ compliant alternative measures.

Several commenters requested clarification regarding the area that would need to be enclosed by a perimeter fence. As discussed above, the area or areas where animals are in outdoor housing facilities would have to be enclosed by one or more fences, unless an exception or exemption applies.

Several commenters asked if "outdoor facility" meant outdoor activities and stated that the rule should not include outdoor activities. The regulation is intended to apply to facilities rather than to the activities that may occur within them (or elsewhere). Thus, it is not intended that a circus parade, for example, would have to be enclosed by a fence. However, the occurrence of an activity, such as a performance or other exhibition within a facility, would not remove the facility from the requirements of this rule.

One of the commenters asked if "outdoor facility" included a permanent facility. Outdoor facilities can be either temporary or permanent (traveling facilities have been discussed above).

#### **Exemptions from the Perimeter Fence Requirements**

Several commenters asked how an exemption from the perimeter fence requirements could be granted by the Administrator and whether an

exemption is one-time only or would be granted on an annual basis. One commenter asked what occurs in the event that a facility's physical environment does not allow the placement of a perimeter fence. An additional commenter asked if an APHIS inspector will make a recommendation to the Administrator for approval of the exemption.

If a facility wishes to use a perimeter fence that does not meet the regulatory requirements, including, but not limited to, height requirements, or if a facility wishes to use alternative security measures, the facility must obtain written approval from the Administrator. (As discussed above, traveling facilities may employ alternative security measures without prior approval.) No particular method of requesting approval for alternative fencing, natural barriers, or alternative security measures is required. Requests may be submitted to the facility's inspector, the regional director for Animal Care in the area where the facility is located, or the Deputy Administrator for Animal Care. All information relevant to the request will be reviewed, including, but not limited to, supporting documentation submitted by the facility and any relevant information from the APHIS inspector responsible for the facility. Each evaluation will take into account the alternative measures proposed, the species of the animals involved, and any other relevant information. The licensee or registrant will have to demonstrate that the proposed alternative measures would accomplish the goals of providing a secondary containment system for the animals and of preventing unwanted animals and unauthorized persons from gaining access to the animals. Because this determination is dependent upon the circumstances of each case, approval may not be given for a specified period of time but must be reevaluated if the circumstances change or if experience demonstrates that the alternative measures are not, in fact, effective.

One commenter expressed concern that supporting documentation, including security plans, submitted with a request for approval of alternative fencing or security measures could be subject to disclosure under the Freedom of Information Act.

APHIS recognizes this concern. However, we do not contemplate that the request include documentation that, if revealed, would result in the defeat of the security measures. If a licensee believes that disclosure would pose a problem, the supporting documentation

could be reviewed on site by the inspector.

#### **Wildlife Reserves**

Several commenters stated that facilities, such as wildlife reserves, that maintain animals on very large tracts of land and that adequately contain such animals should be exempt from the perimeter fence requirements. Another commenter asked whether such a facility would need to install two fences, one as a primary enclosure and one around the perimeter of its entire acreage. This commenter also asked whether the naturally occurring wildlife within the facility would have to be destroyed.

APHIS recognizes the existence of facilities such as wildlife reserves where small mammals and hoofed animals such as deer may be adequately confined by a fence rather than cages. APHIS also recognizes that, in such circumstances, a perimeter fence 3 feet outside the enclosure fence would add little to the security of the animals' confinement. Further, animals roaming within a very large tract of land require little protection from human or animal intruders. Thus, while a deer caged in a typical zoo needs protection from human and animal intruders, deer in a wildlife reserve would be able to flee unwanted contact. As previously noted, this final rule provides alternatives and exceptions to perimeter fencing requirements, and it should be possible for facilities that consist of large tracts of land to comply with the rule without incurring significant additional costs. However, because the appropriateness of confining animals (other than farm animals) simply by a fence is highly dependent upon the circumstances, it is necessary to require that alternative security measures be submitted and approved.

This rule does not require that naturally occurring wildlife be eliminated from wildlife reserves. However, each facility is responsible for the health and safety of the regulated animals maintained on its premises. Facilities that experience problems as a result of the naturally occurring wildlife must address such situations appropriately.

#### **Marine Mammal Enclosures**

One commenter questioned why a perimeter fence is only necessary for the land-side portion of a marine mammal enclosure and not the waterside portion to prevent the escape of the captive marine mammals. Two commenters questioned the need for the proposed perimeter fence requirements for marine mammals. One commenter stated that

the proposed regulations were redundant. The other commenter pointed out that in § 3.101, paragraph (a)(1) already requires that outdoor facilities contain the animals and restrict the entrance of unwanted animals, and paragraph (a)(2) requires that all marine mammals be protected from abuse and harassment by the viewing public by the use of a sufficient number of employees or attendants to supervise the viewing public, or by physical barriers, such as fences, walls, glass partitions, or distance or both. This commenter also referred to language developed by the Marine Mammal Negotiated Rulemaking Advisory Committee, which calls for lagoons and similar natural seawater facilities to maintain effective barrier fences, or other appropriate measures, on all sides of the enclosure not contained by dry land. (The proposed rule that contains the language developed by the Marine Mammal Negotiated Rulemaking Advisory Committee was published in the **Federal Register** on February 23, 1999 (64 FR 8735-8755, Docket No. 93-076-1)).

We gave careful consideration to these issues when we developed the proposed rule. Based upon all available information, we believe that the placement of a secondary barrier at natural seawater enclosures creates unacceptable risks for the marine mammals contained within them. All natural seawater enclosures for marine mammals, like land-based enclosures, are required to contain the animals within them. This includes, among other things, a barrier to prevent escape by contained animals and access by unwanted animals. We believe that the placement of a secondary barrier in the water has a higher risk of causing a marine mammal to become entangled and hurt or drowned. A second barrier also could impede the water circulation within the primary enclosure and endanger the health of the marine mammals. The placement of a perimeter fence around the land portion of a marine mammal facility will provide protection from the entry of intruders.

One commenter maintained that the terms "lagoon" or "natural seawater facility" should replace the term "sea pen" to maintain consistency with the language used in the marine mammal negotiated rulemaking. This commenter also said that the term "surrounding land" needed clarification.

We agree that the terms "lagoon" and "natural seawater facility" more accurately reflect current industry terminology. Therefore, this final rule uses the term lagoons or other natural

seawater facilities, rather than sea pens. Also, this final rule refers to "abutting land" rather than "surrounding land" in reference to lagoons or other natural seawater facilities that are not surrounded by land. The perimeter fence is to be placed around this portion of the land for facilities with lagoons or other natural seawater facilities and may stop at the shoreline as defined by low tide.

#### Other Comments

One commenter asked if the perimeter fence had to be constructed of chain link. The rule does not specify the type of materials with which the perimeter fence must be constructed. However, the materials must be adequate to accomplish the purposes of the fence. For example, § 3.125(a) requires that the facility, which would include the perimeter fence, "must be constructed of such material and of such strength as appropriate for the animals involved."

Several commenters stated that the rule should include a "grandfather clause" so that facilities that do not currently have perimeter fencing are not required to install perimeter fencing. As noted above, in order to provide flexibility to licensees and registrants, the final rule provides alternatives to the use of a perimeter fence.

One commenter stated that an animal's well-being is not measurable and that the proposal should be based on measurable standards; however, the commenter did not provide further information. We acknowledge that well-being may not be tangibly measurable; however, perimeter fencing will help prevent animals from being harmed by outside animals or unauthorized persons, provide protection against exposure to disease, and reduce the risk of the animals being harmed should they escape their primary enclosure.

One commenter asked if bison, elk, emu, and ostriches are included under the rule. The Act covers most warm-blooded species used for regulated purposes. If elk and bison are maintained for regulated purposes in outdoor housing facilities, then these facilities would be subject to the provisions of this rule. However, at this time, birds, including emu and ostriches, are not covered by the regulations.

One commenter stated that phrases such as "potentially dangerous animals" and "natural barrier" were too broad or vague and needed clarification. This commenter also asked what we considered a public zoo. We do not believe that an exhaustive list of every potentially dangerous animal would be helpful. We believe that the examples

given in the rule will be more helpful. We also believe that the meaning of the term "natural barrier" is clear. As previously noted, this final rule uses the term "effective natural barrier" rather than the term "impenetrable natural barrier." Our use of the term "public zoo" was intended to refer to the common use of the term to indicate a zoo that is open to the public.

Therefore, for the reasons given in the proposed rule and in this final rule, we are adopting the proposed rule as a final rule, with the changes discussed above, and with other nonsubstantive changes for clarity.

#### Executive Order 12866 and Regulatory Flexibility Act

This final rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

This final rule will amend the Animal Welfare regulations by requiring that a perimeter fence be placed around outdoor housing facilities for marine mammals and certain other regulated animals.

Class A and B dealers, Class C exhibitors, registered exhibitors, and research facilities are the entities that will be affected by the perimeter fence requirement. Class A dealers breed and raise animals to sell for research, teaching, or exhibition; Class B dealers include brokers and operators of auctions sales for animals; and Class C licensees and registered exhibitors include exhibitors such as animal acts, carnivals, circuses, and zoos. Research facilities include schools, institutions, organizations, or persons who use live animals in research, tests, or experiments.

There are about 4,000 licensed dealers, 2,200 regulated exhibitors, and 1,300 registered research facilities. However, the vast majority of the licensed dealers are involved only with dogs and cats and would not be affected by this rule. Likewise, the vast majority of research facilities do not use marine mammals or "animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals." Further, most of the research facilities that do hold animals subject to this final rule would hold farm animals, for which this rule imposes only minimal burdens. According to the Small Business Administration (SBA) size standards, more than 50 percent of zoos are considered large businesses. Although more than 50 percent of the zoos are

considered large businesses, most exhibitors would be considered small businesses. Most dealers in "exotic animals" are also small businesses.

This final rule has been modified in several respects in response to the comments in order to reduce the burdens on small businesses. Also, this rule provides that perimeter fences will not be required until 6 months after the effective date of this rule in order to give small entities additional time to comply.

We received several comments regarding the regulatory flexibility analysis. These comments are discussed below.

One commenter requested clarification regarding the relationship between wildlife and the Small Business Administration.

We assume that this commenter is referring to the Regulatory Flexibility Act section of the proposed rule where we referenced the SBA size standards of zoos. All regulatory actions must be evaluated under the Regulatory Flexibility Act for their effect on small entities.

Several commenters stated that the estimated cost of compliance that we provided in the regulatory flexibility analysis was too low and that installing a perimeter fence would be more burdensome and costly than the analysis showed. These commenters stated that the proposal did not consider physical limitations of a site or the costs for labor, posts, rails, gates, and excavations.

These comments have been carefully considered, and the final rule places a greater emphasis on alternative measures. However, based on the comments we received, we realize that our estimate of the cost of fencing in the proposal was too low. Based on current prices for fence material only, a 6-foot-high, commercial-quality fence would cost approximately \$2 per linear foot, and an 8-foot-high, commercial-quality fence would cost approximately \$3 per linear foot. For typical commercial installation, the cost would be about \$10 to \$15 per linear foot for a 6-foot-high chain link fence and about \$14 to \$18 per linear foot for an 8-foot-high chain link fence. (This would include fencing hardware and installation.) However, we expect that most affected entities would install the fencing themselves.

Another commenter expressed concern regarding the economic impact on small entities. The commenter maintained that small entities would be negatively affected. We believe that the burdens imposed by this final rule are both minimal and necessary. Many of the small entities affected by the rule would be traveling exhibitors. As

discussed above, we have provided great flexibility for traveling exhibitions.

One commenter requested the number of large and small entities that would be affected by this rule.

We recognize that this rule will affect each facility, regardless of size, to a different degree. We believe that only 10 percent of licensed dealers will be affected by this rule because the remaining 90 percent breed or trade animals, such as dogs and cats, that are not subject to this final rule. Most of the dealers who would be subject to the rule already have a perimeter fence or other measures that would be satisfactory.

In addition, most research facilities will be unaffected by this rule because they do not use outdoor housing facilities. In fact, we estimate that greater than 90 percent of research facilities are solely indoor facilities. Further, the vast majority of research facilities that use animals subject to this rule would be using farm animals for which only minimal burdens are imposed by this rule.

Several commenters stated that the cost of a perimeter fence could be quite high. We have taken the cost of perimeter fencing under careful consideration. This final rule provides for alternatives to perimeter fencing that minimize costs to affected facilities.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

#### Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

#### Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. The Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

#### Paperwork Reduction Act

One commenter disagreed with the estimated burden of information collection. The commenter stated that we underestimated the burden because some respondents may require approval

for alternatives to the use of perimeter fencing for more than one outdoor facility.

Our estimated burden was based on a facility submitting one request for approval of alternative fencing or alternative security measures. If a facility has multiple sites that are geographically separated and wishes to request approval for alternatives to the use of perimeter fencing for each site, it may be necessary to submit more than one request. However, we believe this scenario would be unusual, and that the estimated burden is accurate. In fact, the burden should be somewhat less than estimated in the proposed rule because of the provisions for exemptions and other changes in this final rule.

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this final rule have been approved by the Office of Management and Budget (OMB). The assigned OMB control number is 0579-0093.

#### List of Subjects in 9 CFR Part 3

Animal welfare, Marine mammals, Pets, Reporting and recordkeeping requirements, Research, Transportation.

Accordingly, we are amending 9 CFR part 3 as follows:

#### PART 3—STANDARDS

1. The authority citation for part 3 continues to read as follows:

**Authority:** 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.2(d).

2. Section 3.103 is amended by adding a new paragraph (c) to read as follows:

#### § 3.103 Facilities, outdoor.

(c) *Perimeter fence.* On and after May 17, 2000, all outdoor housing facilities (i.e., facilities not entirely indoors) must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out. Fences less than 8 feet high for polar bears or less than 6 feet high for other marine mammals must be approved in writing by the Administrator. The fence must be constructed so that it protects marine mammals by restricting animals and unauthorized persons from going through it or under it and having contact with the marine mammals, and so that it can function as a secondary containment system for the animals in the facility when appropriate. The fence must be of sufficient distance from the outside of the primary enclosure to prevent physical contact between

animals inside the enclosure and animals or persons outside the perimeter fence. Such fences less than 3 feet in distance from the primary enclosure must be approved in writing by the Administrator. For natural seawater facilities, such as lagoons, the perimeter fence must prevent access by animals and unauthorized persons to the natural seawater facility from the abutting land, and must encompass the land portion of the facility from one end of the natural seawater facility shoreline as defined by low tide to the other end of the natural seawater facility shoreline defined by low tide. A perimeter fence is not required:

(1) Where the outside walls of the primary enclosure are made of sturdy, durable material, which may include certain types of concrete, wood, plastic, metal, or glass, and are high enough and constructed in a manner that restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(2) Where the outdoor housing facility is protected by an effective natural barrier that restricts the marine mammals to the facility and restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(3) Where appropriate alternative security measures are employed and the Administrator gives written approval; or

(4) For traveling facilities where appropriate alternative security measures are employed.

3. Section 3.127 is amended by adding a new paragraph (d) to read as follows:

#### § 3.127 Facilities, outdoor.

\* \* \* \* \*

(d) *Perimeter fence.* On or after May 17, 2000, all outdoor housing facilities (i.e., facilities not entirely indoors) must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out. Fences less than 8 feet high for potentially dangerous animals, such as, but not limited to, large felines (e.g., lions, tigers, leopards, cougars, bobcats, etc.), bears, wolves, rhinoceros, and elephants, or less than 6 feet high for other animals must be approved in writing by the Administrator. The fence must be constructed so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility. It must be of sufficient distance from the outside of the primary enclosure to prevent

physical contact between animals inside the enclosure and animals or persons outside the perimeter fence. Such fences less than 3 feet in distance from the primary enclosure must be approved in writing by the Administrator. A perimeter fence is not required:

(1) Where the outside walls of the primary enclosure are made of sturdy, durable material, which may include certain types of concrete, wood, plastic, metal, or glass, and are high enough and constructed in a manner that restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(2) Where the outdoor housing facility is protected by an effective natural barrier that restricts the animals to the facility and restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(3) Where appropriate alternative security measures are employed and the Administrator gives written approval; or

(4) For traveling facilities where appropriate alternative security measures are employed; or

(5) Where the outdoor housing facility houses only farm animals, such as, but not limited to, cows, sheep, goats, pigs, horses (for regulated purposes), or donkeys, and the facility has in place effective and customary containment and security measures.

Done in Washington, DC, this 8th day of October 1999.

**Craig A. Reed,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 99-27135 Filed 10-15-99; 8:45 am]

BILLING CODE 3410-34-U

## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 741

RIN 3133-AC22

#### Requirements for Insurance

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final rule.

**SUMMARY:** NCUA is issuing a final rule that revises NCUA rules concerning capitalization of the share insurance fund through the maintenance of a deposit by each insured credit union, payment of an insurance premium, and equity distribution. NCUA is making these revisions to conform its regulation with changes to the Federal Credit Union Act required under the Credit Union Membership Access Act (CUMAA).

**DATES:** This rule is effective January 1, 2000.

**ADDRESSES:** National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

**FOR FURTHER INFORMATION CONTACT:** Dennis C. Winans, Chief Financial Officer, Office of the Chief Financial Officer, at the above address or telephone: (703) 518-6570; or Regina M. Metz, Staff Attorney, Division of Operations, Office of General Counsel, at the above address or telephone: (703) 518-6540.

#### SUPPLEMENTARY INFORMATION:

##### Background

CUMAA was enacted into law on August 7, 1998. Public Law 105-21. Section 302 of CUMAA amends section 202 of the Federal Credit Union Act providing for requirements for obtaining and maintaining share insurance coverage from the National Credit Union Share Insurance Fund (NCUSIF). 12 U.S.C. 1782. The revisions concern capitalization of the share insurance fund through the maintenance of a one percent deposit by each insured credit union, payment of an insurance premium, and distribution of fund equity. CUMAA also adds provisions concerning the NCUSIF's equity ratio and available assets ratio. The amendments to the Federal Credit Union Act will become effective January 1, 2000. Accordingly, on May 27, 1999, NCUA issued a proposed rule with request for comments revising § 741.4 to implement the provisions of section 302 of CUMAA. 64 FR 28415 (May 26, 1999). The Board also requested comments on the level at which it should set the normal operating level of the NCUSIF for the year 2000. After reviewing the comments, the NCUA Board is adopting the final rule unchanged from the proposed rule.

##### Summary of Comments

NCUA received 18 comment letters: 12 from credit unions, four from credit union trade associations, and two from bank trade associations.

##### General Comments

Although CUMAA specifically mandates most of the amendments in the proposed rule, NCUA received several comments on these statutorily required provisions. NCUA also received several other comments that fell outside the scope of the proposed rule and we have noted this in the specific sections below. The majority of relevant comments were recommendations concerning the NCUSIF's normal operating level. These

comments are discussed in the section on the normal operating level below.

##### Section 741.4(c) One Percent Deposit

This paragraph incorporates the provision of CUMAA that requires NCUA to adjust the deposit amount semiannually for insured credit unions with assets of \$50 million or more, while retaining the annual adjustment requirement for credit unions with less than \$50 million in assets. NCUA received two comments on this paragraph. The first comment from a bank trade association suggested that credit unions be required to expense the one percent "deposit insurance premium" and to exclude the premium from both assets and net worth when assessing capital adequacy. This comment mistakenly identifies the one percent insurance deposit as a "premium" and is outside the scope of this regulation. The nature of the one percent insurance deposit is established by statute. 12 U.S.C. 1782a(c)(1). The second commenter on this paragraph, a state credit union league, suggested that NCUA adjust the one percent deposit amount semiannually for all credit unions regardless of size. NCUA is not adopting this suggestion; it would exceed the requirements of CUMAA and, further, create accounting burdens for both the NCUSIF and insured credit unions. Including credit unions with less than \$50 million in assets in the semiannual calculation would have only a minimal impact on the NCUSIF.

##### Section 741.4(d) Insurance Premium Charges

As required by CUMAA, the section requires the NCUA Board, as of January 1, 2000, to calculate the amount of the premium not more than twice in any calendar year based on the amount of the NCUSIF's equity ratio. The NCUA Board may only assess an insurance premium if the NCUSIF equity fund ratio is less than 1.3 percent. The premium charge must not exceed the amount necessary to restore the equity ratio to 1.3 percent. If the amount of the equity ratio is less than 1.2 percent, the NCUA Board must assess an insurance premium in an amount to restore the equity ratio to 1.2 percent. The NCUA Board will require staff to report annually on the issue of an insurance premium charge after the availability of the December 31 Call Report data.

The NCUA received four comment letters on insurance premium charges: one from a bank trade association and three from credit unions. Three comment letters concerned requirements mandated by CUMAA over which NCUA has no discretion.