ATTACHMENT B

COPY OF THE CONSOLIDATED RULES OF PRACTICE (40 C.F.R. PART 22)

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Environmental Protection Agency

40 CFR Part 22

Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance or Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 22

[FRL–6373–3]

RIN 2020–AA13

Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This Rule revises the Consolidated Rules of Practice ("CROP"), including expansion of these procedural rules to include certain permit revocation, termination and suspension actions, and new rules for administrative proceedings not governed by section 554 of the Administrative Procedure Act. The CROP has not been substantially revised since 1980. This Rule will remove inconsistencies, fill in gaps in the CROP by codifying accepted procedures, and make the CROP more clear and easily understood. Most of these changes will not produce any procedural or substantive difference in the Agency's administrative enforcement actions. Other changes make the CROP more efficient and more effective, or to conform to new statutory requirements and new judicial decisions.

DATES: *Effective Date:* This rule shall become effective August 23, 1999.

Applicability Date: This rule shall be applicable to all proceedings commenced on or after August 23, 1999. Proceedings commenced before August 23, 1999 shall become subject to this rule on August 23, 1999, unless to do so would result in substantial injustice.

FOR FURTHER INFORMATION CONTACT: Scott Garrison (202–564–4047), Office Enforcement and Compliance Assurance, Office of Regulatory Enforcement (2248A), U.S. Environmental Protection Agency, Washington, D.C. 20460.

SUPPLEMENTARY INFORMATION:

The following outline is provided to assist the reader in locating topics of interest in the preamble.

I. Background

II. Response to Public Comments

A. Significant Comments Supporting Proposed Revisions

B. Significant Comments Critical of Proposed Revisions

1. Scope (40 CFR 22.1)
2. Powers and Duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal and reassignment (40 CFR 22.4)
3. Filing, Service, and Form of Documents (40 CFR 22.5(a)–(c))
4. Confidentiality of Business Information (40 CFR 22.5(d))
5. Computation and Extension of Time (40 CFR 22.7)
6. Ex Parte Discussion of Proceeding (40 CFR 22.8)
7. Intervention and Non-Party Briefs (40 CFR 22.11)
8. Commencement of a Proceeding (40 CFR 22.13)
9. Complaint (40 CFR 22.14)
10. Answer to the Complaint (40 CFR 22.15)
11. Default (40 CFR 22.17)
12. Quick Resolution (40 CFR 22.18(a))
13. Settlement and Scope of Resolution or Settlement (40 CFR 22.18(b)&(c))
14. Alternative Dispute Resolution (40 CFR 22.18(d))
15. Prehearing Exchange; Prehearing Conference (40 CFR 22.19(a)&(b))
16. Other Discovery (40 CFR 22.19(e))
17. Supplementing Prior Exchanges, and Failure To Exchange Information (40 CFR 22.19(f)&(g))
18. Evidence (40 CFR 22.22)
19. Filing the Transcript (40 CFR 22.25)
20. Initial Decision (40 CFR 22.27)
21. Appeal From or Review of Initial Decision (40 CFR 22.30)
22. Final Order (40 CFR 22.31)
23. Motion To Reconsider a Final Order (40 CFR 22.32)
24. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Clean Air Act (40 CFR 22.34)
25. Scope of Subpart I (40 CFR 22.50)
26. Presiding Officer (40 CFR 22.51)
27. Information Exchange and Discovery (40 CFR 22.52)
28. Interlocutory Orders or Rulings (40 CFR 22.53)
29. Clean Air Act Field Citations
30. Other Comments Not Related to a Particular Section of the Proposed Rule

III. Miscellaneous Revisions

A. Section Numbering

B. Definitions (40 CFR 22.3)

C. Filing and Service of Rulings, Orders and Decisions (40 CFR 22.6)

D. Examination of Documents Filed (40 CFR 22.9)

E. Consolidation and Severance (40 CFR 22.12)

F. Motions (40 CFR 22.16)

G. Record of the Prehearing Conference (40 CFR 22.19(c))

H. Accelerated Decision; Decision to Dismiss (40 CFR 22.20)

I. Assignment of Presiding Officer; Scheduling a Hearing (40 CFR 22.21)

J. Offers of Proof (40 CFR 22.23(b))

K. Proposed Findings, Conclusions, and Order (40 CFR 22.26)

L. Motion to Reopen a Hearing (40 CFR 22.28)

M. Interlocutory Appeals (40 CFR 22.29)

N. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act (40 CFR 22.35)

O. Supplemental Rules of Practice Governing the Administrative Assessment of Civil Penalties Under the Clean Water Act (40 CFR 22.38)

P. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under CERCLA Section 109 (40 CFR 22.39)

Q. Supplemental Rules Governing the Administrative Assessment of Civil Penalties for Violations of Compliance Orders Issued to Owners or Operators of Public Water Systems Under Part B of the Safe Drinking Water Act (40 CFR 22.42)

R. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Against a Federal Agency Under the Safe Drinking Water Act. (40 CFR 22.43)

S. Supplemental Rules Governing the Termination of Permits Under Section 402(a) of the Clean Water Act or Under Section 3005(d) of the Resource Conservation and Recovery Act (40 CFR 22.44)

T. Supplemental Rules Governing Public Notice and Comment in Proceedings Under Section 309(g) of the Clean Water Act and Section 300h–2(c) of the Safe Drinking Water Act (40 CFR 22.45)

U. Appendices

IV. Administrative Requirements

A. The Regulatory Flexibility Act

B. Executive Order 12866

C. Paperwork Reduction Act

D. Unfunded Mandates Reform Act

E. Executive Order 12875

F. Executive Order 13045

G. Executive Order 13084

H. National Technology Transfer and Advancement Act

I. Submission to Congress and the Comptroller General

I. Background

The Consolidated Rules of Practice ("CROP"), 40 CFR part 22, are procedural rules for the administrative assessment of civil penalties, issuance of compliance or corrective action orders, and the revocation, termination or suspension of permits, under most environmental statutes. The CROP were first promulgated on April 9, 1980 (45 FR 24360). On February 25, 1998, (63 FR 9464) EPA issued a notice of proposed rule making giving public notice and soliciting comments on proposed revisions to the CROP.

During the public comment period, EPA received substantive comments from Dow Chemical Company ("Dow"), the U.S. Air Force ("USAF"), the Utility Air Regulatory Group ("UARG"), the Utility Water Act Group ("UWAG"), the Corporate Environmental Enforcement Council ("CEEC"), and joint comments

from the Chemical Manufacturers Association and the American Petroleum Institute ("CMA/API"). The original public comment period closed on April 27, 1998. On May 6, 1998 (63 FR 25006), EPA published a second notice reopening the public comment period for an additional 60 days. During this reopened public comment period, EPA received one set of supplementary comments from CEEC.

All of the public comments submitted in response may be reviewed at the Enforcement and Compliance Docket and Information Center, room 4033 of the Ariel Rios Federal Building, 1200 Pennsylvania Avenue, N.W., Washington, DC. Persons interested in reviewing the comments must make advance arrangements to do so by calling 202-564-2614. A reasonable fee may be charged by EPA for copying docket materials. The public comments may also be viewed on the internet at http://www.epa.gov/oeca/forepart22.html.

Today's final rule includes most of the revisions identified in the proposed rule, with certain additional changes (both to the proposed revisions and to other provisions of the existing rule) responding to public comments. EPA's response to the public comments appears below.

II. Response to Public Comments

A. Significant Comments Supporting Proposed Revisions

Dow stated that "[m]ost of the CROP provisions appear to reflect an appropriate balancing of interests" and that it has a "favorable impression of part 22 as a whole." CMA/API support EPA's efforts to simplify and clarify the CROP. CEEC states that it supports "many of the types of changes EPA has proposed, as they will increase efficiency and reduce complexity in the administrative process." The following are specific comments supporting particular provisions of the proposed rule.

Commenters generally support the consolidation of the various rules into a single set of CROP procedures for APA and non-APA proceedings. CMA/API supports the Agency's decision to use the CROP instead of the proposed part 28 procedures for Class I proceedings under the Clean Water Act and the Safe Drinking Water Act (56 FR 29996 (July 1, 1991)). Dow and UARG support the use of CROP procedures in lieu of the procedures originally proposed for use under the Clean Air Act Field Citation Program.

Dow states that it supports the "change" in § 22.4(d)(1) [1] that would make appeals from a denial of a motion to disqualify a Presiding Officer go to the Environmental Appeals Board ("EAB") "rather than the Administrator." EPA notes that this revision of § 22.4(d)(1) is not intended to change the substance of the existing rule but merely to eliminate any implication that the Administrator must personally rule on appeals from the denial of disqualification requests made to Presiding Officers. *See In re Woodcrest Manufacturing, Inc.*, EPCRA Appeal No. 97-2, slip op. at 11-12 (EAB, July 23, 1998)(stating that the term "Administrator" is defined at 40 CFR 22.4(d)(1) to include the Administrator's delegate, and therefore "the Administrator is not required to act personally on disqualification issues, but may instead delegate this authority to other individuals within the EPA").

Dow supports the proposed change to § 22.5(c)(5), giving the Presiding Officer and the EAB, rather than the hearing clerks, authority to rule on the adequacy of documents filed. Dow strongly supports the inclusion of language in § 22.5(d) stating that the Agency's rules governing treatment of Confidential Business Information (40 CFR part 2) apply in CROP proceedings.

Dow supports proposed changes to §§ 22.5 and 22.6 allowing service of documents by reliable commercial delivery services other than the U.S. Mail, and supports the decision to expand the "mail box rule" of § 22.7(c) to provide that service is complete when the document is placed in the custody of a reliable commercial delivery service.

CMA/API support the provision in the proposed § 22.14(a)(6) requiring that the complaint give notice whether subpart I, non-APA procedures apply to the proceeding.

CMA/API and Dow support the proposed revision to § 22.15(a) expanding to 30 days the time allowed to file an answer.

CMA/API and Dow support the provisions in the proposed rule extending the time period for filing a response to a motion from 10 days to 15 days. Additionally, CMA/API supports not placing page limits on motion papers.

Dow supports the revisions to § 22.17(a) & (c) that give the Presiding Officers greater discretion in determining the appropriate relief in the default orders, because this "flexibility will let the Presiding Officer ensure that any relief ordered is supported by the administrative record." CMA/API "support the provision requiring the Presiding Officer, when issuing a default order, to determine that the relief sought in the complaint is consistent with the applicable statute."

CEEC supports the Agency's explicit recognition of Alternative Dispute Resolution in the proposed § 22.18(d). Dow supports the provisions of the proposed § 22.18(d)(2) that permit the Presiding Officer to grant extensions of time for the parties to engage in alternative dispute resolution procedures.

CMA/API support the proposed § 22.19 allowing amendment of prehearing exchanges without restriction, and support the § 22.19(f) requirement that parties promptly supplement or correct information known to be incomplete, inaccurate or outdated, without requiring the parties to constantly check the accuracy of their information exchanges. CEEC supports the proposed revisions to §§ 22.19 and 22.22 that would allow use of information that has not been timely provided to the opposing party, upon a showing of "good cause" for the failure to timely provide that information. CEEC also supports the proposed limitation that "other discovery" pursuant to § 22.19(e) should be available only after the prehearing exchange required under § 22.19(a).

The CMA/API comments support the proposed change in § 22.27(b) "requiring the Presiding Officer in all cases to explain how the civil penalty imposed corresponds to the statutory penalty criteria, rather than just the Agency's penalty policies." Dow notes its support for the provision in § 22.27(b) requiring that the Presiding Officer articulate how the amount of penalty conforms to the criteria set forth in the law under which the proceeding has been commenced. Dow supports the proposed revision of § 22.27(c) that would make an initial decision inoperative pending review by the EAB, because it "will avoid premature recourse to the Federal courts" and avoid harm to respondents whose appeals might be successful. Dow also supports the provision in the proposed § 22.28(b) under which a motion to reopen a hearing would expressly stay the deadlines for appeal or EAB review of the initial decision.

Both CMA/API and Dow support the new provision in § 22.30(a) allowing a party who has initially declined to

[1] To conform the CROP to the preferred style of the U.S. Government Printing Office, EPA has converted § 22.01 to § 22.1, § 22.02 to § 22.2, etc., in this final rule. For simplicity, this preamble will use the new numbering system throughout, even when referring to sections of the proposed rule or the 1980 CROP.

appeal an additional 20 days to raise additional issues in a cross appeal.

EPA received no significant public comment on many of the proposed revisions to the CROP. Proposed revisions to §§ 22.2, 22.6, 22.12, 22.21, 22.23, 22.24, 22.29, 22.33, and 22.35–22.45 elicited no specific comments at all. Today's final rule incorporates all of the changes identified in the February 25, 1998, Notice of Proposed Rule Making, except as noted below.

B. Significant Comments Critical of Proposed Revisions

1. Scope (40 CFR 22.1)

a. Summary of Proposed Rule. Section 22.1(a) identifies, statute by statute, the types of proceedings that are subject to the CROP. The proposed rule would bring within the scope of the CROP a number of proceedings that had previously used other procedures or that had no formal procedures: field citation proceedings under the Clean Air Act (42 U.S.C. 7413(d)(3)), proceedings to suspend or revoke a permit issued under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) or to suspend or revoke a permit under sections 3005(d) and 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and 6928(h)) (originally proposed in 60 FR 65280, December 11, 1996), proceedings for the assessment of administrative civil penalties under section 6001 of the Solid Waste Disposal Act (42 U.S.C. 6961), section 311(b)(6) of the Clean Water Act (33 U.S.C. 1321(b)(6)), and sections 1423(c) and 1447(b) of the Safe Drinking Water Act, 42 U.S.C. 300h–2(c) and 300j–6, including orders requiring both compliance and the assessment of a civil penalty under 1423(c), and proceedings for the assessment of civil penalties or the issuance of compliance orders under the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. 14304). Other amendments would clarify the applicability of the CROP to proceedings already within its scope, and delete outdated references.

Section 22.1(b) explains the interrelation between the subpart H, the new subpart I, and the provisions of subparts A–G. Section 22.1(c) empowers the Administrator, the Regional Administrator, and the Presiding Officer to resolve procedural matters not covered in the CROP. The proposed revision to § 22.1(c) would make explicit the authority of the EAB to resolve such procedural matters.

b. Significant Comments and EPA Response. CEEC objects to expanding the scope of the CROP to include non-APA proceedings, arguing that EPA has failed to explain why the proposed CROP is more suitable than other procedures. Dow and CMA/API strongly support revised CROP procedures replacing the procedures proposed for the part 59 field citation program. CMA/API also supports the decision to include non-APA proceedings within the CROP, rather than as a distinct set of procedures under part 28.

The preamble to the proposed rule explained generally why EPA considers the proposed CROP suitable for non-APA enforcement cases, but it did not expressly contrast the suitability of alternative sets of procedures. In drafting the proposed CROP, EPA had the benefit of the public comments received in response to the 1991 proposed part 28 procedures and the 1994 proposed field citations procedures, and the benefit of practical case experience with both the proposed part 28 procedures and the existing CROP procedures. The proposed CROP revisions drew from the best provisions of each set of procedures, and is as a result more clear, more simple and more efficient than its predecessors.

CEEC questions EPA's decision to use the CROP procedures for non-APA cases, asserting that it is inappropriate for EPA "to assume that one size fits all." CEEC does not identify any class of cases for which the proposed CROP might be unsuitable, nor does it identify other procedures that might be more suitable. EPA has taken into account the limits to a "one size fits all" approach through the inclusion of statute-specific supplemental rules (subpart H) and the special rules for non-APA proceedings (subpart I).

In apparent contradiction to its criticism of the "one size fits all" approach of the CROP, CEEC also faults EPA for failing to explain why the scope of the CROP fails to encompass corrective action orders pursuant to Solid Waste Disposal Act ("SWDA") sections 3008(h) and 9003(h)(4), and pesticide cancellation proceedings pursuant to section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Although the proposed rule would expand the scope of the CROP, EPA did not propose that it should replace all administrative adjudicatory procedures.

EPA determined in 1988 that less formal procedures are appropriate for corrective action orders because of the need for quick response to hazardous waste spills, because such cases present fewer factual issues than cases where a regulatee may be forced to pay a civil penalty for violating the law, and because the cost of the formal CROP procedures is twice as high as the cost of the informal procedures. 53 FR 12256, 12257 (April 13, 1988). EPA's procedures for corrective action orders, codified at 40 CFR part 24, were challenged upon issuance and upheld by the Court of Appeals for the District of Columbia Circuit. The D.C. Circuit agreed with EPA that "to the modest extent that EPA's Part 24 regulations do implicate the private interest in avoiding the expense of unnecessary corrective actions, formal procedures [i.e., the CROP] do not promise a sufficient lowering of the risk of error to justify their significant expense to the Government." *Chemical Waste Management, Inc. and Waste Management of North America, Inc., v. U.S. Environmental Protection Agency*; 873 F.2d 1477, 1485 (D.C. Cir. 1989). EPA continues to believe that the informal procedures of part 24, rather than the CROP, are appropriate for SWDA sections 3008(h) and 9003(h)(4) corrective action orders.

Pesticide cancellation proceedings are subject to rules codified at 40 CFR part 164, as are other proceedings related to the registration status of a pesticide. Although some sections of part 164 are very similar, or identical, to provisions of the CROP, there are also fundamental differences, that reflect differences between FIFRA section 6 and the statutory authorities for various CROP proceedings. Although it would be possible to draft a single set of procedures that could apply to all corrective action orders and pesticide cancellation proceedings, as well as the proceedings within the scope of the CROP, it would call for extensive revisions and elaborate supplemental rules. At this time, it does not appear that combining either part 24 or part 164 with the CROP would produce significant efficiencies or improvements.

c. Final Rule. EPA has adopted § 22.1 as proposed, with minor changes. In the December 11, 1996, "Round Two" permit streamlining proposed rule, EPA proposed to remove the procedures existing in 40 CFR part 124, subpart E, for proceedings to revoke or suspend a permit issued under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) or to revoke or suspend a permit under sections 3005(d) and 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and 6928(h)). See 61 FR 65268 (December 11, 1996). EPA proposed that such proceedings would be conducted pursuant to the CROP procedures, and proposed CROP revisions to accomplish this. These changes were incorporated into the February 25, 1998, proposed CROP revisions. As EPA has not yet finalized the Round Two permit

streamlining rule and 40 CFR part 124, subpart E remains in effect, EPA has removed from § 22.1 (a)(4) and (a)(6) the proposed references to permit revocation, suspension and termination. EPA anticipates that these references will be restored when the Round Two permit streamlining rule is finalized.

EPA has deleted the word "conducted" from paragraphs (a)(1), (a)(3) and (a)(5). This word is unnecessary, and the deletions make these paragraphs more consistent with the rest of § 22.1(a). In § 22.1(a)(4)(i), EPA has replaced the word "and" in the first parenthetical list of citations to the U.S. Code, with the word "or" for consistency.

In the proposed § 22.1(b), the word "establish" appeared twice in the first sentence. EPA has deleted the redundant word. EPA has also revised the last sentence of 22.1(b) for clarity.

2. Powers and Duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; Disqualification, Withdrawal and Reassignment. (40 CFR 22.4)

a. Summary of Proposed Rule. Proposed revisions to § 22.4(a) clarify the role of the Environmental Appeals Board, to which the Administrator has delegated the authority to rule on appeals. The proposed rule clarifies that the Environmental Appeals Board rules on appeals from decisions, rulings and orders of a Presiding Officer in proceedings under the CROP, acts as Presiding Officer until an answer is filed in cases initiated at EPA Headquarters, and approves settlement of such cases. The proposed rule provides that appeals and motions must be directed to the Environmental Appeals Board except those in matters referred by the Environmental Appeals Board to the Administrator, and motions for disqualification under paragraph (d).

Proposed revisions to § 22.4(b) describe the function of the Regional Judicial Officer, requiring each Regional Administrator to designate one or more Regional Judicial Officers to act as Presiding Officers in proceedings under subpart I, and to act as Presiding Officers in APA CROP proceedings until an answer is filed. The proposed rule provides that the Regional Administrator may delegate to a Regional Judicial Officer the authority to approve settlement of proceedings, ratify consent agreements and issue consent orders.

EPA proposed deleting from § 22.4(b) certain limitations on the Regional Judicial Officers. One proposed deletion is the current prohibition on employment of a Regional Judicial Officer by the Region's Enforcement Division or the Regional Division directly associated with the type of violation at issue in the proceeding. The other is the prohibition, derived from section 554(d) of the Administrative Procedure Act, against a Regional Judicial Officer having "performed prosecutorial or investigative functions in connection . . . with any factually related hearing." The proposed rule would add new language precluding an individual from serving as Regional Judicial Officer in any case in which he or she has any "interest in the outcome." The proposed rule retains the provisions that prohibit an individual from serving as Regional Judicial Officer in the same case in which he or she performed prosecutorial or investigative functions, and that require that Regional Judicial Officers be attorneys employed by a Federal agency.

EPA proposed editorial revisions to § 22.4(c), describing the role of the Presiding Officer, that do not introduce any substantive change.

The proposed § 22.4(d) establishes new procedures for seeking disqualification of the Administrator, a Regional Administrator, a member of the EAB, a Regional Judicial Officer ("RJO"), or an Administrative Law Judge ("ALJ"), from performing functions they are authorized to perform under the CROP. Under the existing rules, any party may seek the disqualification of a Regional Judicial Officer by motion to the Regional Administrator; or may seek the disqualification of any of the other individuals by motion to the Administrator. Under the proposed rules, any party must first file a motion with the particular individual requesting that he or she disqualify himself or herself from the proceeding. If the party has moved to disqualify a Regional Administrator, a Regional Judicial Officer, an ALJ, or a member of the EAB, and the motion is denied, the party may appeal the denial of the motion administratively. The proposed rule does not provide for administrative appeal from the Administrator's denial of a motion to disqualify herself.

The proposed § 22.4(d) provides that an interlocutory appeal may be taken when an ALJ denies a motion that he disqualify himself or herself from a proceeding. However, EPA asked for comments on whether to prohibit such interlocutory appeals.

b. Significant Comments and EPA Responses

22.4(a). Dow suggests clarifying the rule by adding the word "initial" before the word "decisions" in the description of the Environmental Appeals Board's role in ruling on decisions, rulings and orders of a Presiding Officer. EPA accepts the suggested change.

22.4(b). CEEC states that it opposes expansion of the role of RJOs through the CROP. The preamble to the proposed rule stated that EPA had no current plans to use the subpart I procedures for any cases other than those arising under Clean Water Act ("CWA") sections 309(g)(2)(A) and 311(b)(6)(B)(i) (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)), and Safe Drinking Water Act ("SDWA") sections 1414(g)(3)(B) and 1423(c) (42 U.S.C. 300g–3(g)(3)(B) and 300h–2(c)). *See* 63 FR at 9479. To codify that point, EPA has revised the proposed § 22.50 so that it applies only to these cases. With this revision, today's rule clearly does not represent any practical expansion of the RJOs' role. Since the 1980's, RJOs have presided over cases under CWA sections 309(g)(2)(A) and 311(b)(6)(B)(i), and SDWA sections 1414(g)(3)(B) and 1423(c), under the procedures proposed (but not finalized) as part 28 and under other Agency guidance (*e.g. Guidance on UIC Administrative Order Procedures*, November 28, 1986). Now they preside over the same kinds of cases using the CROP.

Of the six commenters on the proposed rule, five (UWAG, UARG, CEEC, CMA/API, and Dow) expressed concern that the proposed rule fails to protect constitutional due process rights and assure the independence and impartiality of Regional Judicial Officers. UARG and UWAG oppose use of any EPA attorneys as Presiding Officers, arguing that Agency loyalty will create bias or the appearance of bias. CEEC, CMA/API, Dow and (by implication) UARG and UWAG oppose the use of EPA enforcement attorneys as Presiding Officers. These commenters argue that allowing enforcement personnel to be Presiding Officers creates actual or apparent bias by commingling the investigative, prosecutorial and adjudicative functions. Particular concerns include EPA enforcement attorneys presiding over cases brought by their colleagues, and over cases with issues or defendants in common with cases the Presiding Officer has litigated. Dow, UARG and UWAG urge the Agency to use Administrative Law Judges for adjudication of all administrative enforcement proceedings, arguing that ALJs are more qualified and are insulated against institutional bias.

In response to these concerns, EPA has made several changes to § 22.4(b). First, EPA has added a requirement that a "Regional Judicial Officer shall not prosecute enforcement cases and shall

not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel." This change will assure that the persons presiding over subpart I proceedings will be able to freely exercise independent judgment, without fear of adverse action by EPA enforcement managers.

Commenters suggested various independence criteria: Dow suggested that the CROP should mandate either that the employment and advancement of each EPA attorney serving as RJO expressly be made independent of his or her rulings as Presiding Officer, or the attorney has no direct or indirect supervision (for a total of at least two levels of supervision) by persons or offices responsible for enforcement. UARG and UWAG believe that hearings should be run only by ALJs, but if the Agency refuses to implement that suggestion, they support the idea presented in the preamble to the proposed rule that the Presiding Officer not be directly supervised by any person who directly supervises the prosecution of the case. CMA/API suggested a requirement that the Regional Judicial Officer "should not be employed by or supervised by any enforcement component, whether that component is in the Office of Regional Counsel or the Regional Office of Enforcement."

EPA has considered the various independence criteria suggested by the commenters, and has concluded that prohibiting RJOs from prosecuting enforcement cases, and prohibiting RJOs from being supervised by persons who supervise the prosecution of enforcement cases, will sufficiently separate RJOs from enforcement. Although Regional Administrators and Regional Counsels necessarily have significant responsibility for their Regions' enforcement program, they have other responsibilities which give them a broader perspective. Accordingly, there is little risk that they would exert improper influence over the decisions of an RJO. In order to avoid any confusion, the rule explicitly allows supervision by the Regional Counsel. The Regional Administrators' authority to personally supervise the RJOs is implicit, but may not be delegated to a person who supervises the prosecution of enforcement cases (except the Regional Counsel).

EPA's experience with non-APA adjudications to date indicates that RJOs maintain their independence and impartiality, and their decisions reveal no bias toward the complainant. Only four decisions by EPA attorneys serving as Presiding Officer have been reversed on appeal out of over 180 decisions rendered over a period of approximately 10 years. Moreover, there has not been a single penalty or corrective action case where a respondent has appealed a denial of a motion to disqualify a Regional Judicial Officer, nor where a respondent has alleged a Regional Judicial Officer's actual bias among its grounds for appeal. These results demonstrate that the RJOs' present levels of competence and independence are reasonable. Today's rule assures that this independence will not be compromised.

The more restrictive requirements suggested in some of the comments would not be feasible to implement. Prohibiting supervision by Agency officials who have any enforcement responsibilities would prohibit virtually all upper management in the Regional Offices, including the Regional Administrators, from such supervision. The RJOs' record to date indicates that such restrictive standards are not necessary. Other suggested standards would invite time consuming litigation over side issues, such as whether a supervisor or office is responsible for "enforcement" or whether someone is "indirectly" supervising the RJO, when the proper questions are whether an RJO is in fact biased and whether such bias affected the outcome of a particular case.

Second, EPA has included in the final rule a provision precluding a Regional Judicial Officer from knowingly presiding over a case involving any party concerning which the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the initiation of the case. CMA/API recommended that Regional Judicial Officers should not currently be involved in any other proceedings involving the same defendants and should not have been involved in the investigation or prosecution of the defendant within the previous 5 years. EPA agrees that it could create at least an appearance of bias if an EPA attorney were to serve as prosecutor of one complaint and shortly thereafter function as adjudicator of another complaint against the same party. It is neither necessary nor practical for EPA to adopt CMA/API's recommendation that the CROP prohibit prosecutorial or investigative activity against the respondent for 5 years. EPA has included in the final rule a provision precluding a Regional Judicial Officer from knowingly presiding over a case involving any party concerning which the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the initiation of the case. EPA has made this requirement contingent upon the RJO's knowledge because name changes are sufficiently common in modern industry that a RJO might preside over a case without being aware that he or she had previous dealings with the same company. Upon becoming aware of such prior relationship, the RJO must promptly disqualify himself or herself from the proceeding. If, in a particular case, a party were to believe that participation in a similar case more than 2 years earlier would bias the RJO, that party could move for disqualification under § 22.4(d). Note also that, owing to the new prohibition against RJOs prosecuting enforcement cases, the potential for these conflicts will decrease over time.

In the response to the public comments, EPA has revised the proposed § 22.4(b) to increase the independence of RJOs (prohibiting RJOs from prosecuting enforcement cases, prohibiting their supervision by persons who supervises prosecution of enforcement cases, and prohibiting the RJO from knowingly presiding over a case involving any party concerning which he or she performed any functions of prosecution or investigation within the 2 years). Other changes sought by the commenters are impractical and unnecessary.

In proceedings subject to section 554 of the APA, Congress has determined that Presiding Officers may not be "engaged in the performance of investigative or prosecuting functions for [EPA] in * * * a factually related case * * *", and may not "be responsible to or subject to the supervision or direction of [persons] engaged in the performance or investigative or prosecuting functions for [EPA]." 5 U.S.C. 554(d). However, subpart I is designed for use in proceedings that are not subject to section 554 of the APA. Congress has expressly authorized EPA to assess civil penalties through procedures that do not meet the standards of section 554. Despite the broad range of options this allows, EPA has chosen as a matter of policy to make subpart I procedures adhere closely to the APA requirements. The subpart I procedures depart from the requirements of section 554 only in regard to the independence of the Presiding Officer. The commenters who object to subpart I for failing to provide this same level of independence are objecting, in effect, to the statutes that authorize non-APA proceedings. The Agency does not agree that such a broad limitation on its authority is appropriate.

Whether adjudication by EPA attorneys under subpart I provides adequate protection for respondents' due process rights must be evaluated according to the three part standard established in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976):

"[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 334–35.

The private interests in a proceeding under subpart I of the CROP are the impact on respondent of a civil penalty and on respondent's reputation from a finding of liability, and perhaps in the expense and burden of the hearing itself. Although these interests are important, they are less important than the private interest at stake in *Mathews* v. *Eldridge*, where the governmental agency summarily discontinued an individual's social security disability benefits while the benefit termination hearing was pending. The private interests at stake in CROP proceedings do not rise to this level. Moreover, the interests at stake certainly are not so significant as individual interests in liberty or bodily integrity.

The risk of an erroneous deprivation of respondents' private interests through adjudications by EPA attorneys is low, and certainly lower than in *Mathews* v. *Eldridge*, where the disability benefits were terminated before any hearing was afforded. In a CROP subpart I proceeding, the respondent first has an opportunity for a hearing before an RJO (including the opportunity to present evidence and to cross examine the Agency's witnesses), and has opportunities for administrative review before the penalty is assessed (i.e., appeal of the initial decision to the EAB). The risk of an erroneous deprivation of a respondent's interests should correspond closely to the frequency with which decisions by EPA attorneys serving as Presiding Officer are reversed on appeal by either the EAB or a federal court, and as described above, this rate has been extremely low.

Balanced against the private interests at stake and the risk of their impairment is the government's interest. The government's primary interest in having EPA attorneys preside over certain enforcement cases is in making efficient use of Agency resources. The costs for an ALJ to travel from Washington, D.C., to the hearing location is greater than the cost for an EPA attorney to travel from the Regional office to the hearing location. In addition, ALJs are paid more than the EPA attorneys who serve as Presiding Officers. The other government interest is in having the flexibility to increase the number of Presiding Officers to meet the administrative case load. In the recent past, the number of ALJs was clearly inadequate to handle the number of cases. Although the number of ALJs is today more commensurate with the number of cases, future imbalances might be alleviated by temporarily expanding or contracting the number of EPA attorneys who may serve as Presiding Officer.

To summarize the results of this *Mathews* v. *Eldridge* three-step balancing test, there appears to be a relatively small risk of impairment of private interests that are of a moderate level of importance. This small risk of impairing moderately important interests must be balanced against the government's interests in making best use of its resources. Although it is not possible to weigh these factors with mathematical precision, it is clear that the use of EPA attorneys as Presiding Officers, subject to the provisions adopted in this rule and with the right to appeal to the EAB, is not a violation of respondents' rights to due process of law.

CMA/API recommend that, if EPA allows Agency personnel to serve as Regional Judicial Officers, they should be members in good standing with a bar. EPA notes that under the Federal personnel rules all attorney positions require bar membership, so this need not be addressed in § 22.4(b). CMA/API also argues that Regional Judicial Officers should have substantial litigation experience including adjudication. The position descriptions for Regional Judicial Officers require that they be senior attorneys with substantial litigation experience, and EPA believes that its internal procedures and controls are adequate to assure that Regional Judicial Officers have substantial litigation experience. EPA intends to continue its practice of sending each of its Regional Judicial Officers to the National Judicial College for training in presiding over administrative hearings. This level of experience and training is sufficient to prepare Agency attorneys to preside over the relatively straight-forward cases expected under subpart I.

Some commenters (CMA/API, UWAG, UARG) were concerned that the physical proximity, friendships or colleague relationships of the Regional Judicial Officers with Agency prosecuting attorneys would create an appearance of partiality, where they may share work and social activities, training and secretarial support, and where Regional Judicial Officers may overhear statements made by prosecutors. EPA and its RJOs make efforts to avoid such contacts where feasible, and the contacts that remain are unlikely to result in an actual bias. It does not appear that any solution short of complete physical isolation of Regional Judicial Officers from the enforcement offices could completely eliminate this concern. Such separation would also pose significant logistical difficulties for EPA's Regional offices. Accordingly, this comment is not adopted in the final rule. EPA Regional Offices will continue to take prudent measures to physically separate Regional Judicial Officers from personnel responsible for enforcement case development and prosecution to the extent feasible.

CMA/API suggested that a Regional Judicial Officer should not adjudicate any case involving the same counsel as another case in which he or she performed prosecutorial or investigative functions. EPA disagrees. Counsel serve merely as representatives of their clients, and bias cannot be presumed to attach merely to a representative.

CEEC and Dow suggested that the final sentence of the proposed § 22.4(b), which stated that RJOs may not have "any interest in the outcome of any case", is unclear and should incorporate explanatory language from the preamble to the proposed rule indicating that it includes "a financial interest, personal interest, or career interest in the outcome of the action". 63 FR at 9467. EPA notes that any interpretation of this clause would have to conform to the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635, which are intended to supersede all agency ethics standards (except those approved by the Office of Governmental Ethics and promulgated as supplemental ethics regulations pursuant to 5 CFR 2635.105). In order to avoid creating a standard which might be interpreted differently than these government-wide ethics standards, EPA has removed this clause from the final rule.

A general principle of the government-wide ethics regulations, particularly 5 CFR 2635.101, is that all federal employees must perform their duties impartially. If an RJO held any interest or bias which would compromise his or her ability to preside

impartially in a particular proceeding, this would be grounds for disqualification under § 22.4(d).

Dow suggests that the CROP prohibit enforcement attorneys from serving as Presiding Officers unless the attorney has not issued potentially relevant interpretations of the statute or regulations allegedly violated. Dow suggests possible bias where the Regional Judicial Officer had previously issued interpretations of the regulations at issue in a case before him, that may create a reluctance to overrule his own prior interpretation. However, all adjudicators face the possibility of having to overrule their own prior interpretation of a rule, as contained in their own prior decisions. EPA is unaware of any court where adjudicators are barred from deciding cases where their earlier positions are precedent. In every case, the adjudicator's decision must be supported by the evidence and applicable law, and parties may appeal any adverse decision to the EAB. Accordingly, EPA has not made the suggested change in the final rule.

UARG and UWAG argue that anyone who has participated in a rule making proceeding that leads to the promulgation of a substantive rule would have an interest and bias in the interpretation of that rule, and should not serve as Presiding Officer in a case where that rule is at issue. Although Regional Judicial Officers have presided at public rule making hearings during the public comment period, their role is limited to conducting an orderly hearing—they are not responsible for weighing the evidence and do not participate substantively in the regulatory decision making. EPA believes that participation in substantive rule making is unlikely to result in bias in the interpretation of the rule. The Presiding Officer's decisions must include findings of fact and conclusions of law based upon the record in the case, and their interpretations of regulations are subject to appellate review. EPA declines to add the suggested prohibition with regard to rule making.

The proposed rule would delete from § 22.4(b) language precluding a Presiding Officer from hearing a case that is "factually related" to one in which he or she performed investigative or prosecutorial functions. The 1980 CROP was intended to provide procedures for hearings conforming to section 554 of the APA, and the "factually related" clause was derived from section 554(d), that provides that "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision [or] recommended decision * * *." As the revised CROP is intended for use in proceedings that are not subject to section 554, as well as APA proceedings, provisions of the 1980 CROP such as the "factually related hearing" clause are no longer appropriate for RJOs.

It is very probable that any EPA attorney sufficiently experienced to be selected as RJO would have prosecuted a substantial number of the type of routine cases which are expected to form the bulk of subpart I practice, and these cases may contain similar factual issues. Moreover, the geographical limits on each Region's enforcement efforts make it likely that highly experienced EPA attorneys will have prosecuted cases that have parties, locations, or other facts in common with cases they might hear as an RJO. The prohibition on hearing "factually related" cases is too broad for subpart I proceedings, where the cases will mainly involve well settled law and simple factual issues. The mere fact that two cases have some facts in common need not present any significant risk of bias or "will to win," but it may result in unnecessary litigation over whether the cases are "factually related." Although EPA acknowledges that experience with cases that are factually related in a substantial way could potentially be a cause for concern, there are many more cases where the factual relation is too trivial to result in bias.

Today's final rule will provide respondents in subpart I proceedings a fair and impartial decision maker. Any party may move to have a decision maker disqualified, or a decision overturned, on the basis of partiality where "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career and Finishing School* v. *FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). In the event that an RJO who performed prosecutorial or investigative functions in a factually related case denies a motion for disqualification, respondent can appeal that decision, and, if the appellate body finds that the RJO was not impartial, then the RJO's decision will undoubtedly be reversed.

22.4(c). A comment as to paragraph (c) urges EPA to provide further sanctions, in addition to the existing sanction authorizing the Presiding Officer to draw adverse inferences against a party. For example, the rule should authorize, when a party willfully disregards discovery orders, sanctions up to the level of dismissal with prejudice or default, such as striking a count from a complaint or striking a specific defense. The commenter suggests adding to the rule that a Presiding Officer may impose any other appropriate sanction that could be imposed by a Federal court in a civil proceeding.

EPA believes that it is not necessary to add any additional language with regard to sanctions that may be imposed by a Presiding Officer. The broad language of § 22.4(c)(10) to "[d]o all other acts and take all measures necessary" authorizes the Presiding Officer to impose a broad array of sanctions appropriate for management of cases, to ensure the "maintenance of order and for the efficient, fair and impartial adjudication of issues." Pursuant to that authority, Presiding Officers impose sanctions such as limiting the evidence a party may present. See, Paul Durham, d/b/a Windmill Hill Estates Water System, EPA Docket No. [SDWA]–C930036, 1997 SDWA LEXIS 1, nn. 5, 6 (ALJ, April 14, 1997). In addition, § 22.17(a) and 22.19(g) specifically provide for sanctions of default or dismissal with prejudice, and for exclusion of the information from evidence for failure to comply with information exchange required by § 22.19 or with an order of the Presiding Officer.

22.4(d). Commenters generally favor the proposed disqualification procedures, but have proposed several revisions to the proposed regulation:

CEEC recommends that EPA add a provision that "requires the individual for whom disqualification is sought to specify reasons for his decision" on the disqualification motion. EPA does not agree with the recommendation because it is unnecessary. When a decision maker rules on any motion under the CROP, the decision maker provides reasons for the ruling unless the reasons therefor are patently evident. The precise level of detail provided will depend upon the decision maker's informed discretion and the circumstances of the case. There is no reason to single out disqualification rulings for purposes of imposing an explicit requirement to articulate the basis for the ruling and no reason for limiting a decision maker's discretion in this regard.

Dow proposes that "EPA should provide a procedure for appeal, in cases where the Administrator denies a motion to disqualify himself." EPA rejects the commenter's suggestion. Since all Agency officials are supervised by the Administrator, there is no

Agency official who could appropriately resolve such an appeal. Moreover, any need for such a requirement is remote, for the occasions when the Administrator acts or serves as the deciding official under the CROP are extremely rare. In practice, the EAB performs the role of final decision maker pursuant to its delegation from the Administrator under the regulations. For the most part, the Administrator's role is residual and limited to cases specifically referred to her by the EAB. The EAB has not made such a referral since its creation in 1992. A slightly different role is reserved for the Administrator under proposed § 22.31(f) (§ 22.31(e) of this final rule), which provides that, if the EAB were to issue a final order to a Federal agency, the agency may request a conference with the Administrator. This opportunity is not available to other recipients of EAB orders. If a conference occurs as provided in the provision, a decision by the Administrator may become the final decision. Nonetheless, EPA does not expect that many such requests will be made pursuant to this provision. If the Administrator were to deny a motion to disqualify herself from participating in a proceeding, the appropriate recourse would be to federal court, upon issuance of the final agency action at the end of the administrative proceeding.

Under both the existing rule and the proposed rule (except for subpart I cases), an interlocutory appeal under § 22.29 is available where a Presiding Officer denies a motion for disqualification. EPA requested comment on whether to prohibit interlocutory appeals to the EAB following the denial of a disqualification motion, consistent with federal court practice.

In response to EPA's request for comment, Dow and CEEC recommend that interlocutory appeals of motions for disqualification be allowed because "there is a far greater likelihood of bias under CROP proceedings than in Federal courts," especially where the presiding officer is not an ALJ. Dow adds, therefore, that although it might be acceptable to prohibit an interlocutory appeal from the denial of a motion to disqualify an ALJ, because "ALJs are insulated against actual bias," it is not appropriate to prohibit an interlocutory appeal from the denial of a motion for disqualification where the presiding officer is not an ALJ. CEEC argues that prohibiting interlocutory appeals would contribute to delay because the unavailability of an interlocutory appeals process would increase the number of proceedings that would have to be overturned on appeal.

EPA has considered these comments, but has decided to add a provision to the rules prohibiting interlocutory appeals from the denial of disqualification motions. EPA believes a prohibition against interlocutory appeals will not significantly affect the impartiality of the administrative adjudicative process and at the same time will prevent unnecessary delays. Based on the Agency's experience to date, motions to disqualify decision makers have been very infrequent. Therefore, the Agency expects that the circumstances will be extremely rare in which either the Agency or private litigants will have the burden of a retrial.

CEEC proposes that the regulatory bases for disqualifying a decision maker be expanded to include "the appearance of impropriety." Courts have held that appearance of impropriety, without more, does not warrant disqualification under due process standards. *Del Vecchio* v. *Illinois Department of Corrections*, 31 F.3d 1363, 1371–72 (7th Cir. 1994). Courts have also declined to extend the judicial system's strict separation of functions standard to multi-function agencies. See e.g., *Simpson* v. *OTS*, 29 F.3d 1418, 1424 (9th Cir. 1994); EDF v. EPA, 510 F.2d at 1305. Likewise, the more stringent "appearance" standard in 28 U.S.C. 455(a), that requires a Federal judge to disqualify himself whenever his impartiality "might reasonably be questioned", does not apply to agency adjudicators. See, e.g., *Marine Shale Processors, Inc.* v. *EPA*, 81 F.3d 1371, 1386 (5th Cir. 1996). Although EPA intends that RJOs should avoid the appearance of impropriety, EPA does not believe that the CROP should create a disqualification standard based on appearance of impropriety.

The criteria for disqualification in a CROP proceeding are whether decision makers have "a financial interest or [a] relationship with a party or with the subject matter which would make it inappropriate for them to act". Whether a financial interest or a relationship is inappropriate is determined by reference to the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635. Decision makers who fail to conform to these government-wide ethics standards are subject to disqualification.

c. Final Rule. EPA has reconsidered the proposed change to the title of § 22.4, and has decided to retain the original title "Powers and duties of the Environmental Appeals Board * * *."

EPA has adopted the language proposed under § 22.4(a), with the addition of the word "initial" before the word "decisions" in the first sentence, as recommended by a commenter. This paragraph appears as § 22.4(a)(1) in today's final rule. As noted above in the response to comments on § 22.4(c), a commenter recommended that Presiding Officers be given additional authority to impose sanctions. Although § 22.4(c) and other sections of the CROP provide adequate authority to impose procedural sanctions, EPA notes that § 22.4(c) applies only to the Presiding Officer, and not the EAB. In order that the CROP should expressly authorize the EAB to employ equivalent procedural sanctions, EPA has added a new paragraph to § 22.4(a). This new paragraph (a)(2) makes explicit the EAB's authority to impose procedural sanctions for failures to conform to CROP requirements and to orders of the EAB, an authority that the Agency has always considered implicit:

> (2) In exercising its duties and responsibilities under these Consolidated Rules of Practice, the Environmental Appeals Board may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding, including imposing procedural sanctions against a party who without adequate justification fails or refuses to comply with these Consolidated Rules of Practice or with an order of the Environmental Appeals Board. Such sanctions may include drawing adverse inferences against a party, striking a party's pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding.

EPA has also made a minor editorial revision to the last sentence of what is now § 22.4(a)(1), for reasons of grammar and clarity. EPA has changed the last clause from "motions * * * where the Environmental Appeals Board has referred a matter to the Administrator" to "motions filed in matters that the Environmental Appeals Board has referred to the Administrator."

As discussed in the response to comments above, EPA has made several changes to § 22.4(b) in response to public comments. EPA has added a new sentence to § 22.4(b): "A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel." EPA has also included in the final rule a provision precluding a Regional Judicial Officer from knowingly presiding over a case involving any party concerning which the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the initiation of the case. EPA has deleted from the final

sentence of the proposed § 22.4(b) language prohibiting RJOs having "any interest in the outcome" of any proceeding. EPA has also revised § 22.50(a) to limit the applicability of subpart I to cases under CWA sections 309(g)(2)(A) and 311(b)(6)(B)(i) (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)), and SDWA sections 1414(g)(3)(B) and 1423(c) (42 U.S.C. 300g–3(g)(3)(B) and 300h–2(c)).

EPA has also made a minor, editorial change to § 22.4(b), unrelated to the public comments. The first sentence of the proposed § 22.4(b) stated that the "Regional Administrator shall designate one or more Regional Judicial Officers to act as Presiding Officer...." EPA has revised this sentence to say that the Regional Administrator shall "delegate" that authority.

EPA has adopted the proposed § 22.4(c) without change.

As discussed above, EPA has revised § 22.4(d) by adding a provision prohibiting interlocutory appeals from the denial of disqualification motions.

EPA has made three minor changes to correct errors in the proposed § 22.4(d). Contrary to the Agency's express intent that all motions for disqualification be made first to the official whose disqualification is sought (see 63 FR at 9467), the proposed § 22.4(d) erroneously includes a statement that motions for disqualification of a Regional Judicial Officer should be made to the Regional Administrator. The final rule requires that all motions for disqualification must first be made to the official whose disqualification is sought.

In the final rule, EPA has corrected another error in the proposed rule by substituting "Administrative Law Judge" for "Presiding Officer" in § 22.4(d). In § 22.3 of the 1980 CROP, "Presiding Officer" was defined as an Administrative Law Judge who has been designated by the Chief Administrative Law Judge to serve as Presiding Officer. However, under the proposed rules, the definition of "Presiding Officer" has been revised to mean either an Administrative Law Judge or a Regional Judicial Officer. The proposed § 22.4(d) failed to reflect this change. Because the proposed § 22.4(d) used the term "Presiding Officer" solely to refer to Administrative Law Judges, EPA has revised this paragraph to use the term "Administrative Law Judge" instead.

Finally, the phrase "they deem themselves" should be singular, rather than plural. EPA has substituted the phrase "he deems himself".

3. Filing, Service, and Form of Documents (40 CFR 22.5(a)–(c))

a. Summary of Proposed Rule. EPA proposed revisions of § 22.5(a) clarifying the requirements for filing documents with the hearing clerk or the clerk of the EAB. Proposed revisions of § 22.5(b) clarify the requirements for serving documents on other parties and on the Presiding Officer. The proposed paragraph (b)(1) would allow service of the complaint by any reliable commercial delivery service that provides written verification of delivery, and paragraph (b)(2) would allow service of all documents other than the complaint by any reliable commercial delivery service.

The proposed § 22.5(c) added provisions which would require more information on the first page of every pleading and to require tables of contents and tables of authorities for all legal briefs and memoranda greater than 20 pages in length (excluding attachments) to simplify review. The provision that allowed Hearing Clerks to determine the adequacy of documents was deleted, leaving that authority solely with Presiding Officers or the Environmental Appeals Board.

b. Significant Comments and EPA Response. Dow says that it is unclear whether the language in § 22.5(b)(1) allowing service of the complaint "by certified mail, return receipt requested" refers to one method of service or two alternative methods. EPA has amended this phrase to read "by certified mail *with* return receipt requested".

Dow suggests that § 22.5(b)(1) should allow respondent to waive the requirement that EPA send a copy of the CROP with the complaint. EPA acknowledges that this is superfluous in many cases, but nevertheless believes that this requirement is the most certain way of assuring that respondents are aware of their procedural rights.

USAF requests that the phrase "officer or" be deleted from § 22.5(b)(1)(ii)(B), questioning EPA's authority to file administrative cases against officers of the United States for actions within the scope of their employment. EPA agrees that the words "officer or" should be deleted from the proposed section for the reasons stated. EPA agrees that under normal circumstances, officers of the United States acting outside the scope of their employment would be treated in the same manner as other individuals. Where the real party in interest is a Federal agency, that agency should be named as respondent.

USAF also notes that the proposed § 22.5(b)(1)(ii)(B) provides less guidance as to the manner of service on Federal agencies than the language presently codified at § 22.5(b)(1)(iii). USAF urges the adoption of language clearly providing for service as provided by regulation, and absent regulation, service upon the chief attorney and on the senior executive officer responsible for the overall operations of the geographical unit of the agency being served. The language describing this latter official is adapted from 40 CFR § 270.11(a)(3)(ii), that designates who must sign waste permit applications. EPA agrees with the Air Force that the proposed rule does not succeed in clarifying who must be served. EPA has revised this paragraph to require service as provided by the respondent agency's regulations, or in the absence of controlling regulation, as otherwise provided by law. This will clearly allow Federal agencies to specify how they are to be served, and where they do not do so, it will allow EPA to serve the agency in any manner permitted by the Federal courts.

EPA recognizes the benefits of assuring that those directly in charge of a federal facility get prompt notice of a complaint, and so, has added to the final rule a direction that the complainant should send an additional copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. This language, proposed by USAF, is derived from EPA's regulation designating who must sign applications for hazardous waste permits, 40 CFR 270.11(a)(3)(ii). EPA recognizes that the term "geographical unit" may be subject to varying interpretations, but has concluded that the imprecision is both necessary given the wide variety of federal facilities, and acceptable given that this copy of the complaint merely supplements the official service of the complaint. In recognition of this imprecision, this new provision uses the word "should" rather than "shall." EPA will make a good faith effort to provide a copy of the complaint to the base commander, or equivalent, however, so long as complainant properly serves the federal agency according to its regulations or as otherwise provided by law, the requirements of § 22.5(b)(1)(iii) are satisfied.

USAF finds the phrase "all pleadings and documents other than the complaint", used in § 22.5(b)(2) and elsewhere, to be confusing. USAF recommends using "answer" and/or "complaint" in place of "pleading" and "all filed documents" or "all filings" in place of "pleadings and documents". EPA agrees with this recommendation.

Dow recommends that § 22.5(c)(2) should specify how respondent is to

determine the docket number. EPA agrees that the proposed rule leaves this unclear. EPA has stricken the parenthetical clause "(after the filing of the complaint)" in order to assure that the docket number shall appear on the complaint.

Dow and CEEC observe that under § 22.5(c)(4) a party who fails to furnish or update its name, address, and telephone number, and those of its attorney or representative, if any, completely waives its right to notice and service. The commenters argue that this sanction is too severe for harmless errors. EPA has amended this provision so that where a party fails to update information concerning its representative and/or service address, service to the outdated representative or address shall satisfy the requirements of § 22.5(b)(2) and § 22.6. In this manner, the consequences of any failure to update this information will be commensurate with the severity of the error.

In its comments on §§ 22.17(a) and 22.34(c), Dow notes that default is too harsh a sanction for minor errors in service or filing. The proposed § 22.5(c)(5) would allow the EAB or the Presiding Officer to exclude from the record any document that does not comply with § 22.5(c). This would apparently preclude exclusion for service errors as significant as those in § 22.5(c) (e.g., failure to serve the opposing party, failure to include a certificate of service per § 22.5(a)(3), failure to file the original document per § 22.5(a)(1)). Therefore, the final rule expands this sanction to include failures to conform to paragraphs (a), (b) and (d), as well as (c).

The Agency solicited comments on whether electronic filing and service should be allowed, and if so, under what conditions, but received no comments. After further consideration, EPA has decided that the CROP should permit the Presiding Officer and the EAB, in consultation with the parties and the affected hearing clerk, to authorize facsimile or electronic service and/or filing on a case-by-case basis. Accordingly, language is added to §§ 22.5(a)(1) and 22.5(b)(2) allowing the Presiding Officer or the EAB to authorize facsimile or electronic service and/or filing, subject to any appropriate conditions and limitations.

c. Final Rule In response to public comments, EPA has adopted a modified version of the proposed § 22.5(a), (b), and (c). EPA has revised this and other sections to use the more general term "document" in place of "pleadings and documents", and to use "complaint" or "answer" where reference to one or the other is specifically intended. EPA has edited § 22.5(b)(1) to read "by certified mail with return receipt requested". EPA deletes the phrase "officer or" from § 22.5(b)(1)(ii)(B), and revises the proposed § 22.5(b)(1)(ii)(B) as follows:

"Where respondent is an agency of the United States, complainant shall serve that agency as provided by that agency's regulations, or in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose."

EPA has stricken from § 22.5(c)(2) the parenthetical clause "(after the filing of the complaint)". EPA has revised § 22.5(c)(4) as follows:

"(4) The first document filed by any person shall contain the name, address, and telephone number of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Regional Hearing Clerk, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information or any changes thereto, service to the party's last known address shall satisfy the requirements of § 22.5(b)(2) and § 22.6."

EPA has revised the proposed § 22.5(c)(5) to allow the EAB or the Presiding Officer to exclude from the record any document that does not comply with any requirement of § 22.5.

In addition to the changes suggested by the commenters, EPA has made several other minor changes to § 22.5. EPA has amended § 22.5(a)(1) to allow the Presiding Officer and the EAB the discretion to allow facsimile or electronic filing under such circumstances and limitations as they deem appropriate. EPA also has added to § 22.5(b)(2) language allowing the Presiding Officer or the EAB to authorize facsimile or electronic service, subject to such conditions and limitations as they deem appropriate. EPA has added a reference to the EAB to § 22.5(b): "A copy of each document filed in the proceeding shall be served on the Presiding Officer or the Environmental Appeals Board, and on each party."

EPA has determined that additional clarifications are appropriate for § 22.5(b)(2). EPA notes that the U.S. Postal Service considers overnight express and priority mail to be forms of first class mail. EPA has revised § 22.5(b)(2) to allow service "by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), or by any reliable commercial delivery service. This change necessitates a corresponding change in § 22.7(c), because 5 day grace period for responding to motions sent by first class mail is unnecessary for documents served by overnight or same-day delivery.

Finally, EPA has revised the CROP to present numbers consistently, adopting the preferred style of the U.S. Government Printing Office. Numbers of 10 or more are expressed in figures and not spelled out. Accordingly, EPA has revised § 22.5(c) to require a table of contents and a table of authorities for all briefs and legal memoranda "greater than 20 pages in length".

4. Confidentiality of Business Information (40 CFR 22.5(d))

a. Summary of Proposed Rule. The proposed § 22.5(d) addresses treatment of information claimed as Confidential Business Information ("CBI") in documents filed in CROP proceedings. The proposed paragraph (d)(1) would provide that any business confidentiality claim shall be made in the manner prescribed by 40 CFR part 2 at the time that the document is filed. It warns that a document filed without a claim of business confidentiality will be available to the public for inspection and copying pursuant to § 22.9.

Paragraph (d)(2) would require the submission of a redacted, non-confidential version in addition to the full document containing the information claimed confidential, and describes the process for preparing these documents. Paragraph (d)(3) describes the procedures for serving documents containing claimed-confidential information and makes clear that only a redacted version of any document may be served on a party, amici, or other representative thereof not authorized to receive the confidential information. Paragraph (d)(4) provides that only the redacted version of a document with claimed-confidential information will become part of the public record of the proceeding, and further provides that an EPA officer or employee may disclose information claimed confidential only as provided by 40 CFR part 2.

b. Significant Comments and EPA Response. Dow and CEEC express concern that under the proposed rule a failure to include a CBI claim at the time a document is submitted forecloses any future protection of the document. They argue that even where a company has inadvertently placed information in the public record, there is still value to in preventing further disclosure. They also point out that the Agency's CBI regulations at 40 CFR 2.203(c) provide that the Agency "will make such efforts as are administratively practicable to

associate [a] late [confidentiality] claim with copies of . . . previously-submitted information in EPA files. . . ."

Section 2.203(c) expresses an Agency intent to give effect to late claims of business confidentiality, to the extent administratively practicable. While it is often administratively practicable to provide meaningful protection for a document that has been submitted in a non-confidential manner to an EPA office for EPA's own regulatory use, it is not administratively practicable to protect information that has become a matter of public record. There are significant costs associated with maintaining the confidentiality of documents EPA uses, and EPA must balance them against the potential benefits of protecting information that is already likely to be circulating among the public. The criteria for determining whether business information is entitled to confidential treatment, at § 2.208, include whether the business has taken reasonable measures to protect the confidentiality of the information. Placing a document in the public record falls short of those reasonable measures. Some of EPA's enforcement dockets receive daily visitors, while others are less frequently examined. Accordingly, once a person has filed a document with a hearing clerk, a subsequent effort by that person to assert a business confidentiality claim for information contained in that document will generally be ineffective. EPA will consider untimely confidentiality claims on a case-by-case basis, but claims asserted more than a few days after the original filing are unlikely to be granted.

CEEC also faults EPA for failing to draw sufficient attention in the notice of proposed rule making to the provisions addressing CBI. CEEC asserts that EPA missed an opportunity to work with the regulated community to achieve important regulatory reforms. EPA disagrees. It is the purpose of a notice of proposed rule making to elicit comment from the public to better inform the Agency's rule making process. EPA has made many changes in this final rule in response to the helpful comments submitted by CEEC and other commenters. Although EPA has not agreed with CEEC's one substantive comment on the CBI provisions, EPA appreciates the comment and carefully considered CEEC's point.

c. *Final Rule.* EPA adopts § 22.5(d) as proposed, except for replacing the phrase "pleading or document" with "document" as discussed in the response to public comments on § 22.5(a), (b) and (c), and replacing "amici" with "non-party participant" for consistency with changes to § 22.11(b).

5. Computation and Extension of Time (40 CFR 22.7)

a. Summary of Proposed Rule. Section 22.7(a) defines time periods for determining the date upon which a document is due. The proposed rule would revise the term "legal holiday" to "Federal holiday" for clarity.

Section 22.7(b) sets forth conditions under which the due date may be extended. The proposed revision to that paragraph would require that a motion for extension of time be filed sufficiently in advance of the due date so as to allow other parties an opportunity to respond and to allow time for the Presiding Officer or EAB to issue a ruling upon the motion.

Section 22.7(c) of the proposed rule would expand the "mailbox rule" to provide that service of documents other than the complaint is complete either upon mailing or when placed in custody of a reliable commercial delivery service, and to allow 5 additional days to respond not only to documents served by mail but also to documents served by reliable commercial delivery service.

b. Significant Comments and EPA Response. Dow requested an exception from including Saturdays, Sundays and holidays where the time period is 10 days or less. The commenter is concerned that there are not enough work days and mail delivery days to respond to a document.

In effect, this would extend the time period for a party's reply to a response, which is 10 days, under § 22.16(b). EPA believes that two different ways of calculating time periods would cause confusion and inconsistency. When a party needs more than 10 days to file a document, an adequate solution would be to request an extension of time.

Dow suggested a "good cause" exception to the time limit for filing a motion for extension of time. EPA believes that including such an exception in the rule is unnecessary and may encourage untimeliness, and thereby adversely affect the Agency's efforts to make administrative proceedings more efficient. A motion for leave to file a document beyond the time limit ("out of time"), stating reasons for not having filed within the time limit, may be submitted in accordance with § 22.16(a), along with the document sought to be filed. The time limit provided in the proposed revision does not require a motion for extension to be filed so far in advance of the due date so as to allow other parties the 15 days provided by § 22.16(b) to respond to the motion. A "reasonable opportunity to respond" and "reasonable opportunity to issue an order" will be construed based on the circumstances of the case.

c. Final Rule. Today's additional clarifications to § 22.5(b)(2), which define first class mail as including Overnight Express and Priority Mail, expressly allow for service by EPA's internal mail system, and provide the Presiding Officer and the EAB discretion to authorize facsimile or electronic filing, require a corresponding change to § 22.7(c). To assume 5 days for delivery by mail of a document, and thus to allow 5 additional days for a response, is appropriate where a document is served by first class mail and some forms of commercial delivery. However, it is not appropriate to make such assumption and allowance where there is a date of receipt, logged or stamped by the postal or commercial delivery service, showing that the document was sent by same day or overnight delivery. Accordingly, EPA is revising the third sentence of § 22.7(c) to exempt documents served by overnight or same-day delivery. According to the preferred style of the U.S. Government Printing Office, measurements of time are to be expressed in figures and not spelled out. EPA has revised § 22.7(c) to say that "5 days shall be added".

6. Ex Parte Discussion of Proceeding (40 CFR 22.8)

a. Summary of Proposed Rule. The existing § 22.8 prohibits the decision making officials in a proceeding from discussing the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in the proceeding or a factually related proceeding. This prohibition is also imposed on representatives and to persons likely to advise the decision making officials on the proceeding. The proposed rule would add a sentence that would exempt officials who have formally recused themselves from all adjudicatory functions, including the approval of consent agreements and issuance of final orders.

b. Significant Comments and EPA Response. Dow argues that the CROP should also restrict ex parte contacts before a complaint is issued, in order to avoid the potential for an adjudicator developing a bias in favor of the complainant. Dow suggests that the CROP should prohibit any communication regarding contemplated or reasonably foreseeable enforcement

proceedings between potential adjudicators and Agency enforcement personnel. Dow also suggests that where Agency enforcement attorneys may potentially serve as Presiding Officers, any communications regarding contemplated or reasonably foreseeable enforcement proceedings should be recorded, kept on file, and served on respondent as soon as that attorney is designated Presiding Officer.

EPA agrees that EPA attorneys who may serve as Presiding Officers should avoid communications regarding contemplated or reasonably foreseeable enforcement proceedings over which they might preside. However, a complete prohibition is neither feasible nor necessary.

In some instances, it is appropriate for Agency enforcement personnel to have prefiling discussions concerning specific enforcement cases with Agency attorneys who may be called upon act as Presiding Officers. When considering whether to assign a new case to a particular Agency enforcement attorney, it may be necessary to inquire of that attorney whether a prospective case may present a conflict with any cases in which the attorney is acting as Presiding Officer. So long as those discussions are carefully limited to transmitting the identity of the prospective respondent and a bare statement of the statutory or regulatory provisions allegedly violated, and to exploring whether there is any potential conflict of interest, but do not address the merits of the potential action, such discussions could not influence the decisions of the prospective adjudicator, and should not be considered prohibited ex parte communications.

Sound management of the Agency's enforcement program also periodically requires some discussion between complainants and adjudicators concerning anticipated work loads. For example, EPA periodically offers compliance audit programs (see, e.g., Registration and Agreement for TSCA Section 8(e) Compliance Audit Program, 56 FR 4128 (Feb. 1, 1991)) where large numbers potential cases are simultaneously settled on essentially identical terms, and it is appropriate in such cases for the complainant to discuss process issues with the persons who would be responsible for approving the consent agreements and issuing final orders. Discussions of how many consent agreements might be submitted for approval, when they might be submitted, whether or to what extent the consent agreements vary, are all permissible procedural matters that are not prohibited ex parte communications.

Compliance audit programs encourage violators to identify their violations and disclose them to EPA in exchange for a settlement and release of liability on favorable terms. Obtaining advance approval of the generic consent agreements could reassure those members of the regulated community who are wary of disclosing violations that the Agency will in fact conclude the cases according to the terms offered. Although this would result in substantive discussion of the terms of settlement between prospective complainants and adjudicators, this is permissible under the peculiar circumstances of a compliance audit program. It is permissible because compliance audit programs are entirely voluntary. Each compliance audit program is an offer by the Agency to the regulated community at large, and EPA typically engages in these efforts precisely because it does not know who is in violation and it wants to bring a large and ill-defined sector of the industry into compliance. No regulatee is obligated to identify itself as a violator or to participate in the program; each chooses to do so only if it considers the terms offered by the Agency to be in its best interest. Accordingly, where complainants wish to confer with Agency officials responsible for approving consent agreements and issuing final orders concerning potential compliance audit programs, they may do so without violating § 22.8.

Dow's suggested limitations also pose significant implementation problems. Parties may disagree about when an investigation becomes a "contemplated or reasonably foreseeable enforcement proceeding" and about what communications concern such a proceeding. For the foregoing reasons, EPA has not added any prohibition against communications concerning cases before the filing of the complaint. Similarly, EPA does not believe that it is necessary to require by rule that potential adjudicators retain a written record of all communications regarding potential cases. The prohibition in § 22.4(d)(1) against individuals serving as Presiding Officer in regard to "any matter in which they have any relationship with a party or with the subject matter which would make it inappropriate for them to act" provides adequate protection against any bias that might arise through communications prior to the filing of a complaint.

Dow also comments that where an adjudicator obtains advice from other EPA personnel, any such advice should be served on the respondent. The focus of Dow's concern is that EPA personnel such as technical experts, rule writers, and attorneys might be advising adjudicators on the merits of a proceeding. EPA shares Dow's opinion that such ex parte advice is generally unnecessary and inappropriate, and believes that it is in fact extremely uncommon. EPA agrees with the commenter that adjudicators should not be receiving such advice without all parties having the opportunity to review and respond to it. The CROP provides suitable procedures for adjudicators to solicit such advice (e.g., by calling for an expert to testify pursuant to § 22.19(e)(4)) and for EPA personnel to volunteer such advice (through amicus briefs subject to § 22.11(b)) without risk of ex parte communication.

There are, however, circumstances where it is appropriate for adjudicators to obtain from other EPA personnel advice that is not served on the parties. Administrative Law Judges periodically consult with each other, as do the Agency's RJOs. Adjudicators routinely receive advice from the attorneys and law clerks on the staff of the Environmental Appeals Board and the Office of Administrative Law Judges, and on occasion from hearing clerks and from Agency ethics officials. Accordingly, EPA declines to require that all advice to adjudicators from EPA personnel be served on the parties.

c. Final Rule. EPA is adopting § 22.8 as proposed, with minor changes. EPA notes that § 22.8 refers in three places to both Regional Judicial Officers and Presiding Officers. In order to avoid redundancy and potential confusion, EPA has stricken the words "the Regional Judicial Officer." Other minor editorial changes in the first sentence are the substitution of the word "proceeding" for "case", so as to consistently use the word "proceeding" when referring to a particular administrative adjudication, and substitution of "any decision" for "the decision" to clarify ex parte communication is prohibited in regard to small matters as well as large ones. These editorial changes do not alter the substance of the CROP.

The preamble to the proposed rule indicated that the prohibitions on ex parte communications would apply to persons who approve consent agreements and issue final orders. 63 FR at 9468 ("For purposes of this provision [§ 22.8], the Agency would consider the approval of consent agreements and issuance of consent orders to be adjudicatory functions."). In some instances, Regional Administrators have delegated the authority to review settlements and issue final orders to

persons associated with the Regions' enforcement programs. The Agency has reconsidered the position expressed in the preamble to the proposed rule, and has determined that the person who ultimately approves settlements on the Agency's behalf and issues these final orders need not be as independent as those who adjudicate contested issues. To make this change clear, EPA has amended the last sentence of § 22.8 to state that the ex parte restrictions shall not apply to a person who issues final orders only pursuant to § 22.18(b)(3).

7. Intervention and Non-party Briefs (40 CFR 22.11)

a. Summary of Proposed Rule. Section 22.11(a) describes the process for intervening in a CROP proceeding. The proposed rule provides more specific procedures and would make the standard for intervention equivalent to the standard used in the Federal courts. Paragraph (b) describes the procedures for motion for leave to file an amicus brief; the major change proposed was to provide a uniform 15 day period for responses to an amicus brief, rather than leaving this to the discretion of the Presiding Officer or the EAB.

b. Significant Comments and EPA Response. Dow suggests that § 22.11(b) should expressly allow 15 days for parties to respond to a motion for leave to file an amicus brief, as well as 15 days to respond to the brief itself. This change is not necessary, because "motions" are subject to § 22.16, which provides for responses within 15 days. Nevertheless, EPA accepts Dow's suggestion and has revised § 22.11(a) and (b) so that all CROP requirements apply to any motion for leave to file an amicus brief or motion to intervene in the same manner as if the movant were a party.

c. Final Rule. EPA is adopting the proposed § 22.11 with modifications. EPA has amended the language of § 22.11(a) and (b) so that all requirements of the CROP shall apply to any motion for leave to intervene or motion for leave to file an amicus brief as if the movant were a party.

EPA has also made two other changes to § 22.11(b) on its own initiative. First, it has replaced the terms "amicus curiae" and "amicus brief" with "non-party brief." Second, EPA has replaced the requirement that motions for leave to file a non-party brief "state the reasons why the proposed amicus brief is desirable" with the requirement that it "explain the relevance of the brief to the proceeding." Both changes are intended to improve the clarity and specificity of the CROP, and neither is intended to make a substantive change.

To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.7(c) to state the time allowed for responding to a non-party brief with the numeral "15".

8. Commencement of a Proceeding (40 CFR 22.13)

a. Summary of Proposed Rule. EPA proposed amending § 22.13 to define the commencement of an administrative enforcement proceeding, and to allow the simultaneous commencement and conclusion of a case through the filing of a consent agreement and a final order where pre-commencement negotiations result in settlement.

b. Significant Comments and EPA Response. CEEC recommends that the CROP should require discussions with a prospective respondent before the filing of a complaint. CEEC argues that pre-filing discussions would expedite the proceeding by allowing the parties to resolve the matter cooperatively, and by allowing early elimination of inappropriate allegations or penalties. CEEC proposes that the CROP should require that complainant determine whether a potential respondent had fair notice of the regulatory requirement(s) that it is alleged to have violated, and require EPA to disclose both the information in EPA's possession suggesting the violation and the information EPA will utilize to set the proposed penalty. CEEC argues that such a pre-filing process would maximize the opportunity to resolve compliance matters cooperatively and expeditiously.

EPA has often found it advantageous to engage in pre-filing discussions with prospective respondents under the existing CROP, and the proposed revisions will increase EPA's incentives to do so. Nothing in the proposed rule prevents EPA from engaging in the sort of pre-filing process CEEC proposes. However, EPA declines to go as far as CEEC proposes and create a mandatory pre-filing process. EPA's experience with pre-filing negotiations has been mixed: While in many cases pre-filing negotiations have produced expedited settlements, in other cases they have resulted in delay. Sometimes a respondent is not interested in settlement, but uses settlement discussions as a tactic in efforts to forestall enforcement. In contrast, active management of the case by a neutral presiding officer is generally effective in keeping both parties actively engaged in settlement efforts, and provides an alternative process when settlement efforts fail.

Although EPA does not at this time believe that a mandatory pre-filing process should be part of the CROP, EPA will consider ways to expand use of pre-filing negotiations. Although statutory public commenter provisions somewhat limit the Agency's authority to pursue pre-filing negotiations, the final rule does not add any further limits to EPA's discretion in this regard.

c. Final Rule. EPA is adopting § 22.13 of the CROP as proposed, with two minor changes. The first resolves conflicting language in the proposed rule concerning whether a case subject to public comment requirements of § 22.45 could be commenced through the filing of a consent agreement and final order pursuant to § 22.13(b). Although the proposed § 22.13(b) states that it is limited to cases not subject to § 22.45, the proposed § 22.45(b)(1) and (2) describe a process for public notice in cases commenced pursuant to § 22.13(b). EPA has revised the public comment procedures of § 22.45 to better accommodate cases commenced pursuant to § 22.13(b). Accordingly, EPA has deleted from § 22.13(b) the clause which would have made it inapplicable in cases subject to the public comment provisions of § 22.45. Second, as noted in the discussion of public comments on § 22.18(b) and (c), EPA has eliminated the term "consent order," and is using the term "final order" instead.

9. Complaint (40 CFR 22.14)

a. Summary of Proposed Rule. The primary substantive change proposed in § 22.14 was the addition of explicit authority for complainants to use, at their discretion, a notice pleading approach comparable to that used in administrative enforcement proceedings under the proposed part 28 procedures and in the Federal courts. The proposed § 22.14(a)(4) would expressly permit EPA to file a complaint without specifying the precise penalty sought, as an alternative to pleading a specific penalty. Where complainant elects not to demand a specific penalty in the complaint, complainant is nonetheless obligated to provide a brief explanation of the severity of each violation alleged and a citation to the statutory penalty authority applicable for each violation alleged in the complaint. The text originally in paragraph (c) would be deleted to avoid the possibility of conflict with the notice pleading option proposed under § 22.14(a)(4)(ii).

The proposed § 22.14(a)(6) would require the complainant to specify in the complaint whether the non-APA procedures in subpart I shall apply to the proceeding. If a complaint does not contain an explicit statement that subpart I applies, the ensuing

proceeding shall be conducted in conformance with section 554 of the APA.

EPA also proposed editorial revisions, primarily to consolidate the provisions applicable to complaints for assessment of civil penalties with the essentially parallel provisions for revocation, termination or suspension of permits, and to explicitly provide for the issuance of compliance and corrective action orders.

b. Significant Comments and EPA Response

Four of the commenters, CMA/API, CEEC, UWAG and USAF, opposed the proposed notice pleading option.

Implicit in these comments is a concern that respondents will not be able to fairly gauge the amount of their potential penalty liability based on the information in the complaint. EPA agrees that complaints should provide more information than is required under the proposed rule. The proposed § 22.14(a)(4)(ii) arguably would allow issuance of complaints which do not clearly identify the number of violations charged, for example, where a statute authorizes EPA to assess a separate penalty for each day a violation continues. In order to ensure that respondents understand from the complaint how many violations are charged, EPA has revised § 22.14(a)(4)(ii) to require that the complaint specify "the number of violations (where applicable, days of violation) for which a penalty is sought".

CMA/API objected to the notice pleading option and recommended that it be rejected, noting that allowing complaints to issue without stating a sum certain would make it "too easy" for EPA to proceed with an administrative penalty action without gathering sufficient information to make an informed decision, and that the Agency might file meritless complaints that would nonetheless have a "stigmatizing impact" on respondents. EPA notes that the proposed § 22.14 would still require complainant to state the factual basis for alleging the violation, and to specify each provision of a statute, regulation, permit or order that respondent is alleged to have violated. The proposed change would only allow EPA, at its discretion, to postpone stating the extent of the relief sought. Owing to the retention of provisions that require complainant to specifically allege respondent's violation, the risk that EPA might file meritless complaints is not increased by the proposed change.

CMA/API objects that notice pleading will allow EPA to use the administrative complaint as a form of discovery to obtain information from the respondent, and argues that EPA's existing information gathering tools are adequate for that purpose. EPA does not view the administrative complaint as an investigation or discovery tool, but rather, the product of an investigation through which EPA has collected evidence reasonably supporting the conclusion that the respondent has violated the law. However, in some cases the litigation process is the only mechanism by which EPA can obtain the financial information necessary to determine what penalty is appropriate for those violations (see, e.g., FIFRA section 8(b), 7 U.S.C. 136f(b), and Toxic Substances Control Act ("TSCA") section 11(b), 15 U.S.C. 2610(b), which expressly prohibit inspections seeking financial information).

The USAF argues that the proposed change potentially shifts to respondents the burden of demonstrating that something less than the maximum penalty is appropriate. EPA disagrees, as the proposed § 22.24(a) states that complainant bears both "the burdens of presentation and persuasion * * * that the relief sought is appropriate", while respondents only bear "the burden of presenting * * * any response or evidence with respect to the appropriate relief." Notice pleading is common practice in the state and federal courts, and in those courts notice pleading does not put the burden of persuasion on the respondent, is not inherently unfair, and does not violate a defendant's due process rights.

USAF objects that notice pleading is unnecessary to achieve the Agency's stated goal of "provid[ing] the Agency with added flexibility in issuing a complaint under circumstances where only the violator possesses information crucial to the proper determination of the penalty * * *." USAF suggests that a better approach would be to require a specific penalty proposal in the complaint, but allow the complainant to amend the proposed penalty based on information it timely obtains after the commencement of a suit.

EPA agrees that the approach USAF identified is appropriate in many cases. However, where EPA does not have adequate information to confidently recommend a specific penalty, EPA would be misleading the respondent were it to propose an arbitrary penalty which does not reflect significant facts of the case. An unreasonable penalty demand may also make EPA liable for respondent's attorneys' fees under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. 504. The Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub.L. 104–121, expanded the EAJA to allow recovery of attorney's fees where an initial penalty demand is later shown to be unreasonable. Notice pleading is an appropriate and responsible choice in circumstances where liability is clear, but where EPA is not able to determine with confidence the reasonableness of a specific penalty amount before filing the case.

If EPA were not to provide the option of notice pleading, the SBREFA amendments would make it possible for polluters to escape high penalties if they can effectively hide from EPA their financial status or the economic benefits derived from their noncompliance with environmental regulation. Some statutes require EPA to consider a respondent's ability to pay the proposed penalty or its economic benefit of noncompliance in assessing a penalty (e.g., FIFRA section 14(a)(4), TSCA section 16(a)(2)(B), CWA section 309(g)(3), Clean Air Act ("CAA") section 113(e)(1)), and EPA generally considers these factors relevant in penalty assessment under other statutes as well. However, authority for EPA to gather such information is not always clear, and under some statutes it has been expressly withheld (see, e.g., FIFRA section 8(b), 7 U.S.C. 136f(b), TSCA section 11(b), 15 U.S.C. 2610(b)). The SBREFA amendments to the EAJA make the Agency wary of seeking large penalties against individuals or privately held corporations (who do not generally make public disclosures of their financial condition) absent reliable financial information. Because EPA does not have the resources to inspect any but the largest facilities more than once every few years, inspections typically reveal violations that are several years old. The 5-year federal statute of limitations may limit the Agency's ability to sanction violators for older violations, so a respondent need only hide its financial status for a short time in order to forestall EPA from seeking penalties commensurate with a serious violation. Notice pleading increases the deterrent effect of EPA's enforcement program, and levels the regulatory playing field for publicly held and privately held corporations.

CEEC noted in its comments that the February 25, 1998, FR Notice of Proposed Rule Making did not analyze the proposed notice pleading option in light of the SBREFA amendments to the EAJA. The proposed rule, as well as today's final rule, is fully consistent with the EAJA as amended by SBREFA. The EAJA does not prohibit notice

pleading, and nothing in the SBREFA legislative history suggests any intent by Congress to limit its use in judicial or administrative enforcement. The EAJA does not require the agencies to include specific penalty demands in their complaints.

When a complainant makes an express demand, the remedies of the EAJA may be invoked. However, the EAJA explicitly excludes from the definition of "demand" any "recitation of the maximum statutory penalty" in the administrative or civil complaint. Consistent with this provision, EPA may postpone making a "demand" by exercising the notice pleading option of § 22.14(a)(4)(ii), and providing "a brief explanation of the severity of each violation alleged and a citation to the statutory penalty authority applicable for each violation alleged in the complaint" instead of a specific penalty demand.

Civil administrative penalty complaints should communicate the significance that the Agency places on the alleged violations. The CROP accomplishes this in both the traditional method embodied in § 22.14(a)(4)(i), and the notice pleading option in § 22.14(a)(4)(ii). Section 22.14(a)(4)(i) requires that the complaint state "[t]he amount of the civil penalty which is proposed to be assessed, and a brief explanation of the proposed penalty," while § 22.14(a)(4)(ii) requires "a brief explanation of the severity of each violation alleged and a citation to the statutory penalty authority applicable for each violation alleged in the complaint". Moreover, EPA intends to maintain the practice developed in the notice pleading cases under the proposed part 28 administrative enforcement rules of concurrently supplementing complaints with early, informal settlement overtures to respondents. EPA has found this process expedites settlement while also providing respondents with more specific guidance on the penalty value the Agency places on its enforcement case.

EPA notes that notice pleading is not mandatory, but is instead an option. EPA expects that administrative complaints containing specific penalty proposals will continue to be a central part of the Agency's administrative enforcement program. However, one clear mandate of SBREFA is that the Agency should not make a penalty demand unless it has evidence to fully support that demand. Notice pleading balances the goals of SBREFA with those of the statutes EPA is charged with enforcing, as it allows the Agency to pursue enforcement in cases where adequate financial information is either unavailable or withheld by the respondent during the case development process.

Today's final rule is fully consistent with the spirit and intent of the Equal Access to Justice Act, in that the CROP produces complaints that are substantially justified by the facts, circumstances and relevant statutory and regulatory requirements alleged to be violated. The limitations on discovery in CROP proceedings practically force complainants to have in hand at the time an administrative complaint is filed virtually all the evidence necessary to prove the alleged violations and the appropriateness of the penalty. This is in marked contrast to the rules governing civil judicial enforcement, that allow complaints to be filed so long as the allegations and factual contentions "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery * * *." See Rule 11(b)(3) of the Federal Rules of Civil Procedure. The notice pleading option does not ease the Agency's pre-filing burdens associated with documenting that a regulatee has violated the law, but merely allows the filing of a complaint with somewhat less information about what penalty might be appropriate for those violations.

UWAG also questioned the efficacy of the notice pleading option, asserting that the Agency will be no better informed at the time of prehearing exchange or default than it is at the time the complaint is issued. EPA has shared this concern, and requested comments on whether complainant might postpone stating a specific proposed penalty for an additional 30 days, or longer, after prehearing exchange. 63 FR at 9472. Dow objected to postponement beyond prehearing exchange (although it did not state any objection to allowing complainant to state a specific proposed penalty for the first time in prehearing exchange). As discussed in the response to comments on § 22.19(a) below, it is appropriate to allow complainant to review respondent's prehearing exchange for 15 days before specifying a proposed penalty. EPA believes that this process properly balances the parties' competing interests.

Most regulatees will engage in settlement discussions with the Agency once a complaint has been filed. Such settlement discussions, often accompanied by voluntary exchanges of certain documents, almost always give EPA additional information about the merits of the Agency's allegations and the appropriateness of a penalty. In addition, § 22.15(b) requires respondent to state in its answer the "circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; [and] the basis for opposing any proposed relief * * *." As a result of the information received through the answer and settlement discussions, complainant generally has a better understanding of whether respondent has financial limitations significant enough to warrant assessing a lower penalty. EPA recognizes that in some cases, a respondent may still resist providing necessary information. In such cases, the Agency's recourse would be to postpone proposing a specific penalty until 15 days after respondent has filed its prehearing exchange, in accordance with § 22.19(a)(4). If respondent's prehearing exchange fails to contain necessary information, complainant could then move for a discovery order, and subsequently amend the penalty demand as necessary.

Several commenters noted that notice pleading might impede quick resolution and settlement. CEEC notes that failure to provide a specific penalty amount early in the process can frustrate quick resolution of the proceedings. UWAG states that the failure to specify a sum-certain penalty in the complaint will undercut the Agency's goal of resolution of administrative complaints with a minimum of cost and delay, since a party will "have no choice" but to engage in settlement discussions in order to ascertain "exactly what penalty" the Agency is seeking. CMA/API notes that requiring a specific penalty demand amount encourages settlement because it makes clear to the respondent the extent of the penalty relief that EPA is seeking. CMA/API states that without a specific penalty amount stated in the complaint, a respondent can neither judge whether settlement is a realistic possibility nor gauge EPA's view of the significance of the matter. USAF states that the proposed change reduces the respondent's ability to negotiate and removes any incentive to negotiate.

The Agency acknowledges that notice pleading may impede use of the quick resolution process, and that it has the potential to delay settlement relative to cases where a sum certain penalty amount is stated in the complaint. However, notice pleading also provides an additional incentive to settle by preserving EPA's full penalty claim in the event settlement is not achieved. In those cases where the Agency perceives critical information gaps relevant to the amount of the penalty, these potential inefficiencies are an acceptable price to

pay in order to avoid making an unreasonable penalty demand.

EPA's introduction of the notice pleading option into CROP proceedings does not signal any intention to alter the Agency's longstanding policies and practices favoring expeditious settlements. Over the past 20 years, more than 98 per cent of all administrative cases have been settled without trials. Today's final rule evidences EPA's continuing commitment to non-adversarial resolution with new provisions such as commencement of pre-negotiated cases with a final order pursuant to § 22.13(b), the quick resolution of § 22.18(a), and procedures supporting alternative dispute resolution at § 22.18(d). Although notice pleading could possibly delay settlement, it is expected that the need to make efficient use of enforcement resources will restrain EPA's use of notice pleading if, in actual practice, it significantly reduces the frequency of settlements or the pace at which settlements are reached.

c. Final Rule. EPA has adopted § 22.14 as proposed, with several changes. As noted above, EPA has revised § 22.14(a)(4)(ii) to require that where complainant chooses not to specify a proposed penalty in the complaint, the complaint must state "the number of violations (where applicable, days of violation) for which a penalty is sought".

EPA also has made several minor changes at its own initiative. The proposed § 22.14(a)(6) required complainant to specify in the complaint whether subpart I "applies to such hearing." EPA has revised this paragraph to clarify that where subpart I applies, it applies to the entire proceeding, and not just the evidentiary hearing phase.

EPA has added two new requirements as to content of the complaint. Section 22.14(a) now requires in paragraph (7) that the complaint include the address of the Regional Hearing Clerk, and in paragraph (8) requires instructions for paying penalties, if applicable. EPA has observed that the names and addresses of the lock box banks change often, and that it would be difficult to keep the proposed Appendix B up to date. EPA also notes that Appendix A is redundant with 40 CFR 1.7, and moreover, notes that these addresses are of less value to respondent than the specific address of the Regional Hearing Clerk. EPA has decided to expand § 22.14(a) to require that the relevant information appear in the complaint, and to delete both appendices.

In recognition of the fact that most complaints allege more than one violation, EPA has amended § 22.14(a)(3) to require that the complaint state the factual basis "for each violation alleged."

For the convenience of respondents receiving complaints which do not specify a proposed penalty, EPA has amended § 22.14(a)(4)(ii) to clarify that the complaint shall include "a recitation of", rather than a mere "citation to", the applicable statutory penalty authority.

EPA has revised § 22.14(a)(4)(iii) and (a)(5), as well as other sections of the CROP, to replace the unwieldy phrase "revocation, termination or suspension of all or part of a permit" with a new term "Permit Action." EPA has moved the "revocation, termination or suspension" language into the definition of "Permit Action" at § 22.3(a), which makes the remainder of the CROP easier to read, and will facilitate any future efforts to bring other permit actions within the scope of the CROP.

EPA has changed the title of this section from "Content and amendment of the complaint" to the more general "Complaint". Finally, to conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.14(c) to state the time allowed for responding to an amended complaint with the numeral "20".

10. Answer to the Complaint (40 CFR 22.15)

a. Summary of Proposed Rule. EPA proposed to amend § 22.15(a) to clarify requirements for filing and serving the answer to a complaint, and to extend the time allowed for the filing of an answer from 20 days to 30 days. EPA proposed to add to paragraph (b) a new requirement that the answer state the basis for opposing any proposed penalty, compliance or corrective action order, or permit revocation, termination or suspension. EPA proposed editorial changes to paragraph (c), and proposed no changes to paragraphs (d) or (e).

b. Significant Comments and EPA Response. USAF notes that where complainant has elected not to specify a penalty in the complaint, respondent cannot comply with the proposed requirement in § 22.15(b) that the answer state respondent's basis for opposing the proposed relief. In response, the final rule now requires that the answer shall state "the basis for opposing any proposed relief * * *"

CEEC urges that EPA amend § 22.15(e) to allow respondent to amend its answer as a matter of right, arguing that respondent is unlikely to have all the necessary information at the time the answer is due. Allowing amendment of the answer as a matter of right would not encourage diligence in answering the complaint, and could disrupt the orderly progress of proceedings. Accordingly, EPA declines to adopt CEEC's suggestion.

The existing CROP allows amendments of the answer at the presiding officer's discretion, and motions to amend pleadings are generally granted. See, e.g., In re Port of Oakland and Great Lakes Dredge and Dock Co., 4 E.A.D. 170, 205 (EAB 1992) ("the Board adheres to the generally accepted legal principle that administrative pleadings are liberally construed and easily amended") (citations omitted). Moreover, in paragraph (a) EPA already has expanded by 50% the time allowed for assembling information and preparing an answer. Although leave to amend pleadings is liberally granted, allowing amendments to the answer as a matter of right would make the CROP significantly less efficient. The purpose of the answer is to clarify what is contested and what is not contested at an early stage of the proceeding. Allowing amendment of the answer as a matter of right would not encourage due diligence in framing the issues, and could unfairly prejudice complainant if, for example, respondent were to substantially alter its defenses shortly before, or even after, the evidentiary hearing. Accordingly, CEEC's recommendation is rejected, except in circumstances where the complaint has been amended.

c. Final Rule. For the foregoing reasons, EPA has adopted § 22.15 of the CROP as proposed, with the exception of certain changes. As discussed above, the language of § 22.15(b) is amended to require that the answer state "the basis for opposing any proposed relief * * *", and the proposed § 22.15(e) is amended to allow amendment as of right whenever the complaint is amended.

Section 22.15(c) of both the proposed rule and the 1980 CROP states that "[a] hearing ... shall be held if requested by respondent in its answer." As used in this context, the word "hearing" refers to an adjudicatory proceeding, and encompasses a determination on motion papers alone. See In re Green Thumb Nursery, Inc., 6 E.A.D. 782, 790 & n.14 (EAB 1997) (holding that there is no right to an oral evidentiary hearing). Elsewhere in both the proposed rule and the 1980 CROP, "hearing" refers specifically to the oral evidentiary hearing phase of a proceeding. In today's final rule, EPA has endeavored to use the term "hearing" to refer specifically to the oral evidentiary hearing. In order to avoid the implication that a request for a hearing

necessarily results in an oral evidentiary hearing, EPA has replaced the word "shall" with "may."

Consistent with the changes noted in § 22.14(a)(4)(iii) and (a)(5) above, EPA has revised § 22.15(a) by replacing the phrase "permit revocation, termination or suspension" with a new term "Permit Action." To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.15(a) to state the time allowed for filing an answer with the numeral "30".

11. Default (40 CFR 22.17)

a. Summary of Proposed Rule. The proposed § 22.17 would reorganize the entire section to indicate the role of each of the parties and the Presiding Officer in a sequential manner.

Paragraph (a) would describe the actions of each party that may result in a finding of default and the consequences of such a finding for each of the parties. Provisions describing the end of the process (i.e., when penalty monies come due, when a permit revocation, termination or suspension becomes effective) would be moved to paragraph (d).

Paragraph (b) would describe content requirements for motions for default and would include a requirement that when the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and must put into the record the legal and factual grounds for the relief requested. This amendment accommodates the change in § 22.14 that allows notice pleading in which the complainant elects not to demand a specific penalty in the complaint.

Paragraph (c) would describe the default order itself, would provide that a default order shall be an initial decision, and would clarify the standards for granting the default order, for granting the relief proposed, and for setting the order aside. In addition, proposed paragraph (c) would remove the apparent restriction on the Presiding Officers' discretion in existing § 22.17(a), in which a default order automatically assesses the penalty proposed in the complaint, or automatically revokes or terminates the permit according to the conditions proposed in the complaint. Although the proposed paragraph (c) would acknowledge that the Presiding Officer has some discretion regarding default orders, it would require that the proposed relief must be granted unless the record clearly demonstrates that the requested relief is inconsistent with the Act.

Paragraph (d) would specify when penalties assessed by default are due, and the effective dates for the default revocation, termination or suspension of permits, and for the default issuance of compliance or corrective action orders.

b. Significant Comments and EPA Response. Dow suggests revising § 22.17(a) to allow other less serious sanctions. Dow argues that minor or technical defaults, such as not including a proof of service in a responsive document when proper service is perfected or failing to appear at a conference due to weather conditions, do not deserve the severe sanctions delineated in the section. Dow's objection seems to be two-fold: that issuance of an order of default is mandated upon the violative conduct and that an issued order of default might be too severe under certain circumstances.

Dow's objection concerns language that has been in § 22.17(a) since 1980. The CROP has not mandated and does not now mandate automatic determination of default liability. The proposed rule retained the language in § 22.17(a) which states that a "party may be found to be in default", and in § 22.17(c) included the old § 22.17(d) language "[f]or good cause shown, the Presiding Officer may set aside a default order" [emphasis added]. Moreover, the proposed rule adds a new provision at § 22.17(c), which states that "[w]hen the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party unless the record shows good cause why a default order should not be issued". Therefore, the new provisions at § 22.17 would allow Presiding Officers to exercise discretion in issuing a default order for "minor or technical default."

Furthermore, Presiding Officers do have authority to impose sanctions less than a complete finding of default when appropriate. Section 22.16(b) provides that any party who fails to respond to a motion within the designated period waives any objection to the granting of the motion. Section 22.19(g) provides that a when a party fails to respond to a discovery or prehearing exchange order as required, the Presiding Officer may draw adverse inferences and exclude information from evidence. As noted above in the response to comments on § 22.5(c), EPA has amended § 22.5(c)(5) so that the Presiding Officer may exclude from the record documents that are improperly served or untimely filed.

EPA has made no change to § 22.17(a) in response to Dow's comment because the CROP does not mandate default for minor errors and because other provisions of the CROP authorize less severe sanctions that are appropriate for types of nonperformance that fall short of default. Nevertheless, EPA has revised § 22.17(c) to emphasize the Presiding Officer's discretion, as discussed below.

The proposed § 22.17(b) would require complainant to specify the penalty sought and the legal and factual grounds therefor in any motion that "requests the assessment of a penalty or the imposition of other relief against a defaulting party * * *" This provision was added in order to complement the notice pleading option in § 22.14(a)(4)(ii), giving respondents notice of complainant's specific penalty demand assuring that record will support the penalty assessed. CEEC argues that delaying disclosure of the penalty demand until this stage "delays resolution, fails to give respondents sufficient notice; frustrates small entities' or small business' rights under SBREFA; and thwarts EPA's goal to increase administrative efficiency." For the reasons stated above in the response to comments on § 22.14(a)(4), EPA disagrees. Because EPA has retained the notice pleading option in § 22.14(a)(4), EPA also retains in § 22.17(b) the requirement that complainant specify a penalty and state the legal and factual grounds therefor.

In its objection to the notice pleading option, CEEC states that the new provision requires disclosure of the penalty demand in "any motion for default" when such demand has not been disclosed in the complaint. This statement does not correspond exactly to the text of the § 22.17(b), which only requires that motions for default specify a penalty sought "[w]here the motion requests the assessment of a penalty * * *" Section 22.17(b), consistent with accepted practice under the existing CROP, allows parties to make motions that merely ask the Presiding Officer to determine whether a default has occurred, without arguing at that time what penalty should be assessed.

As noted in the response to comments on § 22.17(a), not all failures to conform to the CROP will warrant a default judgment. Until such time as a respondent is found to be liable for a default judgment, it is not necessary for the parties to commit their resources to arguing what relief is appropriate. Motions for default may be likened to motions for accelerated decision: It is appropriate in many instances to file a motion for partial accelerated decision, that merely attempts to resolve whether as a matter of law respondent is or is not liable for a violation, leaving the determination of the proper penalty for

a subsequent motion if liability is established. This approach spares the parties from burdensome litigation over an issue that may be moot.

CEEC's statement mirrors a statement in the preamble to the proposed rule (63 FR at 9469). EPA acknowledges that this statement, while generally accurate, is overly broad in that it incorrectly implies that every motion for default must specify a penalty. In order to avoid unnecessary burdens on the litigants, EPA intends that the CROP should continue to allow parties to make motions that merely ask the Presiding Officer to determine whether a default has occurred, without specifying a penalty in that particular motion. Pursuant to the second sentence of paragraph (b), complainant will still be obliged to specify a penalty if it moves for the assessment of a penalty against a defaulting party. However, this may be a second motion that follows a finding that default judgment against respondent is warranted.

In order to eliminate any confusion resulting from the overly broad statement in the preamble or ambiguity in the regulation itself, EPA has added an additional clarifying sentence to § 22.17(b): "The motion may seek resolution of all or part of the proceeding."

Dow supports the revision of § 22.17(c) that gives the Presiding Officers greater discretion in determining the appropriate relief in the default orders because this "flexibility will let the Presiding Officer ensure that any relief ordered is supported by the administrative record." Dow's comment is essentially reiterated by CMA and API: both organizations "support the provision requiring the Presiding Officer, when issuing a default order, to determine that the relief sought in the complaint is consistent with the applicable statute."

Even though there were no adverse comments regarding this provision, the preceding discussion of paragraphs (a) and (b) suggests some useful revisions of paragraph (c). First, corresponding to § 22.17(b)'s statement that a default "motion may seek resolution of any or all parts of the proceeding", § 22.17(c) is revised to no longer require that a default order must be an initial decision, unless it resolves "all issues and claims in the proceeding." This will allow Presiding Officers to find a party liable in default, without necessarily determining the appropriate relief in the same order.

Second, EPA has also relaxed the proposed requirement that "the relief proposed in the complaint or the motion for default shall be ordered unless the record clearly demonstrates that the requested relief is inconsistent with the Act." Under this proposed language, if a proposed penalty were inconsistent with the record (e.g., owing to a mathematical error), though not to such a degree as to be clearly inconsistent with the statutory penalty authority, the Presiding Officer would apparently be required to assess the proposed penalty. In order to prevent injustice, EPA has amended this language to allow the Presiding Officer to impose other relief where "the requested relief is clearly inconsistent with the record or the Act".

c. Final Rule. EPA is adopting § 22.17 as proposed, but with several modifications. As discussed above, EPA has added one sentence to § 22.17(b). EPA has also noted that the rest of the proposed § 22.17(b) repeats parts of § 22.16(a). Section 22.16 applies to all motions, except as otherwise provided, so restatement is not necessary in § 22.17(b). Moreover, the failure to include all of § 22.16(a) in § 22.17(b) introduces potential confusion. Accordingly, EPA has deleted from the final rule those parts of the proposed § 22.17(b) that are redundant with the general requirements for motions at § 22.16.

The proposed § 22.17(a) provided that a default by respondent would constitute a waiver of respondent's "right to a hearing" on the factual allegations in the complaint. Throughout today's final rule, for clarity and consistency, EPA has endeavored to use the term "hearing" only to refer to oral evidentiary hearings. As there is no right to an oral evidentiary hearing (see, e.g., In re Green Thumb Nursery, Inc., 6 E.A.D. 782 (1997)), EPA has revised § 22.17(a) to state that default by respondent constitutes a waiver of respondent's "right to contest" the factual allegations in the complaint. EPA has replaced the undefined word "action" in § 22.17(a) with the word "proceeding," which is defined in today's final rule as discussed below.

EPA has revised § 22.17(c) as follows: (1) EPA has added the clause "as to all or part of the proceeding," to the first sentence, before "unless the record shows"; (2) EPA has revised the second sentence to say "If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice."; (3) EPA has expanded the next to last sentence in order to allow the Presiding Officer to impose relief other than that requested by complainant if it is clearly inconsistent with the record of the proceeding. In addition, EPA has split the second sentence of the proposed § 22.17(c) into two sentences. This editorial revision is not intended to effect a substantive change.

For consistency with changes elsewhere in the CROP, EPA has revised § 22.17(d) to refer to the effective date of a "Permit Action" rather than the effective date of a permit revocation or suspension. To conform to the preferred style of the U.S. Government Printing Office, EPA has also revised § 22.17(d) to state the time allowed for paying default penalties with the numeral "30".

12. Quick Resolution (40 CFR 22.18(a))

a. Summary of Proposed Rule. In cases where the complaint proposes a specific penalty amount (and seeks no other relief), the proposed § 22.18(a)(1), would provide that the respondent can resolve the case at any time by simply paying the proposed penalty in full. The only restriction on when the respondent can take advantage of the quick resolution provision is in cases involving the public comment provisions of § 22.45. In these cases, the respondent must wait until 10 days after the period for public comment has closed before submitting the penalty payment.

Where the complaint includes a specific proposed penalty, the proposed § 22.18(a)(2) would allow respondent to resolve an action without filing an answer by paying the penalty within 30 days of receipt of the complaint. By paying the proposed penalty within that 30 day time frame, the action is resolved before the answer is due and hence there is no need for respondent to file an answer.

If the respondent wishes to resolve the matter by paying the proposed penalty in full but needs additional time in which to do so, § 22.18(a)(2) would allow the respondent to file a written statement with the Regional Hearing Clerk within 30 days of receiving the complaint in which it agrees to pay the penalty within 60 days of receipt of the complaint.

b. Significant Comments and EPA Response. Dow noted that in actions subject to the public comment provisions, the 30 day public comment period may require respondent to file an answer even though it wants to resolve the action, because the last sentence of § 22.18(a)(1) provides that a respondent cannot utilize the quick resolution provision until 10 days after the close of the public comment period. This commenter suggested amending the last sentence of § 22.18(a)(1) to explicitly provide that the respondent does not have to file an answer if it wishes to settle the action by paying the full penalty. Instead, EPA believes that the

better approach is for respondent to file a statement agreeing to pay the full penalty, in accordance with § 22.18(a)(2), and delay payment until the eleventh day after the close of the public comment period. Section 22.18(b)(2) provides ample time for paying the proposed penalty after the close of the public comment period, so long as the public notice is issued contemporaneously with the complaint. If the public notice is delayed, a motion for extension of time may be necessary.

CEEC supports the proposed inclusion of the "quick resolution" process, but noted that the quick resolution option is not available to respondents if the complaint does not propose a specific penalty. The proposed language would have prevented respondents who receive complaints that did not contain specific penalty demands from exercising the quick resolution option even after EPA has made a specific penalty demand. This was unintended, and EPA has revised § 22.18(a)(1) so that once complainant has made a specific penalty demand, respondent may resolve the proceeding by paying the proposed penalty in full. The option of notice pleading in lieu of pleading a specific penalty amount is intended to provide EPA with flexibility in those situations where only the violator possesses information crucial to the proper determination of the penalty, such as the economic benefit the violator derived from its noncompliance, or its ability to pay the penalty. Under such circumstances, EPA needs to obtain and review the necessary information before proposing a penalty. Section 22.19 of the rule provides that EPA must at the prehearing exchange stage propose a specific penalty. Once EPA proposes a specific penalty, the respondent may, if it wishes, utilize the quick resolution provision and pay the proposed penalty in full at that time. As a result of this revision, notice pleading does not prevent the use of the quick resolution provision by the respondent, it only delays it. While the respondent, under such circumstances, would not be able to take advantage of the quick settlement until after the prehearing exchange, respondents always have the option of early resolution of the proceeding pursuant to § 22.18(b), by informally negotiating settlement with the Agency.

The same commenter noted that the quick resolution option was available to respondents only if they are willing to pay the full amount of the proposed penalty. This commenter also noted that the quick resolution provision should include safeguards to prevent or redress those situations where EPA may have pled an excessive penalty amount. These comments appear to envision a quick resolution that is entirely unlike that proposed in § 22.18(a), but which does not appear to differ significantly from the settlement process in § 22.18(b) and (c). As presently codified, the CROP does not explicitly provide for a "no contest" plea. EPA intended to remedy this by explicitly providing in the proposed § 22.18(a) a formal process for a respondent who—upon receipt of the complaint or at any later time—wishes to simply pay the proposed penalty and disengage from the proceeding. In contrast, the settlement provisions of § 22.18(b) and (c) provide opportunity to negotiate a settlement that could terminate the proceeding upon payment of a lesser penalty. If the respondent believes that EPA has pled an excessive amount, the respondent has the option of informally discussing the matter with EPA during settlement negotiations, or formally contesting the proposed penalty through the hearing process. Consequently, there is no need to amend the proposed § 22.18(a) to safeguard respondents' interests.

The USAF noted that, because of fiscal law requirements, it would be difficult for a federal agency to make a penalty payment within 60 days of complaint issuance, thereby effectively foreclosing federal agencies from taking advantage of the quick resolution provision. The USAF suggests that 18 months would be appropriate. EPA acknowledges that it may be difficult for a federal agency, or a state or local agency, to pay a penalty within 60 days of receipt of the complaint. However, EPA does not believe that the intended purpose of the quick resolution provision would be served by such an extension of the payment period. Where respondent is unable to pay the penalty within 60 days, EPA believes that the § 22.18(b) settlement process would be the appropriate process for terminating the proceeding.

The USAF also noted that this section obligates respondent to admit the jurisdictional allegations of the complaint and waive its right to appeal a final order, and argues that this deprives the federal respondent its right to elevate the matter to the President. The Agency maintains that if a federal agency wishes to contest a proposed penalty, it should exercise its right to hearing and raise the matter through the appeal processes provided. If, on the other hand, the federal agency wishes to conclude the action, it must be willing to agree to waive its rights to further appeals.

c. Final Rule. As noted above, EPA has amended the proposed § 22.18(a)(1) to allow quick resolution at any point in a proceeding once complainant has proposed a specific penalty, including penalties specified in complainant's prehearing exchange, and by moving from the first to the second sentence the language that limited quick resolution to cases where the complaint contained a specific proposed penalty.

As discussed in connection with the revisions to § 22.14, EPA has deleted Appendix B. Accordingly, EPA has revised the first sentence of § 22.18(a)(1) to require that payment be made as specified by complainant, and deleted reference to Appendix B. In order to address interbank funds transfers, EPA has expanded § 22.18(a)(1) to include other instruments of payment. With these changes, the first two sentences of § 22.18(a)(1) now read as follows:

> A respondent may resolve the action at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed.

The proposed § 22.18(a)(3) provided that quick resolution would constitute a waiver of respondent's "rights to a hearing". Throughout today's final rule, for clarity and consistency, EPA has endeavored to use the term "hearing" only to refer to oral evidentiary hearings. As there is no right to an oral evidentiary hearing (see, e.g., In re Green Thumb Nursery, Inc., 6 E.A.D. 782 (EAB 1997)), EPA has revised § 22.18(a)(3) to state that quick resolution constitutes a waiver of respondent's "rights to contest the factual allegations in the complaint".

EPA has also corrected a typographical error in the word "section" that appeared in the third sentence of the proposed § 22.18(a)(1). In the third sentence of § 22.18(a)(1), EPA has replaced the phrase "to revoke, terminate or suspend a permit" with the term "Permit Action", as discussed in connection with revisions to § 22.3(a) and § 22.14(a)(4)(iii).

EPA has replaced the undefined word "action" in § 22.18(a)(1) and (2) with the word "proceeding," which is defined in today's final rule as discussed below. Finally, to conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.18(a)(1) and (2) to state all time periods with numerals.

13. Settlement and Scope of Resolution or Settlement (40 CFR 22.18(b)&(c))

a. Summary of Proposed Rule. The proposed § 22.18(b) would clarify the existing settlement process. Paragraph (b)(2) would specify that consent agreements contain an express waiver of the respondent's right to a hearing and appeal of the final order, and establishes additional content requirements for consent agreements in cases where the complainant proposes to simultaneously commence and conclude a case pursuant to § 22.13(b) through filing of a consent agreement and final order negotiated before a complaint is issued.

Paragraph (b)(3) would be revised to expressly provide that an administrative action is settled only when the Regional Judicial Officer or Regional Administrator, or, in cases commenced at EPA Headquarters, the Environmental Appeals Board, approves a consent agreement and issues a final order.

Paragraph (c) would provide that the effect of settlements and full payment of proposed penalties is limited to those facts and violations specifically alleged in the complaint, and reserves the Agency's right to pursue injunctive relief or criminal sanctions.

b. Significant Comments and EPA Response. Dow urges that § 22.18(b)(2) should expressly provide for partial or contingent settlements. Dow's particular concern is that paragraph (b)(2) should not require respondent to waive its right to hearing or to appeal matters that are raised in the complaint but not included in the consent agreement or the final order. Dow's comments do not take issue with the waiver of rights to hearing or appeal in settlements of the entire proceeding.

Paragraphs (a), (b) and (c) of § 22.18 define the process by which the parties may resolve an entire proceeding, and so, consent agreements pursuant to § 22.18(b)(2) and final orders under § 22.18(b)(3) can be neither partial nor contingent. Nevertheless, EPA disagrees with Dow's conclusion that the proposed rule precludes partial or contingent settlements. Where the parties wish to settle some of the counts in a complaint, they may file stipulations as to a respondent's liability, and/or to the appropriate relief, for those counts. Where the parties seek a more final resolution, they may move pursuant to § 22.12(b) to sever the case "with respect to any or all parties or issues." Upon severance, the parties may settle the uncontested portions and litigate the contested portions. Contingent settlements (e.g., where the parties agree that if a contested issue is resolved in a certain manner, then the parties agree to settle on predetermined terms) are possible under the proposed rule, however, the documents committing the parties to the contingency agreement would not themselves constitute "consent agreements" pursuant to § 22.18(b)(2). Such contingent settlements could be accomplished, for example, through formal stipulations as to the appropriateness of certain relief in the event that liability is established, or agreements to sign a specific "consent agreement" when the agreed conditions are met. As the problems Dow describes can easily be avoided, EPA believes that the language in the proposed rule is desirable in that it gives respondents unambiguous notice that consent agreements waive respondents' rights to a hearing and all rights of appeal, including appeal to the federal courts as well as appeal to the EAB under §§ 22.30 and 22.32.

CMA/API object to language proposed for § 22.18(c) that would limit the scope of relief available in settlements to those "violations and facts" alleged in the complaint. CMA/API feel this provision prevents the parties from taking advantage of the economies that result from resolving in a single settlement additional violations that may come to light during the proceeding. EPA agrees that it is, in many cases, desirable to resolve in a single proceeding additional violations that become apparent as a case progresses. However, such expansions of a proceeding should be accomplished through motions to amend the complaint, pursuant to § 22.14(c). Although even a joint or uncontested motion to amend the complaint is somewhat more burdensome that expanding the case through a consent agreement alone, this burden is outweighed by the interest of assuring a clear public record of the Agency's administrative enforcement proceedings.

This is particularly important where statutes require public notice of a proposal to assess penalties for specific violations. Such statutes envision that interested members of the public will have had notice of all violations cited in the complaint and all violations resolved by consent agreement, in order to properly avail themselves of their statutory rights as to those actions.

CEEC also objects to the proposed language limiting settlements to "the facts and violations alleged in the complaint", on the grounds that it is improper for the Agency to assess in a subsequent proceeding additional penalties for other violations arising out of the same circumstances identified in the initial proceeding. As noted above, EPA is well aware that resolving as many violations as possible within a single proceeding generally demands less resources than pursuing multiple cases involving similar facts or issues, and EPA generally can be counted on to take advantage of such cost-saving opportunities. There are, however, circumstances where this may be inadvisable or impossible. For example, where one violation is straightforward and undisputed, neither party would gain from delaying resolution of that case in order to address within the same proceeding another violation sharing certain facts with the first, but concerning a different statute, an unsettled area of the law, and presenting substantial evidentiary disputes. In other circumstances, where new facts establishing other violations come to light after the close of a case, it would be impossible to resolve these newly discovered violations through the closed case. EPA therefore disagrees with CEEC's contention that it is necessarily improper for EPA to seek penalties in a subsequent proceeding for violations related to the initial proceeding.

Section 22.14(a) requires that a complaint specify each statutory provision, regulation, permit or order that respondent is alleged to have violated, and a concise statement of the factual basis for alleging the violation. The complaint thereby describes the violations at issue in the case, in terms of the specific legal requirements and their specific factual circumstances; anything else is outside the scope of the proceeding. This description of the violations that comprise the case must also describe the scope of any settlement. Any violations that are outside the scope of the complaint must necessarily be outside the scope of any possible settlement.

The language of § 22.18(c) to which CEEC objects merely states that payment of a penalty "shall only resolve respondent's liability * * * for the violations and facts alleged in the complaint." This provision defines the scope of settlement in its most obvious and straightforward sense.

c. Final Rule. EPA is adopting § 22.18(b) and (c) as proposed, with minor editorial changes. The proposed § 22.18(b)(2) provided that in a consent agreement, respondent must waive "any right to a hearing". For the reasons noted in the discussion of § 22.18(a)(3) above, EPA has revised this to require that respondent waive "any right to contest the factual allegations in the complaint". EPA has also replaced the term "consent order" with the term "final order" or "proposed final order" in paragraph (b) and elsewhere (§§ 22.3

(definition of final order), 22.13(b), and 22.45(b)(4)). A consent order is in fact a final order, and CROP's suggestion that there is a distinction only adds potential for confusion. EPA has replaced the phrase "permit revocation, termination or suspension" with "Permit Action", as discussed in connection with revisions to § 22.3(a) and § 22.14(a)(4)(iii). Finally, reflecting changes to § 22.14(a) noted above, EPA has added the requirement that in proceedings commenced pursuant to § 22.13(b), the consent agreement shall also contain the information required in § 22.14(a)(8).

14. Alternative Dispute Resolution (40 CFR 22.18(d))

a. Summary of Proposed Rule. The proposed § 22.18(d) would add a new provision that recognizes the use of alternative dispute resolution ("ADR") within the scope of the Alternative Dispute Resolution Act, 5 U.S.C. 581 *et seq.* The proposed rule would provide that, while the parties engage in ADR, the enforcement proceeding is not automatically stayed, jurisdiction remains with the Presiding Officer, and all provisions of the CROP remain in effect. The parties may select any person to act as a neutral, or may file a motion with the Presiding Officer to request a neutral. If the Presiding Officer concurs with the motion, the Presiding Officer forwards the motion to the Chief Administrative Law Judge who designates a qualified neutral.

b. Significant Comments and EPA Response. Those who commented on the proposed § 22.18(d) support the Agency's use of ADR and inclusion in the CROP of a provision that recognizes ADR. CEEC believes that the proposed rule does not go far enough to encourage ADR, that it seems to employ ADR only after a complaint is filed, and that it limits the use of ADR by not staying the enforcement proceeding when the ADR process is commenced. CEEC urges the Agency to make available and encourage the use of a broad array of ADR options, by formalizing the availability of the complete range of ADR. Dow Chemical supports the allowance upon request of temporary stays and extensions for motions, discovery and hearings during ADR proceedings, to encourage voluntary settlement and to avoid imposing undue burdens on the parties and the Presiding Officer.

EPA believes that the absence of an automatic stay provision in the rule does not unreasonably limit the use of ADR. The Presiding Officer always has the discretion to grant a stay in connection with the parties' use of ADR, but such a decision should be made for each case individually depending on the circumstances, and a stay may be inappropriate in cases of excessive delay.

EPA agrees that a broad array of ADR options should be made available to parties, but believes that it is not necessary to list in the rule, and thereby possibly limit, the range of ADR options. Section 22.18(d)(1) provides for "any process within the scope of the Alternative Dispute Resolution Act." The neutral serving in the particular case may discuss ADR options with the parties.

CEEC objected that the CROP does not require the Agency to attempt to resolve a case before filing the complaint. The CROP does not limit ADR to the time after a complaint is filed. The parties may agree to use ADR prior to the filing of a complaint.

c. Final Rule. EPA has adopted § 22.18(d) as proposed, with minor technical revisions to paragraph (d)(3) intended to address two concerns. First, in subpart I cases, it is appropriate for a neutral to be appointed by the Regional Administrator rather than by the Chief Administrative Law Judge. Second, it is more accurate to say the Presiding Officer "grants" a motion, rather than "concurs with" a motion.

15. Prehearing Exchange; Prehearing Conference (40 CFR 22.19(a)&(b))

a. Summary of Proposed Rule. EPA proposed to amend § 22.19(a) and (b) by reversing paragraphs (a) and (b) in order from the existing CROP, reflecting the fact that the information exchange is more common than, and usually precedes, a prehearing conference. The requirements for the prehearing exchange would now appear in paragraph (a). In addition to the information required to be exchanged under § 22.19(b) of the existing CROP, EPA proposed that the complainant would specify a proposed penalty if it has not done so in the complaint and state the basis for that penalty. The respondent would be required to provide all factual information it considers relevant to the assessment of a penalty, even if the complainant did not identify a specific penalty in the complaint. EPA also proposed under § 22.22 to tighten the standards for admitting into evidence information that was not timely exchanged.

In addition, EPA requested comments on whether it is necessary for the complainant to specify a proposed penalty in the prehearing exchange when it has not specified a specific penalty in the complaint (notice pleading). Comments were also requested on the merits of allowing the complainant to postpone for an additional 30 days, or indefinitely, the making of a specific penalty demand where EPA has not specified a specific penalty in the complaint. EPA also requested comments on the merits of requiring by rule that the parties simultaneously perform their prehearing information exchange 90 or 120 days after the filing of the answer, rather than requiring a prehearing exchange order from the Presiding Officer. 63 FR at 9472.

EPA proposed to revise paragraph (b) to no longer compel the Presiding Officer to require the parties to "appear at a conference before him", but instead would make the nature of the conference more flexible.

b. Significant Comments and EPA Response. CEEC opposes allowing EPA to postpone making a specific proposed penalty until the prehearing information exchange, insisting that the proposed penalty appear in the complaint. Dow does not object to postponing the specific penalty until prehearing exchange, but objects to any further postponement. Dow notes that if information obtained during or after the prehearing exchange warrants a change in the proposed penalty, the CROP already allows for amendment of the pleadings. Dow maintains that requiring a specific proposed penalty is not a hardship for the complainant, however, postponing it beyond prehearing exchange would impose a hardship on the respondent. Respondents need to know the proposed penalty amounts to make informed decisions about settling or contesting violations. Therefore, Dow argues that no further delays or extensions should be allowed, except with the consent of the respondent. UWAG suggested that the proposal would be ineffective because complainant would be no better informed at the time of prehearing exchange than it is at the time the complaint is issued.

As set forth in the discussion concerning § 22.14, EPA has retained § 22.14(a)(4)(ii), which allows EPA to elect not to specify a specific penalty in the complaint. When complainant has incomplete or unreliable information on subjects such as the economic benefit respondent received from its unlawful conduct and its ability to pay a penalty, it would be of little benefit to respondent for complainant to make an uninforme—and possibly unrealistic—penalty demand, which would need to be amended when better information becomes available. Complainant would risk specifying either a too-high figure that could result in EAJA claims, or a too-low figure that fails to achieve

deterrence, and then be forced to defend its guesswork in the penalty litigation. EPA has concluded that complainants should not have to specify a penalty demand until after prehearing exchange.

EPA continues to believe that there is merit to giving respondents a specific penalty demand at the earliest practical stage of a proceeding, and has therefore not adopted the approach used in the federal courts, where specific penalty demands generally are not made until the end of the proceeding. Today's final rule requires complainant to specify a proposed penalty no later than 15 days after respondent has filed its prehearing exchange. The final rule requires each party to include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty, as well as exhibits and documents it intends to use at the hearing, names of witnesses and summaries of their anticipated testimony. Owing to the general nature of these prehearing exchange requirements, further discovery may still be appropriate, and complainants may need to amend their proposed penalties, but the prehearing information exchange nonetheless will provide complainants with a substantial basis for formulating a specific penalty demand.

CEEC and Dow oppose automatic prehearing exchange, stating that during productive settlement discussions such attention could be better spent on settlement. Dow proposes one of the following options: (1) making the prehearing exchange totally dependent on an order from the Presiding Officer, or (2) making the prehearing exchange automatic, but expressly allowing the Presiding Officer to issue a temporary stay or to extend the deadline. CMA/API recommend a default time period of 90 days prehearing exchanges as a starting point, which the parties would be allowed to modify by mutual agreement.

Today's final rule does not require the automatic filing of prehearing exchanges. Although such a requirement may expedite resolution of many cases, EPA believes that it would be a distraction and an unnecessary burden in that greater number of cases that progress readily toward settlement. Furthermore, the Presiding Officer may require additional information from the parties as part of his or her prehearing scheduling order than is provided in § 22.19(a). Therefore, the prehearing exchanges will not be required until ordered by the Presiding Officer.

Regarding the proposed § 22.19(b), Dow notes that EPA failed to delete the phrase "before him", as discussed in the preamble to the proposed rules. EPA agrees that this editorial change would help clarify that § 22.19(b) no longer requires that the parties personally appear before the Presiding Officer, but allows the Presiding Officer to conduct telephonic prehearing conferences.

CEEC proposes that EPA should be required, as part of its prehearing exchange, to provide a respondent with all information relevant to whether the respondent had fair notice of the regulatory requirement(s). Many different offices in EPA conduct compliance assistance, provide speakers, and otherwise publicize regulatory requirements, and documenting all such efforts in every case would present an unreasonable and unnecessary burden on complainant, particularly because fair notice of the law is rarely an issue. Moreover, it is unlikely that EPA would have evidence showing that respondent does not know something. Accordingly, EPA rejects this proposal.

CEEC also proposes that EPA should also be required to disclose all information it uses, or chooses to ignore, in determining the penalty it seeks for each alleged violation. The proposed § 22.19(a) would require complainant to state the basis for the penalty in its prehearing exchange, as well as to provide narrative summaries of witnesses' expected testimony, and copies of all documents and exhibits that it intends to introduce into evidence at the hearing. These requirements would assure that complainant discloses all information it uses in determining the appropriate penalty. It would not, however, require disclosure of all information that EPA "chooses to ignore." EPA believes that little or no reliable, relevant information is ever knowingly ignored in determining proposed penalties. Moreover, such exculpatory evidence and evidence of concerning a respondent's inability to pay the proposed penalty is almost always in respondent's hands, and not in complainant's. Accordingly, it would be exceedingly rare for the requirement proposed by CEEC to provide a respondent with new information. This potential benefit is greatly outweighed by the burden on the complainant to identify, document, and exchange all the information that it has not considered in determining the proposed penalty.

EPA agrees with CEEC's recommendation that § 22.19(a) should be amended to make the complainant's and respondent's burdens more equal. In the proposed § 22.19(a), complainant would be required to state the basis for the proposed penalty, while respondent would have to provide "all factual information it considers relevant to the assessment of a penalty". For cases where complainant has specified a proposed penalty before prehearing exchange, § 22.19(a)(3) of today's final rule now requires that "complainant shall explain in its prehearing information exchange how the proposed penalty was calculated in accordance with any criteria set forth in the Act, and the respondent shall explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated." For those cases where EPA has not specified a proposed penalty, § 22.19(a)(4) imposes on each party the identical burden of providing "all factual information it considers relevant to the assessment of a penalty."

c. Final Rule. For the foregoing reasons, EPA is adopting § 22.19(a) with the two substantive changes noted above. In response to CEEC's comment, EPA has amended the proposed § 22.19(a) to provide a more equitable burden concerning providing information concerning the proposed penalty. EPA has also revised § 22.19(a) to allow complainant to specify a proposed penalty 15 days after prehearing exchange, rather than in its prehearing exchange as proposed.

The parties information exchange burdens necessarily differ depending on whether complainant has specified a proposed penalty before the prehearing exchange, but the proposed rule did not fully address these differences. In order to make the prehearing information exchange process address these differences, EPA has significantly reorganized and revised § 22.19(a). Paragraph (a)(1) contains the provisions describing the nature and effect of the prehearing information exchange. The only significant differences between the provisions of paragraph (a)(1) and their counterparts in the proposed rule are that paragraph (a)(1) expressly requires that prehearing exchange be "filed" (§ 22.5(b) provides for service on the Presiding Officer and opposing parties), and clarifies that an order of the Presiding Officer initiates prehearing exchange.

Paragraph (a)(2) describes the contents of prehearing information exchange, other than those that depend upon whether complainant has specified a proposed penalty. These requirements are unchanged.

As discussed in the response to comments above, paragraph (a)(3) provides that where complainant has already specified a proposed penalty, complainant shall include in its prehearing information exchange an explanation of how the proposed

penalty was calculated in accordance with any criteria set forth in the Act, and the respondent shall include an explanation why the proposed penalty should be reduced or eliminated.

Paragraph (a)(4) applies where complainant has not specified a proposed penalty, and requires each party to include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty. It also requires that complainant file a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in the Act 15 days after respondent has filed its prehearing information exchange.

EPA has adopted § 22.19(b) as proposed, except that in response to comment, EPA has deleted the words "before him".

16. Other Discovery (40 CFR 22.19(e))

a. Summary of Proposed Rule. The proposed § 22.19(e) would provide a mechanism for discovery should any be necessary after the parties have completed their prehearing exchange. Under the CROP, other discovery has always been limited in comparison to the extensive and time-consuming discovery typical in the Federal courts, and designed to discourage dilatory tactics and unnecessary and time-consuming motion practice.

The proposed revisions to § 22.19(e)(1) would require additional detail in motions for discovery, and refine the substantive standards for issuance of a discovery order. The proposed rule would add a prohibition against discovery that would unreasonably burden the other party. The proposal would also elaborate the existing requirement that discovery seeks "information [that] has significant probative value", by the addition of the clause "on a disputed issue of material fact relevant to liability or the relief sought." The proposed rule would clarify the existing prohibition on discovery where "[t]he information to be obtained is not otherwise obtainable", by substituting a requirement that discovery is permissible so long as it "[s]eeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily".

Paragraph (e)(2) of the proposed rule would expressly prohibit discovery of a party's settlement positions and information regarding their development, specifically including penalty calculations that are based on Agency settlement policies. Paragraph (e)(3) would clarify that the Presiding Officer may order depositions upon oral questions only where additional conditions, over and above those in paragraph (e)(1), are satisfied. Paragraph (e)(4) would consolidate in the main body of the CROP the subpoena standards presently scattered through the supplemental rules. This consolidation does not signify any general subpoena authority: Subpoenas are available in CROP proceedings only where authorized by the Act giving rise to the cause of action.

Paragraph (e)(5) states that none of the § 22.19(e) limitations on discovery limit a party's right to request admissions or stipulations, a respondent's right to request Agency records under the Federal Freedom of Information Act ("FOIA"), 5 U.S.C. 552, or EPA's authority under the Act to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information.

b. Significant Comments and EPA Response. Several of the commenters object to proposed changes to § 22.19(e)(1) that would allow discovery only where it "[w]ill neither unreasonably delay the proceeding nor unreasonably burden the non-moving party", and where it "[s]eeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." UWAG and UARG are concerned that these criteria are vague and might prevent respondents from discovering documents relating to the basis for the Agency's determination that a violation has occurred and concerning how the Agency determined the proposed penalty. UWAG and UARG believe that respondents cannot meaningfully respond to a complaint without access to such documents. CEEC states that while efforts to lessen the burden of discovery are admirable, the proposed limitations on discovery are one-sided and disadvantage respondents. CMA/API believe that the proposed criteria of § 22.19(e)(1) are "unfair and fundamentally tip the balance in favor of EPA." CMA/API say the "unreasonably burdensome" standard is vague, subjective, and too easily abused.

EPA believes that the changes to § 22.19(e)(1) will not significantly alter the amount of discovery permitted, although it is hoped that they will reduce the amount of litigation over whether discovery is to be allowed. EPA notes that the provisions to which the commenters object are less vague than the comparable provisions of the existing rule, which have been reasonably effective for 18 years. Although the standard "neither unreasonably delay nor unreasonably burden" does not achieve mathematical exactness, it is the sort of standard that judges are accustomed to apply. EPA is confident that the impartial presiding officers can implement these standards in a fair and efficient manner.

Although commenters express concern that the proposed discovery criteria may prevent respondents from discovering information important to their defense, no commenter has identified any specific information or category of information that could not be discovered under the proposed discovery standards. None of the commenters have articulated any reason why discovery should extend to information that does not have significant probative value on a disputed issue of material fact relevant to liability or the relief sought, or why a presiding officer should allow unreasonable delay or unreasonable burdens. EPA perceives no basis for the contention that these proposed discovery criteria unfairly limit discovery. The proposed changes to the standards for granting a discovery motion are incremental, and are unlikely to produce different results in the majority of cases. The proposed changes are beneficial in that they clarify the types of discovery that are appropriate and help prevent inappropriate discovery.

There is no inherent unfairness in rules that permit less extensive discovery than those of the Federal courts. Restrictions on discovery work as both an burden and an advantage, and as some of the commenters acknowledge, respondents share in the advantages as well as the burdens. For example, the extensive discovery allowed in the Federal courts allows EPA to expand a judicial case through discovery of all manner of violations. The CROP limits the Agency's discovery to "information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." As a result, EPA foregoes in its administrative proceedings the opportunities afforded by extensive discovery in exchange for the benefits of more expeditious case resolution.

EPA finds no merit to the contention that respondents cannot meaningfully respond to a complaint without broader discovery of documents relating to the basis for the Agency's determination that a violation has occurred and concerning how the Agency determined the proposed penalty. EPA is unlikely to have unique information relevant to the case. Respondents are generally in a better position than is EPA to obtain

first hand information about whether or not they have conducted their activities in violation of the law, and about the circumstances surrounding any violations. The evidence upon which EPA bases its enforcement action is generally acquired from the respondent through an inspection or information collection request that is well known to respondent, or through respondent's own reporting. The proposed § 22.14(a) requires EPA to articulate the regulatory and factual basis of its case in the complaint. The proposed § 22.19(a) requires EPA in prehearing exchange to identify all witnesses it intends to call at hearing, provide summaries of their expected testimony, provide copies of all exhibits and documents to be introduced as evidence, and specify the basis of the proposed penalty. In this context, it cannot reasonably be argued that the limitations on other discovery imposed through § 22.19(e) would prevent respondents' full and meaningful participation in the hearing.

Dow asserts that it is not appropriate for § 22.19(e)(2) to preclude discovery of penalty calculations based on "settlement policies," because this would leave respondent without information necessary to respond to the proposed penalty. Dow observes that EPA does not have separate written policies for settlement and for pleading penalties, and Dow asserts that EPA uses its "settlement" policies for both purposes. Dow argues that § 22.19(e)(2) should allow discovery of any calculations used to derive a proposed penalty for pleading purposes or otherwise pursued in the proceeding.

EPA had intended that the proposed § 22.19(e)(2) should make clear that a party's settlement positions and information regarding their development are not discoverable. There is merit to Dow's contention that EPA should not be able to shield from discovery the basis for a proposed penalty simply by basing it on a document formally titled a "settlement policy." The preamble to the proposed rule describes this paragraph in a manner that appears to avoid this problem, "the proposed revision would prohibit discovery of a party's settlement positions and information regarding their development specifically including penalty calculations for purposes of settlement based on Agency settlement policies." 63 Fed. Reg. at 9473. Accordingly, EPA has replaced the parenthetical clause from the proposed paragraph (e)(2), "(such as penalty calculations based upon Agency settlement policies)", with more restrictive language taken the preamble, "(such as penalty calculations for purposes of settlement based on Agency settlement policies)".

CMA/API express their understanding and support of limitations on discovery and use of settlement positions, but indicate concern that § 22.19(e)(2) might signal an EPA intention to abandon its practice of sharing penalty and economic benefit calculations in settlement negotiations. This revision of CROP draws on two very different antecedents, as it merges the different approaches of the part 22 and the proposed part 28 procedures. In those programs that have historically relied on the 1980 version of the CROP, the Agency has specified a penalty demand in the complaint and has provided a copy of the applicable penalty policy and penalty calculation worksheets typically at initial settlement conferences, but never later than prehearing exchange. In contrast, in its CWA and SDWA class I administrative enforcement programs under the proposed part 28 rules, EPA did not generally argue the basis of a penalty or specify a penalty demand until post hearing briefs, in the manner of enforcement proceedings in the Federal courts. For those programs where the practice has been to specify a penalty in the complaint, EPA does not intend any dramatic change from current practice regarding disclosure of penalty and economic benefit calculations in settlement negotiations. For those programs that evolved in the Federal courts and under the proposed part 28 procedures, specifying a penalty and the basis for that penalty at prehearing exchange will be a major change, but it is certainly a change that will be to respondents' advantage.

Dow argues that the word "reasonably" should be inserted into § 22.29(e)(3)(i) so as to allow depositions on oral questions in circumstances where the information "cannot reasonably be obtained by alternative methods of discovery." EPA agrees that the suggested change should result in more efficient proceedings, and has therefore adopted this recommendation.

The proposed § 22.19(e)(5) also elicited several comments. Some commenters seem to misinterpret the Agency's proposal as if it were offering FOIA and EPA's other information collection authorities as substitutes for discovery opportunities taken away in § 22.19(e)(1). As noted above, the changes to § 22.19(e)(1) will only produce an incremental restriction of discovery, and would preclude only inappropriate discovery. Accordingly, substitutes for discovery are neither needed nor appropriate, and suggestions that FOIA rights be expanded are rejected. EPA proposed § 22.19(e)(5) simply to make clear that FOIA requests, inspections, statutorily provided information collection requests, and administrative subpoenas issued by an authorized Agency official other than the Presiding Officer do not constitute discovery and are not restricted by the CROP. The proposed revision does not change the CROP, because these activities have never been subject to a Presiding Officer's control.[2]

EPA acknowledges that the statutory information collection tools available to the Agency are substantial, however, EPA does not believe that this undermines the fairness of the CROP proceedings. The central factual issue of a CROP proceeding is whether respondent's conduct has been consistent with the law, and respondent's ability to gather information about its own conduct is always greater than EPA's, statutory information collection authorities notwithstanding. In any event, it is uncommon for EPA to initiate inspections, information collection requests, or administrative subpoenas (other than those issued by the Presiding Officer) to gather information to support cases that have already commenced.

EPA notes that the clause "EPA's authority under the Act" may have contributed to some commenters' view of paragraph (e)(5) as endorsing the use of information collection authorities outside of those in § 22.19 to "otherwise obtain information" support ongoing cases. EPA's primary motivation in proposing § 22.19(e)(5) is that its authority to conduct investigations

[2] See, e.g., In Re: Dominick's Finer Foods, Inc., Docket No. CERCLA/EPCRA-007-95 (February 15, 1996) (holding that a pending action in which the parties are subject to the discovery rules of § 22.19(f) "is by no means a basis for restricting EPA's information gathering rights" under CERCLA § 104(e)). Cases holding that EPA may not be enjoined from exercising its investigative authority under the Solid Waste Disposal Act solely because of the pendency of a related administrative action: Del Val Ink and Color, Inc., RCRA II-91-0104 (January 12, 1993), at 6-7; Florida Dept. Of Transportation, RCRA 92-16-R (October 29, 1993), at 3-6; and Coors Brewing Co., RCRA-VIII-90-09 (January 4, 1991), at 11-15. Comparable federal court decisions: *Linde Thomson Langworthy Kohn & Van Dyke* v. *RTC*, 5 F.3d 1508 1518 (D.C. Cir. 1993) (Statute authorizing RTC investigations does not contemplate the termination of investigative authority upon commencement of civil proceedings.); *National-Standard Company* v. *Adamkus*, 881 F.2d 352, 363 (7th Cir. 1989)("The mere pendency of a related civil action does not automatically preclude EPA's use of other authorized law enforcement techniques. * * *"); and In Re Stanley Plating Co., 637 F.Supp. 71, 72-73 (D.Conn. 1986) (Nothing in RCRA suggesting that civil action restricts EPA to investigative techniques in accordance with discovery rules).

unrelated to the particular proceeding, perhaps under other statutes or at other facilities, should not be restricted by an unrelated enforcement proceeding. EPA has replaced the phrase "authority under the Act" with the more general phrase "under any applicable law" in order to better convey EPA's intention that activities unrelated to an ongoing CROP proceeding are not to be subject to the § 22.19(e) limitations.

EPA cannot agree with commenters' suggestions that EPA's information collection authorities be restricted during the pendency of a case. EPA administers fourteen different regulatory statutes, several of which impose a wide variety of requirements on EPA and on regulatees. Many corporations have dozens, or even hundreds, of facilities that are regulated by EPA. EPA needs to continually conduct inspections and exercise other information collection authorities both to identify noncompliance with existing regulations and to determine the need for new or revised regulations, whether or not a company is presently subject to a CROP proceeding. In effect, the commenters ask EPA to blind itself to anything a respondent might do at any facility during the course of a CROP proceeding. EPA would be derelict in its regulatory and enforcement responsibilities if it were to forego its statutorily authorized information collection tools, even for a relatively short time.

Dow stated that although it agrees generally with the proposed § 22.19(e)(5), it believes that the CROP should allow for protective orders and/or sanctions to prevent a party from abusing or harassing another party. The Presiding Officer has the authority, under §§ 22.4(c)(6), 22.4(c)(10), 22.17, and 22.22, to impose certain sanctions against a party, such as exclusion of evidence, that are not provided in the statute under which a case is commenced. The Presiding Officer in a CROP proceeding does not have the broad powers of a Federal court judge, and can order only such relief (e.g. penalty, compliance order) as is authorized by the statute(s) under which the case is commenced. None of the statutes EPA administers authorize protective orders or contempt sanctions for misuse of the information collection authorities noted in § 22.19(e)(5).

The USAF urges that § 22.19(e)(5) state that where EPA seeks to obtain information from a respondent represented by an attorney in a proceeding under the CROP, it shall seek such information through the respondent's attorney. The USAF observes that § 22.10 requires representatives of parties to conform to the standards of conduct and ethics applicable in the Federal courts, and that one such rule would require that information collection efforts concerning the subject of the litigation are to be made through counsel for the party. EPA notes that these ethical rules are already applicable to attorneys and representatives for all parties through § 22.10, and need not be restated in § 22.19(e)(5).

More importantly, EPA's ability to enforce an information collection request will depend on whether the request has been made of the proper individual. Some statutory information collection authorities are only applicable to specified persons (e.g., Section 308(a) of the Clean Water Act, authorizes EPA to require the owner or operator of a point source to submit reports and provide information). Although an attorney may represent respondent in a particular proceeding, it is not clear that the scope of that representation will always make the attorney the surrogate of the proper recipient of an information collection request. In addition, EPA is a large and decentralized agency, and regulates many large and decentralized corporations. As a result, it is possible that the individuals responsible for a particular enforcement proceeding and those responsible for a particular information request may have no knowledge of each other's activities. For these reasons, it is not appropriate for EPA to commit itself by rule to send all information collection requests to respondent's attorney.

c. Final Rule. As stated above, EPA is adopting the § 22.19(e) as proposed with three modifications: Paragraph (e)(2) shall contain the language "(such as penalty calculations for purposes of settlement based on Agency settlement policies)". Paragraph (e)(3)(i) will allow depositions on oral questions in circumstances where the information "cannot reasonably be obtained by alternative methods of discovery." Paragraph (e)(5) shall state that ". . . Nothing in paragraph (e) of this section shall limit * * * EPA's authority, under any applicable law, to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information".

EPA has also noted an unintended side effect of moving the subpoena provisions from the supplemental rules into the discovery section of the proposed rule. In many cases, subpoenas are not used as discovery tools, but merely to ensure the attendance of a witness at hearing. The witness may also be totally independent from the parties. In these circumstances, the standards set forth in § 22.19(e)(1) are inappropriate. Therefore, EPA has revised § 22.19(e)(4) so that it applies only to subpoenas issued for discovery purposes. Other subpoenas would be at the Presiding Officer's discretion, pursuant to § 22.4(c)(9). Corresponding language is also added to § 22.21 to provide for subpoenas not used as discovery tools.

17. Supplementing Prior Exchanges, and Failure To Exchange Information (40 CFR 22.19(f) & (g))

a. Summary of Proposed Rule. Section 22.19(f) would clarify that parties may freely supplement their information exchanges, and additionally impose on each party a duty to supplement or correct prior exchanges of information when the party learns that a prior exchange is deficient. Section 22.19(g) clarifies that a failure of a party to provide information within its control pursuant to an order of the Presiding Officer may lead to an inference that the information sought would be adverse to the non-exchanging party, to exclusion of the information from evidence, or to issuance of a default order.

b. Significant Comments and EPA Response. CMA/API support the proposed changes to § 22.19(f). Dow suggests that § 22.19(g) should state that "the Presiding Officer may, in his discretion," impose the specified sanctions, in order to clarify that the "abuse of discretion" standard applies on appeal. EPA accepts this suggestion.

c. Final Rule. EPA is adopting the proposed § 22.19(f) and (g) with minor modifications. In the first sentence of paragraph (f), EPA has replaced the word "responded" with the more expressive phrase "exchanged information in response." In response to Dow's comment noted above, EPA has added the phrase "in his discretion" to the language of § 22.19(g). EPA also corrected an erroneous citation in paragraph (g)(3): it should refer to § 22.17(c) rather than § 22.17(a). For consistency with the other paragraphs in § 22.19, EPA has added a heading to paragraph (g), "Failure to exchange information".

18. Evidence (40 CFR 22.22)

a. Summary of Proposed Rule. Section 22.22(a) proposes both structural and substantive changes. Structurally, EPA proposes splitting subsection (a) into two paragraphs, (a)(1) and (a)(2). Paragraph (a)(1) proposes to add an exclusionary provision for information not provided to the opposing party at least 15 days before the hearing date unless there was good cause and the

information was provided as soon as it had control of it or there was good cause for not providing the information. Paragraph (a)(2) proposes to clarify how and when confidential business information ("CBI") may be used as evidence in accordance with, and specifically referencing EPA's general confidentiality requirements in 40 CFR Part 2. In conforming with Part 2 requirements, a proposed significant change would authorize the Presiding Officer and EAB to consider CBI information outside the presence of the public or a party as necessary to preserve the confidentiality of business information.

b. Significant Comments and EPA Response. Dow opposes the automatic exclusion of information that is not exchanged in a timely manner unless good cause is shown, as proposed in § 22.22(a)(1). Dow presents hypothetical situations where it believes a respondent would be unable to get exculpatory or mitigating information that comes to its attention admitted into evidence, if EPA "deliberately chooses to withhold" such information "instead of exchanging it in a timely manner." In such situations, Dow reasons that there would be no "good cause" for EPA's failure to exchange the information. As a result, Dow advocates the proposed exclusionary provision be revised to state that the "information will be excluded from evidence *only upon objection* by the innocent party (i.e., the party who did not fail to exchange the information in a timely manner)."

Dow's fears are unfounded. If party A withholds information until just before the hearing, and party B seeks to have that information admitted into evidence, then party A's failure to disclose would constitute "good cause" for the innocent party B's inability to produce the information 15 days prior to the hearing. If the party was required to disclose the information in prehearing exchange or other discovery, § 22.19(g) gives the Presiding Officer some authority to sanction the party who withheld the information. Section 22.19(f) prohibits knowing concealment of deficiencies in information that has previously been exchanged. It imposes an affirmative duty to promptly supplement or correct information provided previously in a prehearing exchange, a response to a request for information, or a response to a discovery order when a party learns that the information is "incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party. * * *" Id. An opposing party's failure to supplement as required under § 22.19(f) would provide "good cause" for admission of evidence. In addition, § 22.4(c)(10) empowers the Presiding Officer do all acts and measures needed for a fair adjudication of the proceedings.

The preamble to the proposed rule noted that the CROP is aimed at the practice of full and complete exchange of information in order to expedite hearings and avoid unnecessary and costly motion practice. *E.g.*, 63 FR at 9472, 9473. The Agency believes that the exclusionary provision facilitates this end and provides a mechanism to enforce the failure of a party to engage in such full disclosure. For parties that act in bad-faith, the CROP, as discussed above, provides adequate safeguards to address these situations and ensure a fair adjudication.

Regarding § 22.22(a)(2), CEEC supports the Agency's proposal to allow the Presiding Officer to review CBI evidence outside the presence of a party if it is necessary to preserve the confidentiality of the business information. In contrast, Dow believes that viewing CBI evidence outside the presence of a party can impede the non-attending party's ability to effectively participate in the hearing and the fairness of the hearing. Dow requests that the Agency include a provision for disclosure of CBI to all parties and to neutral experts, as needed, with safeguards to prevent against using the information outside the scope of the hearing.

The Agency acknowledges the legitimacy of Dow's concerns, however, today's rule and 40 CFR part 2 provide adequate mechanisms to accomplish most of Dow's suggestions. Notwithstanding today's revision of § 22.22(a)(2), EPA retains the authority to disclose CBI in a CROP proceeding where appropriate, pursuant to several statute-specific provisions of part 2 (*see, e.g.*, 40 CFR 2.301(g), 2.302(g), 2.304(g), 2.305(g), 2.306(i), 2.310(g)). Disclosure to a neutral expert could be accomplished through these authorities, or through the statute-specific provisions of part 2 that authorize disclosure to persons performing work under contract to EPA (*see, e.g.*, 40 CFR 2.301(h), 2.302(h), 2.304(h), 2.305(h), 2.306(j), 2.307(h), 2.310(h)). The Agency does not, however, have the authority to enforce secrecy agreements between respondent and an intervener, nor does it have the authority to impose sanctions (other than procedural sanctions such as default) for violations of protective orders that might be issued under the authority of § 22.4(a)(2) or (c). Therefore, it may be advisable for owners of CBI to make such agreements enforceable as contracts.

As expressed in the preamble to the proposed rule, the Agency believes that allowing the independent Presiding Officers the "discretion to review confidential evidence outside the presence of a party * * * strike[s] an appropriate balance between the right of confrontation and the statutory mandates to protect confidential business information." 63 FR at 9474. Contrary to the Dow's suggestion, the Presiding Officer is competent to handle these infrequent situations, including the concern about CBI evidence being unduly relied upon to the detriment of the non-present party. The Presiding Officers handle cases daily involving the Agency's technical regulations and corresponding business information. As an impartial trier of fact, trained to assure that all cases are fairly adjudicated, the Presiding Officer can take into account the failure of a party to be present and to rebut any CBI evidence. Additionally, the Presiding Officer can pose questions to the absent party about any non-CBI issues that exist once the hearing resumes in full. Moreover, as this commenter acknowledges, the CROP provides that a party will have access to a redacted version of the CBI documents. Thus, a right to confrontation and to present its defense will not be unfairly impeded.

c. Final Rule. EPA is adopting § 22.22 as proposed, with four minor changes. In addition to excluding information required to be exchanged under § 22.19(a) or (f) that has not been provided to the opposing party at least 15 days before the hearing date, § 22.22(a)(1) should also exclude information that has not been timely provided pursuant to a § 22.19(e) discovery order. This is a technical change, in as much as § 22.19(g)(2) already permits the exclusion of information not provided pursuant to a discovery order, and that it is clearly the intent of the proposed rule to exclude information that has not been provided to opposing parties in a timely manner. EPA has therefore added to § 22.22(a)(1) a reference to § 22.19(e) discovery orders.

To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.22(a) to state the duration of this exclusion period with the numeral "15".

EPA has made an editorial change to § 22.22(b), which requires witnesses to testify "orally, under oath or affirmation, except as otherwise provided in these Consolidated Rules of Practice or by the Presiding Officer." EPA has replaced the phrase "in these Consolidated Rules of Practice" with the more specific language "in paragraphs

(c) and (d) of this section". No provisions of the CROP other than § 22.22(b), (c) and (d) address whether witnesses must testify orally, under oath or affirmation.

EPA notes that although the existing § 22.22(c) places the burden of delivering copies of a witnesses' written testimony on the witness, this burden should fall on the party who would call that witness to testify. EPA has revised this paragraph to require that "the *party who has called the* witness shall deliver a copy of the testimony to the Presiding Officer, the reporter, and opposing counsel."

19. Filing the Transcript (40 CFR 22.25)

a. Summary of Proposed Rule. Section 22.25 provides that the hearing shall be transcribed, and that the reporter shall transmit copies to the Presiding Officer, and to the Regional Hearing Clerk who shall make copies available to the parties. EPA proposed a new provision specifically allowing motions to conform the transcript to the actual testimony, provided that such motions are filed within 20 days after notice of the availability of the transcript.

b. Significant Comments and EPA Response. Dow asserts that 20 days is insufficient time for attorneys and employee witnesses to review, correct, and move to amend a hearing transcript, even if the 20 days commenced upon receipt of the transcript. Dow recommends that § 22.25 be revised to allow motions to conform the transcript to the actual testimony either 30 days from the date the transcript is received, or 45 days from service of the notice of availability. EPA agrees with Dow's recommendation that additional time be allowed.

EPA originally proposed that the time allowed should be measured time from date the parties are notified that the transcript is available, as this appeared to be a single, well-defined reference point. In practice, this has not been the case, because complainants on occasion receive the transcript itself before receiving a formal notice of its availability. Moreover, the proposed standard would generally give complainant more time than respondent, because complainant typically receives the transcript as soon as it becomes available. The commenter's suggestion of 30 days from the date the transcript is received is good benchmark, as it allows each party the same amount of time to review the transcript, however, it is open-ended for so long as a respondent declines to request or pay for its copy of the transcript. In order to balance fairness to each party with the need for finality, EPA has adopt a standard building on both of the commenter's suggestions: "Any party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner."

c. Final Rule. EPA is adopting the rule as proposed with the exception of modifying the language of § 22.25 to read "Any party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner."

20. Initial Decision (40 CFR 22.27)

a. Summary of Proposed Rule. Section 22.27 is concerned with initial decision, and it consists (in both the existing and proposed versions) of three paragraphs. Paragraph (a) is concerned with the issuance of an initial decision, what it shall contain, and to whom copies shall be sent. Paragraph (b) outlines the factors a Presiding Officer must take into consideration in determining the amount of a civil penalty and the procedures for determining a civil penalty upon a default. Paragraph (c) sets forth when an initial decision becomes a final order and when it does not; this provision also states that the effect of an initial decision appealed to the EAB is stayed pending a decision on an appeal by the EAB.

Many of the changes in § 22.27(a) are intended to clarify the language. Other changes include requiring that an initial decision, where appropriate, include a compliance order, corrective action order or permit revocation, termination or suspension. This provision also designates to whom, in addition to the parties, copies of the initial decision are to be sent.

The revised § 22.27(b) would require that the Presiding Officer explain in the initial decision how the penalty recommended to be assessed therein corresponds to the evidence in the record and any penalty criteria set forth in the statute under which the action has been commenced. It also establishes that in case of default, the penalty recommended to be assessed shall not exceed the lesser of amount sought in either the complaint or motion for default.

In § 22.27(c), the ways in which a party can prevent an initial decision from becoming a final order are set forth. The proposed rule states that pending the issuance of decisions on appeals of them to the EAB, initial decisions are neither final nor operative. This amendment is to prevent a party from seeking judicial review prior to seeking review from EPA's administrative appellate body, the Environmental Appeals Board.

b. Significant Comments and EPA Response. Dow notes that the second sentence of § 22.27(a) arguably requires that every initial decision must include a civil penalty assessment. To remedy this, Dow recommends that the words "if appropriate" be moved so that they follows the phrase "as well as reasons therefor, and". EPA agrees, and adopts Dow's proposed revision.

Dow supports the inclusion in § 22.27(c) of the provision that states, "An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board's issuance of a final order" as properly balancing the needs of EPA and respondents. While Dow is pleased that this "will avoid premature recourse to Federal courts", Dow argues that EPA should not require appeal to the EAB for those issues that cannot be adjudicated administratively. As examples of matters that an agency cannot address, Dow cites challenges involving constitutional questions, challenges to an agency's interpretation of a statute and challenges to an agency's authority.

EPA does not agree with the recommendation that the CROP should not require an appeal to the EAB of "issues that cannot be adjudicated administratively." It cannot be left to a party to determine the scope of the EAB's jurisdiction, and respondents should not bear the burden of attempting to predict whether a particular issue must be appealed to the EAB as a prerequisite to judicial review. Also, issues that may not be adjudicated administratively are often mixed with issues that may be adjudicated by the Board. It is appropriate, and in the interest of both the Agency and the parties, for the EAB to decide which issues may be adjudicated administratively. This will ensure that the EAB has the opportunity to exercise its full review authority and protect respondents from losing their right to appeal based on a failure to exhaust administrative remedies.

CEEC also objects to the proposed changes to § 22.27(c), arguing that it is inappropriate to require respondents to appeal any initial decisions to the EAB before appealing to the federal courts. CEEC's initial comments (April 27, 1998) gave no reasons why this is inappropriate. CEEC reiterated this objection in its supplemental comments (June 4, 1998), again without significant explanation. CEEC's supplemental comments elaborated on this point only

to the extent of echoing Dow's comment, stating that it is especially inappropriate "where the issue to be addressed is a constitutional challenge, a challenge to an Agency interpretation, or a challenge to the Agency's authority."

As EPA has already discussed issues specific to requiring appeal to the EAB as a prerequisite to judicial review "where the issue to be addressed is a constitutional challenge, a challenge to an Agency interpretation, or a challenge to the Agency's authority", this response will address the larger issue raised by CEEC, whether respondents should be required to appeal any decisions of a Presiding Officer to the EAB as a prerequisite to judicial review.

The EAB is responsible for assuring consistency in Agency adjudications by all of the ALJs and RJOs. The appeal process of the CROP gives the Agency an opportunity to correct erroneous decisions before they are appealed to the federal courts. The EAB assures that final decisions represent with the position of the Agency as a whole, rather than just the position of one Region, one enforcement office, or one Presiding Officer. EPA considers this a necessary and important function, and rejects CEEC's suggestion that this internal appeal and review process be abandoned. In addition to meeting EPA's institutional needs, this process also offers enormous advantages to respondents who are dissatisfied with an initial decision, in that appeals to the EAB are much quicker and much less expensive than appeals to a federal court.

CEEC's comment may be based on a misreading of the proposed rule as requiring respondent to make an interlocutory appeal to the EAB every time there is an adverse decision: "In its Preliminary Comments, CEEC noted its concerns with the proposal requiring appeal to the EAB after every "initial" decision or order of the Presiding Officer before seeking judicial review."

To the extent that this comment is intended to apply to any ruling or order other than an initial decision (as the latter term is defined in § 22.3), it is based on a misreading of the proposed rule. The proposed rule would only require that initial decisions (as specifically defined in § 22.3) be appealed to the EAB as a prerequisite to judicial review. EPA did not propose to require interlocutory appeal of rulings and orders other than initial decisions as a prerequisite to judicial review.

CEEC also objects to the process by which EPA has proposed the revisions relating to exhaustion of remedies. Terming the inclusion of the exhaustion requirement a "major revision" to the CROP, CEEC says that "Given the magnitude of this proposed change, EPA should have brought this proposal to the attention of the regulated community in the summary of its proposed rule-change, and explained it thoroughly."

First, the February 25, 1998, **Federal Register** notice of proposed rule making provided adequate notice of EPA's intention to address the exhaustion doctrine in its rules of administrative procedure. The one-sentence summary that begins the notice of proposed rule making accurately describes the subject of the notice, though it does not attempt to summarize all of the issues raised in the proposal. The body of the notice and the proposed regulations clearly identified and discussed this issue in detail. *See* 63 FR 9474–75, 9489. The proposed rule allowed 60 days for the public to comment on the entire proposal. In addition, in response to CEEC's concern, EPA published a second notice on May 6, 1998, reopening the public comment period for an additional 60 days.

CEEC's contention that the initial proposal did not give adequate notice of the magnitude of the proposed changes is not persuasive. The original notice of proposed rule making attracted the attention of a broad spectrum of the regulated community, and elicited comments from major trade associations representing the chemical manufacturing industry, the petrochemical industry and the utility industry, and individual comments from the U.S. Air Force and one major chemical company, in addition to the companies represented by CEEC. These comments were generally detailed and well considered. Only two of the comments addressed § 22.27(c), and only CEEC considered this an extraordinary revision. CEEC's contention that the initial proposal did not allow enough time to consider and comment on the proposed changes is also undermined by the fact that CEEC's supplemental comments were the only comments received during reopened comment period, as well as by the fact that those supplemental comments did not raise any significant issues that were not raised during the original public comment period.

Second, EPA disagrees with CEEC's characterization of the magnitude of the proposed changes. EPA considers appeals of an initial decision to the EAB as a prerequisite to judicial review under the CROP as previously codified, and that, during such appeal, the initial decision is inoperative. The regulated community also appears to share this understanding, as respondents consistently seek EAB review before appealing to the federal courts. The proposed explicit inclusion of the exhaustion doctrine simply clarifies the status quo, and thus does not represent something that would significantly alter or impact a respondent's rights or position under the CROP.

Although the proposed revision of § 22.27(c) was designed to make it explicit that an initial decision must be appealed to the EAB as a prerequisite for judicial review, Dow points out that § 22.27(c) does not actually say anything about the need for administrative appeal before judicial review. An explicit statement appears in § 22.31(e)(1) of the proposed rule, however, EPA acknowledges that it would be more helpful if the provision advising a respondent of the consequences of failing to appeal an initial decision to the EAB were included in the section discussing initial decisions, rather than the section concerned with final orders. Accordingly, language from § 22.31(e)(1) of the proposed rule now appears in a new § 22.27(d).

c. Final Rule. In response to comment, EPA has moved the words "if appropriate" from the end of the second sentence in § 22.27(a) to follow the phrase "as well as reasons therefor, and", in order to clarify that not all initial decisions will assess a penalty.

Language from § 22.27(c) and § 22.31(e)(1) relating to exhaustion of administrative remedies has been combined in a new § 22.27(d). The remainder of § 22.27(c) has also been subdivided into four paragraphs for easier reading.

EPA has made an additional substantive change to § 22.27(a) on its own initiative. The existing and proposed rules specify that the Regional Hearing Clerk shall forward the entire record of the proceeding to EPA Headquarters as soon as an initial decision is issued, regardless of whether the case is appealed to the EAB. For administrative efficiency, this requirement has been deleted. Regional Hearing Clerks will retain the record of the proceeding unless the EAB requests it. This change should have no effect on respondents' interests.

EPA has made minor editorial changes to § 22.27(a) as well: EPA has deleted the word "reply" from the first sentence to make it more general, and has replaced the phrase "permit revocation and suspension" with "Permit Action", as discussed in connection with revisions to § 22.3(a) and § 22.14(a)(4)(iii)..

In the fourth and fifth sentences of paragraph (b), the proposed rule uses the phrase "penalty recommended to be

assessed in the complaint". The convention elsewhere in the CROP is to describe the penalty proposed by complainant as the "proposed penalty", and the penalty determined by the Presiding Officer as the "recommended penalty". In order to eliminate the "recommended to be assessed" language and to provide for cases where complainant makes its specific penalty proposal in its prehearing exchange, EPA has replaced "penalty recommended to be assessed in the complaint" in the fourth sentence with the phrase "penalty proposed by complainant". In the fifth sentence, EPA has substituted the phrase "proposed by complainant in the complaint, the prehearing information exchange or the motion for default".

EPA has also changed the order of the sentences in paragraph (b). The sentence stating that "[t]he Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to the any penalty criteria set forth in the Act" has been moved up to follow the sentence stating that "the Presiding Officer shall consider any penalty guidelines issued under the Act." This will make it clearer that the obligation to explain in detail how the penalty corresponds to the penalty criteria of the Act is not limited to circumstances where the Presiding Officer assesses a penalty different from that proposed in the complaint.

As discussed above in connection with public comments on § 22.17, EPA has revised the CROP to clarify that a motion for default or a default order may apply to all or part of a proceeding. EPA has made a corresponding change to § 22.27(c)(3), to clarify that it applies only to those default orders that constitute initial decisions.

To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.27(c) to state the time after which an initial decision becomes a final order with the numeral "45".

21. Appeal From or Review of Initial Decision (40 CFR 22.30)

a. Summary of Proposed Rule. The proposed revisions to § 22.30(a) would extend the time to file an appeal from 20 to 30 days, clarify the procedure for filing appeals, including, but not limited to, provisions addressing service and filing, and describing the contents of any appeal brief. The proposed rule also contained a new provision whereby a party who initially declined to appeal, but who receives a notice of appeal from another party, is granted an additional 20 days to raise other issues on appeal. This change would eliminate the need for protective filings by parties who otherwise would have elected not to file an appeal.

Proposed revisions to paragraph (b) would clarify the respective roles of the Regional Hearing Clerk and the Clerk of the Board. Paragraph (c) of the proposed rule added a provision expressly limiting the scope of appeals to issues raised during the course of the proceeding or by the initial decision. Minor editorial changes were made to the proposed paragraph (d), as well as to the other paragraphs.

EPA proposed a new paragraph (e) that would specify that the general requirements for motions at § 22.16 apply to motions made in appeals to the EAB. EPA proposed a new paragraph (f), consisting largely of the language formerly contained in § 22.31(a). Paragraph (f) describes the scope of review by the EAB and its authority to increase or decrease a penalty, or to modify any compliance order, corrective action order, or any permit revocation, termination and suspension. The proposed § 22.30(f) would allow the EAB to increase the amount of a penalty assessed in a default order, but would not allow the EAB to increase the default penalty to an amount greater than that proposed in the complaint or in a motion for default, whichever is less.

b. Significant Comments and EPA Responses. CMA/API support the provision extending the time for filing appeals from 20 to 30 days, while Dow objects that 30 days is not sufficient time to review the initial decision and file an appeal brief. CROP proceedings have worked effectively since 1980 with a 20 day appeal period, and with extensions in appropriate cases. Expanding the appeal period by fifty percent should substantially reduce the burdens felt by counsel, as well as allow improvement in the quality of the briefs filed. While today's final rule expands several time periods, EPA still intends that CROP proceedings should progress quickly from the filing of the complaint to the issuance of a final order. EPA believes that further expansion of the appeals period is not necessary at this time.

Dow also commented that the deadline for response briefs would be ambiguous under the proposed § 22.30(a)(2) in cases where two or more notices of appeal are filed in serial fashion. EPA concedes that in such cases there would not be a single date upon which all reply briefs are due, however, the proposed CROP is clear as to when the response briefs are due: A brief responding to an appeal is due within 20 days of service of the appeal brief to which it responds. Requiring all reply briefs to be filed on the same day would give the person filing the last appeal the most time to respond to the opposing party's appeal, while EPA's proposed approach gives each party the same amount of time to respond.

CEEC recommends that the CROP include procedures to ensure that members of the regulated community have access to all administrative complaints, decisions, orders, settlements, etc. EPA notes that all such documents appear in the public docket for each case. The formal opinions of the EAB are published in a series of bound volumes titled Environmental Administrative Decisions (E.A.D.), which may be purchased from the U.S. Superintendent of Documents. The full text of all formal EAB opinions may also be accessed electronically at the EAB's World Wide Web Site (http://www.epa.gov.eab). Decisions and "substantive" orders (i.e., having some discussion of legal argument) of the Agency's ALJs are on http://www.epa.gov/oalj going back to November 1996. A web site for RJO decisions is under construction. Hard copies of ALJ decisions (and substantive orders since 1997) may be obtained from the Headquarters Hearing Clerk, and RJO decisions may be obtained from the Regional Hearing Clerks. Several commercial sources also make available the EAB formal opinions, most ALJ decisions and orders, and some RJO decisions and orders.

The Agency's practice has been for the Regional Hearing Clerk to maintain a complete docket up through the initial decision, and for the Clerk of the Board to maintain the docket of subsequent proceedings. EPA acknowledges that this system has made it difficult for persons reviewing a case docket in an EPA Regional office to review the entire case record. In order that the Regional Hearing Clerk's docket should indicate that a case had been appealed, EPA proposed in § 22.30(a)(1) that each appellant shall serve copies of its notice of appeal and brief with the Regional Hearing Clerk. In response to CEEC's comment, EPA has revised § 22.30(a) and (b) to require that copies of all documents filed with, or by, the EAB shall also be served on the Regional Hearing Clerk.

Finally, Dow notes that despite EPA's stated intention of removing the words "sua sponte" from the CROP, EPA neglected to replace this expression in the title of § 22.30(b). EPA has finished this task by revising this title to read "Review initiated by the Environmental Appeals Board."

c. Final Rule. EPA has adopted § 22.30 as proposed, with several modifications. As discussed above, EPA has revised the title of § 22.30(b) to read "Review initiated by the Environmental Appeals Board", and has revised § 22.30(a) to require that copies of all documents filed with, or by, the EAB shall also be served on the Regional Hearing Clerk. EPA has made several other minor revisions on its own initiative:

As discussed above in connection with the revisions to § 22.11, EPA has replaced the term "amicus curie" in § 22.30(a)(1) and (a)(2) with the term "non-party participant."

In order that the Presiding Officer may be aware of the status of his or her decision, EPA has also revised paragraph (a)(1) to require that a copy of the notice of appeal be served on the Presiding Officer, and revised paragraph (b) to require that the EAB serve on the Presiding Officer a copy of its notice of intent to review a decision.

EPA has also replaced the expression "Clerk of the Environmental Appeals Board" with "Clerk of the Board," using the term defined at § 22.3(a) for consistency.

Because response briefs are to be filed with the Clerk of the Board, the words "and serve" are unnecessary and potentially confusing as they appear in the proposed § 22.30(a)(2), and have therefore been deleted from today's final rule.

The proposed § 22.30(c) included a new provision: "The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision." In order to reflect the well established principle that the question of subject matter jurisdiction cannot be waived and may be raised at any stage of a proceeding, EPA has revised this provision by adding the clause "and to issues concerning subject matter jurisdiction."

The proposed § 22.30(f) may incorrectly suggest that a final order is the only possible outcome from an EAB decision on appeal of an initial decision. However, it is not uncommon for the EAB to remand a case. EPA has revised paragraph (f) by adding the following sentence: "The Environmental Appeals Board may remand the case to the Presiding Officer for further action."

EPA has replaced the phrase "any permit revocation, termination or suspension" in § 22.30(f) with "Permit Action", as discussed in connection with revisions to § 22.3(a) and § 22.14(a)(4)(iii). To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.30 to state all time periods with numerals only.

22. Final Order (40 CFR 22.31)

a. Summary of Proposed Rule. Section 22.31 is concerned with final orders, and the proposed section consists of six sub-paragraphs. Paragraph (a) would specify the effect of the final order. It states that a final order constitutes final Agency action and specifies that a final order neither affects the right of the United States to seek criminal or civil relief for any violation of law nor waives a respondent's obligations to comply with applicable law. Paragraph (b) would establish the effective date of a final order. Paragraph (c) would set forth procedures for paying any civil penalties assessed in a final order. Paragraph (d) would establish that any corrective action or compliance order, or any permit revocation, termination or suspension becomes effective and enforceable as of the effective date of a final order unless otherwise specified in the final order. The proposed paragraph (e) is concerned with exhaustion of administrative remedies, and would specify that where a respondent fails to appeal an initial decision or enters into a consent agreement, the right of subsequent judicial review is waived. The proposed paragraph (f) discusses final orders issued to Federal agencies. This provision would specify that where the head of an affected agency seeks the intervention of the EPA Administrator, the decision by the Administrator will be the final order; this provision would also specify that a motion for reconsideration does not affect the 30-day time period for the effective date of final orders against Federal agencies.

b. Significant Comments and EPA Responses. The proposed inclusion in § 22.31(e) of a provision explicitly addressing exhaustion of administrative remedies as a prerequisite to judicial review is viewed by CEEC as a "major" revision of the CROP. CEEC argues that:

> "Given the magnitude of this proposed change, EPA should have brought this proposal to the attention of the regulated community in the summary of its proposed rule-change, and explained it thoroughly."

As discussed in EPA's response to comments on § 22.27(c), above, EPA disagrees with CEEC's characterization of the magnitude of this change, and maintains that the proposed rule gave adequate notice of the proposed change.

As discussed in EPA's response to comments on § 22.27(c), above, EPA agrees with Dow's comment that the requirement that an administrative appeal is a predicate for subsequent judicial review should appear in § 22.27. Therefore, the language that appeared in the proposed § 22.31(e)(1) has been deleted and moved to § 22.27(c). The proposed § 22.31(e)(2), which would specify that "[a] respondent which elects to resolve a proceeding pursuant to § 22.18 waives its rights to judicial review", is redundant with § 22.18(a)(3) and (b)(2) and can be deleted without substantive change. The proposed § 22.31(f) has been redesignated as § 22.31(e) in today's final rule.

The proposed § 22.31(f) describes the manner in which the head of another Federal agency may bring disputes over a final order directly to the EPA Administrator, and provides that the EAB's decision shall not be effective pending the Administrator's review. Essentially the same provision already appears in the supplemental rule governing Solid Waste Disposal Act cases, § 22.37(g). The proposed rule would move this provision from that supplemental rule into the main body of the CROP, in order that this process should be available in any CROP case brought against a Federal agency.

The USAF opposes moving this provision from the supplemental rule governing Solid Waste Disposal Act cases into the main text of the CROP. USAF argues that instead of a generally applicable provision, such procedures should be confined to the statute-specific supplemental rules. USAF argues that EPA should be required to amend the CROP each time Congressional action expands EPA's authority to enforce against another Federal agency, in order to provide a forum for resolving constitutional and jurisdictional issues.

The proposed change does not expand EPA's jurisdiction to assess civil penalties against a Federal facility, nor does it expand the scope of the CROP as it pertains to Federal facilities. EPA can assess penalties against Federal facilities for violations of the Safe Drinking Water Act (42 U.S.C. 300j–6), the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. 6961), and the Clean Air Act (42 U.S.C. 7413(d), 7524(c) and 7545(d)(1)) through a CROP proceeding regardless of whether the proposed language is adopted. Should other authorities for assessing penalties against Federal facilities become available in the future, this will be true for those authorities as well. The only effect of the change proposed in § 22.31(f) is to provide a mutually understood process for staying a final order while the head of the respondent Federal Agency confers with the EPA Administrator.

The proposed § 22.31(f) is a procedural provision, not a jurisdictional provision. It does not, on its own, establish authority to assess administrative penalties. It merely provides the process to follow where Congress has provided such authority to EPA. Although EPA has not made the change USAF seeks, EPA has made a minor change to the proposed § 22.31(f)(1) (promulgated today as § 22.31(e)(1)) that should help reduce the chance that this might be misperceived as a jurisdictional provision, by moving the words "pursuant to § 22.30", to follow the word "issued."

c. Final Rule. EPA has made no substantive change in response to the comments on the proposed § 22.31. As described above, EPA has deleted the proposed § 22.31(e) because equivalent provisions now appear in §§ 22.18 and 22.27(c). Also as noted above, EPA has changed the proposed paragraph (f) to "(e)", and has moved the words "pursuant to § 22.30", to follow the word "issued" in § 22.31(e)(1).

On its own initiative, EPA has made several other editorial changes to § 22.31. First, the third sentence of the proposed § 22.31(a) is inartfully drafted and subject to misinterpretation. The relevance of the terms "liability" and "violation" is not clear in relation to proceedings for permit actions. For example, permit actions may often involve facts which could establish violations of the permit or of environmental regulations, however, permit action proceedings do not adjudicate respondents' liability for such violations. In order to avoid the implication that a final order in permit action proceeding might "resolve Respondent's liability for a civil penalty", or conversely, that a final order in a penalty proceeding might resolve "the status of a permit or authority to operate", this sentence must be revised. In addition, this sentence does not address proceedings commenced with a consent agreement and final order pursuant to § 22.13(b). Accordingly, EPA has revised the third sentence of the proposed § 22.31(a) to state that: "The final order shall resolve only those causes of action alleged in the complaint, or for proceedings commenced pursuant to § 22.13(b), alleged in the consent agreement."

Second, EPA has significantly simplified the second sentence of § 22.31(c), by removing the requirements concerning who shall be the payee on the check and where the check should be sent, and by amending § 22.14(a) to require that these be specified in the complaint. EPA notes that the proposed § 22.31(c) was deficient in that it did not provide a mechanism to accommodate changes in the lock box banks or bank addresses other than by amending the CROP, and that it did not provide for cases under Section 311(b)(6) of the Clean Water Act, where penalties must be paid to the "Oil Spill Liability Trust Fund." Moreover, the focus on the "check" left it unclear whether interbank funds transfers were permitted. Requiring that the complaint address these issues allows EPA to replace the second and third sentences of § 22.31(c) with a much simpler statement:

> "Payment shall be made by sending a cashier's check or certified check to the payee specified in the complaint, unless otherwise instructed by the complainant. The check shall note the case title and docket number. Respondent shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on complainant."

Third, EPA has replaced the phrase "permit revocation, termination or suspension" in § 22.31(d) with "Permit Action", as discussed in connection with revisions to § 22.3(a) and § 22.14(a)(4)(iii).

Fourth, EPA has clarified an imprecise sentence in the proposed § 22.31(f)(1) (now § 22.31(e)(1). The last sentence of the proposed § 22.31(f)(1) stated that "In that event, a decision by the Administrator shall become the final order." EPA has replaced "In that event" with the more explicit statement, "If a timely request is made".

Finally, to conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.31 to state all time periods with numerals only.

23. Motion to Reconsider a Final Order (40 CFR 22.32)

a. Summary of Proposed Rule. Section 22.32 of the 1980 CROP provides that parties may move for reconsideration of a final order within 10 days of service of the final order, and describes the procedure. The proposed rule made only trivial editorial changes.

b. Significant Comments and EPA Response. Dow objects that 10 days is insufficient time to perform the extensive reviews and legal research on specific issues raised by the final order. Dow concedes that 10 days is sufficient to file a motion for reconsideration, provided that additional time is allowed for the filing of briefs in support of the motion.

The purpose of § 22.32 is to provide a mechanism to bring to the EAB's attention a manifest error, such as a simple oversight, or a mistake of law or fact, or a change in the applicable law. *See In the Matter of Cypress Aviation, Inc.*, 4 E.A.D. 390, 392 (EAB 1992). The motion for reconsideration is not intended as a forum for rearguing positions already considered or raising new arguments that could have been made before. This narrow scope of § 22.32 is reflected in the fact that the CROP does not require a respondent to seek reconsideration in order to exhaust its administrative remedies as a prerequisite for judicial review. Accordingly, EPA has not expanded the time allotted to file a motion for reconsideration or to file briefs in support of a motion for reconsideration.

c. Final Rule. EPA is adopting § 22.32 as proposed, with two modifications. As noted in the discussion of public comments on § 22.18(b)&(c), EPA has eliminated the term "consent order," and is using the term "final order" instead. In the interests of exhaustion of remedies and finality, motions for reconsideration are not appropriate where the final order results from settlement or quick resolution, nor where the parties have declined to appeal an initial decision and it has become final by operation of § 22.27(c). Accordingly, EPA has amended § 22.32 to clarify that it is limited to motions for reconsideration of a final order issued pursuant to § 22.30. In addition, to conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.32 to state the time period allowed for motions for reconsideration with the numeral "10".

24. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Clean Air Act (40 CFR 22.34)

a. Summary of Proposed Rule. Section 22.34 presents supplemental rules applicable to Clean Air Act penalty cases. Paragraph (b) reiterates the requirement of 42 U.S.C. 7413(d)(2)(A) that before issuing an order assessing a civil penalty (i.e., a final order), EPA shall give written notice to the person against whom penalty is to be assessed the order is to be issued, and give that person the opportunity to request a hearing. It clarifies the relationship between this statutory requirement and the CROP by stating that the such notice shall be provided by issuance of a complaint. EPA proposed only minor editorial changes to § 22.34(b).

EPA proposed a new paragraph (c), which would apply to default orders for failure to answer a field citation. Section 59.5(d) of the proposed rule governing CAA field citations (59 FR 22776, May 3, 1994) would provide that when a respondent fails to file a timely answer to a field citation (and fails to offer to pay the penalty under the quick

resolution procedure at § 22.18(a)(2)), the Presiding Officer shall issue a default order assessing the penalty proposed in the complaint.

b. Significant Comments and EPA Response. Dow commented that respondents should be able to waive the written notice required pursuant to § 22.34(b), because this is a procedural protection provided merely for respondents' benefit. EPA agrees that the second sentence of § 22.34(b) appears to require issuance of a complaint in every case. In order to allow the parties to take full advantage of the efficiencies of § 22.13(b) where prefiling negotiations produce a settlement, EPA has amended this provision to specify that a complaint is sufficient to satisfy this notice requirement, but without requiring that a complaint necessarily must be served. The second sentence of § 22.34(b) now reads: "Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies this notice requirement."

c. Final Rule. EPA is adopting § 22.34(a) as proposed, and has adopted the proposed § 22.34(b) with the exception of modifying the second sentence to read "Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies this notice requirement." EPA has deleted the proposed § 22.34(c), pending adoption of a final rule governing CAA field citations. Any changes necessary to accommodate field citations will be made when the proposed Field Citation rule is finalized.

25. Scope of Subpart I (40 CFR 22.50)

a. Summary of Proposed Rule. Section 22.50 defines the scope of subpart I and its relationship to other provisions of Part 22. The proposed paragraph (a) would restrict the scope of subpart I to adjudicatory proceedings that are initiated by a complaint stating that subpart I shall apply. The proposed paragraph (a) would clarify that subpart I does not apply to any proceeding where the statute requires a hearing subject to section 554 of the Administrative Procedure Act (APA).

Paragraph (b) lists the provisions of subparts A through G which do not apply to subpart I proceedings. Almost all provisions of subparts A through G apply to a subpart I proceeding. Paragraph (b) also addresses the potential for conflicting provisions in the preceding sections of the CROP, providing that where any provisions of subparts A though G conflict with any provision of subpart I, the latter supersedes the former.

The preamble to the proposed rule stated that EPA does not intend to alter its present practice of providing the full APA process in cases pursuant to section 109(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (42 U.S.C. 9609(a)) or section 325(b)(1), (c), and (d) of the Emergency Planning and Community Right-To-Know Act ("EPCRA") (42 U.S.C. 11045(b)(1), (c), and (d)), but invited comment as to the types of CERCLA and EPCRA penalty cases for which non-APA procedures would be appropriate, if the Agency decides in the future to assess EPCRA and CERCLA penalties through non-APA proceedings.

b. Significant comments and EPA response. Most commenters (Dow, CEEC, UWAG, UARG) oppose any proposed expansion of the role of RJOs under subpart I. The preamble to the proposed rule stated that EPA did not expect to use non-APA procedures except in the kinds of cases where they have historically been used for the foreseeable future. As discussed in the response to comments on § 22.4(b), EPA has revised § 22.50(a) to expressly limit the applicability of subpart I to cases under CWA sections 309(g)(2)(A) and 311(b)(6)(B)(i) (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)), and SDWA sections 1414(g)(3)(B) and 1423(c)(42 U.S.C. 300g-3(g)(3)(B) and 300h-2(c)). This change makes clear that the scope of the RJOs' activities will remain much the same as it has been in recent years.

All who commented on the proposed subpart I (CMA/API, Dow, CEEC, UWAG, UARG) expressed concern that it would not protect constitutional due process rights. In particular, CEEC considers such a proposal a "major concern" and submits that subpart I procedures do not meet the due process standard set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Dow, UWAG and UARG believe that there is too great a chance that RJOs would have a pro-Agency bias, and suggest that EPA should eliminate subpart I and apply APA procedures universally. Dow suggests in the alternative that either party should be allowed to opt out of subpart I and have APA procedures applied upon request.

EPA has addressed this due process question in the discussion of public comments on § 22.4(b). Also as noted above in the discussion of § 22.4(b), the Agency has implemented adequate measures to ensure the impartiality of the Regional Judicial Officers. If a litigant has reason to believe that a Regional Judicial Officer is biased, then a motion for disqualification pursuant to § 22.4(d) may be submitted.

As to Dow's suggestion of providing parties the option of having APA procedures apply upon request, Congress has provided for this option only in section 1414(g)(3)(B) of the Safe Drinking Water Act. If APA procedures were provided upon respondent's request in all proceedings brought under subpart I, the regulated community, rather than EPA, would be determining the course of the Agency's enforcement program, and imbalances of Agency resources might result. Nevertheless, the Agency acknowledges that, on occasion, a complainant may not recognize until after a case has been commenced that the subpart I procedures would not be adequate, for example, where intervention, amici, subpoena, or additional discovery appear crucial to the case, or where the issues are such that the proceeding would greatly benefit from the unquestioned independence of an ALJ. In those instances, a complainant may move to withdraw the complaint without prejudice in order that the proceeding be recommenced as an APA proceeding, or either party might move that subpart I should not be applied to the proceeding.

As to paragraph (b), Dow and CEEC suggest deleting the reference to § 22.11 and allowing intervention and amici curiae. This would be inconsistent with the purpose of subpart I, that is to have simpler and more efficient proceedings. To add to subpart I more of the provisions of subparts A through G would frustrate this purpose. If a party believes that intervention or amici curiae would be of crucial importance to a particular case, then as discussed above, it may file a motion requesting withdrawal or dismissal without prejudice to allow refiling under the APA procedures.

c. Final Rule. EPA has revised § 22.50(a) to limit the applicability of subpart I to cases under CWA sections 309(g)(2)(A) and 311(b)(6)(B)(i) (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)), and SDWA sections 1414(g)(3)(B) and 1423(c) (42 U.S.C. 300g-3(g)(3)(B) and 300h-2(c)). EPA adopts § 22.50(b) as proposed, with one correction. The February 25, 1998, FR notice included a typographical error in § 22.50(b). The section number that appeared as "22011" has been corrected to read "22.1."

26. Presiding Officer (40 CFR 22.51)

a. Summary of Proposed Rule. The proposed § 22.51 presents the key modification to the CROP facilitating use of the CROP in administrative adjudications not subject to section 554 of the APA, that the Presiding Officer

need not be an Administrative Law Judge ("ALJ"). Instead, the Presiding Officer in a "non-APA", subpart I proceeding would be a Regional Judicial Officer ("RJO"). Unlike an APA proceeding, where an RJO presides until an answer is filed and the RJO is replaced by an ALJ, in a subpart I proceeding the RJO serves as Presiding Officer until the initial decision has become final or has been appealed.

b. *Significant Comments and EPA Responses.* Several commenters objected to EPA attorneys, rather than ALJs, serving as Presiding Officers in subpart I proceedings. Their objections have been fully addressed in the discussion of public comments on the proposed § 22.4, and are not repeated here.

c. *Final Rule.* EPA has adopted § 22.51 as proposed, but with a minor addition. EPA has observed that while § 22.51 provides that the Presiding Officer "shall rule on all motions until an initial decision has become final or has been appealed", it does not explicitly state that the Presiding Officer will conduct the hearing. As is clear from the preamble to the proposed rule, and from the responses of the commenters, conduct of the hearing is the key element in the Presiding Officer's role in such cases, as it is for ALJ Presiding Officers in APA cases. In order to avoid any future confusion, the final rule includes an explicit statement that: "The Presiding Officer shall conduct the hearing, and rule on all motions * * *"

27. Information Exchange and Discovery (40 CFR 22.52)

a. *Summary of Proposed Rule.* The proposed § 22.52 would define the parameters of an information exchange in non-APA proceedings. Parties would be subject to the prehearing exchange authorized in § 22.19(a), but most additional discovery would be prohibited under Subpart I. The proposed § 22.52 would require the respondent to provide in its prehearing exchange information concerning any economic benefit it may have enjoyed as a result of the alleged non-compliance or a failure to act.

Although proposed § 22.52 would prohibit most additional discovery that would otherwise be allowed under § 22.19(e), the complainant would be entitled to discovery of information concerning respondent's economic benefit of non-compliance and of financial records probative of respondent's ability to pay a penalty.

b. *Significant Comments and EPA Response.* CMA/API and CEEC believe that it is unfair to prohibit discovery by private parties but authorize discovery by EPA for penalty information. CMA/API and Dow oppose requiring respondents to provide information on economic benefit in the prehearing exchange because this requirement imposes a burden only upon the respondent. CMA/API argues that the prehearing exchange burdens for each party should be made equivalent, particularly given EPA's far greater information collection powers.

Dow asserts that § 22.52 is unnecessary because § 22.19(d) already provides ways to avoid excessive discovery. Dow argues that § 22.19(d) provides ample authority for the Presiding Officer to protect against excessive or abusive discovery practices. Dow expresses concern that the comparatively less formal procedures of subpart I might be used in very complex cases involving a multitude of separate alleged violations. In such cases, it is likely that additional discovery would be needed and appropriate. Dow urges that EPA abandon the subpart I modifications and apply the standard CROP procedures universally, as this would allow Presiding Officers to tailor the scope of discovery to the needs of each individual case.

While EPA acknowledges that the prehearing exchange requirements and discovery limits of the proposed § 22.52 are asymmetric, EPA disagrees with the contention that they are unfair. The comments suggest that the commenters perceive "fairness" to require that the parties be exact equals subject to the exact same rules. However, the parties are never equals in a CROP proceeding: The complainant alone carries the burden of persuasion, and carries most of the burden of presentation. Yet the statutes generally require penalty assessment to be based in large part on information held by the respondent, not the complainant. The proposed discovery regime redresses this imbalance in knowledge and burden by requiring a respondent to provide such information to the party required to put it forward to the neutral. There is nothing "unfair" about this arrangement. Indeed, it is a logistical necessity.

Being subject to such discovery does not invest in the respondent a reciprocal right to make discovery of the complainant on "fairness" grounds. EPA is not obligated to provide additional discovery in order to satisfy the requirements of the due process clause. *Matthews* v. *Eldridge*, 424 U.S. 319, 344–45 (1976); also see *Chemical Waste Management, Inc.* v. *U.S.E.P.A.*, 873 F.2d 1477 (D.C. Cir. 1989).

Non-APA proceedings are typically for enforcement cases that do not raise significant factual or legal issues. See, e.g., Sen. Rep. 99–50 (99th Cong., 1st. Sess.), reprinted in "A Legislative History of the Water Quality Act of 1987, Congressional Research Service of the Library of Congress (November 1988) at 1448, which states:

> "To serve its intended function, this administrative enforcement tool should be tailored to the less complex cases for which it is intended. Administrative enforcement should be as flexible and unencumbered by procedural complexities as possible, consistent with due process considerations while providing for effective input by citizens who may be affected by the violations. Administrative cases should be resolved promptly * * *. Because administrative penalty assessments will be used in smaller cases and often will be based on discharge monitoring reports routinely submitted by permittees, formal administrative procedures strictly in accordance with the formal adjudicatory procedures of the Administrative Procedures [sic] Act are not required. EPA therefore has the flexibility to streamline its decisionmaking process and procedural rules through promulgation of procedural regulations that provide appropriate due process protection."

Requiring that subpart I provide discovery equal to § 22.19(e) would undermine the objective of subpart I: non-APA proceedings that are more efficient than APA proceedings. See, Superfund Reauthorization: Judicial and Legal Issues, Oversight Hearings before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, 99 Cong. 1st Sess. 64 (1985)(statement of F. Henry Habicht II, Assistant Attorney General, Land and Resources Division)(EPA objected to requiring APA procedures for imposition of administrative penalties under CERCLA, stating that such procedures were too lengthy and laborious). Section 22.52 accounts for most of the streamlining in these non-APA procedures relative to the APA procedures. If the same procedures apply to subpart I proceedings as apply to APA proceedings, the only differences remaining are the qualifications and independence of the adjudicator and the absence of the right to interlocutory appeal. Congress intended that the non-APA process provide faster, simpler, less costly and more efficient administrative proceedings, not just an additional corps of adjudicators.

The types of cases that are to be brought under the non-APA provisions are typically factually simple. Expanding discovery in subpart I would raise costs to the litigants and invite

delaying motions and fishing expeditions. The inquiry should be centered on the conduct of the respondent and any penalty assessment factors. Allowing additional discovery of EPA beyond the prehearing exchange would not serve those goals, but would raise the complexity and cost of proceedings that Congress intended to be as unencumbered as possible.

c. Final Rule. EPA adopts § 22.52 as proposed. EPA notes that this section does not affect the authority of the Presiding Order to require the attendance of witnesses by subpoena, if authorized by the Act, in accordance with § 22.4(c).

28. Interlocutory Orders or Rulings (40 CFR 22.53)

a. Summary of Proposed Rule. The proposed § 22.53 stated that, for proceedings subject to subpart I, "[i]nterlocutory review as set forth in § 22.29 is prohibited."

b. Significant Comments and EPA Response. Dow argues that the prohibition on interlocutory appeals in subpart I proceedings is unnecessary, because § 22.29 already imposes substantial limits on interlocutory appeals. Dow believes that interlocutory appeal is warranted in any case where the criteria of § 22.29(b) are met (i.e., "(1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and (2) either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.")

EPA intends to use subpart I primarily for cases where EPA has substantial prior enforcement experience, which do not appear to present significant new issues of law, and where the sanctions sought are relatively modest. In these circumstances, meritless appeals are likely to greatly exceed meritorious appeals. Because the likely advantages of interlocutory appeal are outweighed by the anticipated delays that would result from meritless appeals, the final rule retains the prohibition on interlocutory appeal in subpart I cases.

c. Final Rule. In today's final rule, EPA adopts the proposed prohibition on interlocutory appeals in subpart I cases. However, EPA has concluded that the proposed § 22.53 is redundant, because § 22.50(b) states that § 22.29, which provides for interlocutory appeals, does not apply to subpart I proceedings. Although the proposed § 22.53 highlighted this provision for purposes of soliciting public comment, EPA has concluded that this redundancy is inappropriate in the final rule. Accordingly, EPA has deleted the proposed § 22.53. The prohibition against interlocutory appeals in subpart I cases is accomplished through § 22.50(b)'s exclusion of § 22.29.

29. Clean Air Act Field Citations

a. Summary of Proposed Rule. EPA proposed that revisions to the CROP would supersede and replace the rules governing non-APA hearings on field citations under section 113(d)(3) of the Clean Air Act ("CAA"). The Field Citation rules were proposed (59 FR 22776, May 3, 1994) but not yet final at the time EPA proposed the CROP revisions, and EPA expected that the Field Citation rules would be published as a final rule before the CROP revisions. The preamble to the proposed CROP stated that EPA intended to use the procedures that would appear as subpart B of the Field Citation rules until the CROP revisions were made final.

b. Significant Comments and EPA Response. CMA/API, Dow and CEEC opposed the interim use of the procedures in subpart B of the Field Citation rules pending publication of the final CROP. These commenters urged EPA to postpone publication of the Field Citation rules until after publication of the final CROP procedures

EPA agrees that commencing a field citation program using one set of procedures for a short time before switching to the CROP procedures could result in unnecessary burdens and confusion. EPA has postponed issuing a final rule governing hearing procedures for CAA field citations.

c. Final Rule. Today's final rule does not contain the provisions in the proposed rule relating to the removal from the CFR of procedures for CAA field citations. A decision on appropriate hearing procedures for field citations, inclusion in subpart I of the CROP, will be made when the Field Citation rules are finalized.

30. Other Comments Not Related to a Particular Section of the Proposed Rule

a. Significant Comments and EPA Response. CEEC suggests that the CROP should provide respondents an opportunity to review enforcement related press releases and raise objections to the Presiding Officer. CEEC notes that unfair and misleading press releases reduce incentives to reach settlement. EPA makes every effort to assure that press releases are accurate, based on the information available to the Agency at the time. A complainant may, at its discretion, allow a respondent to review a press release before issuance, but EPA does not negotiate the terms of enforcement related press releases. To include in the CROP a provision providing respondents the right to review EPA's press releases and raise objections to the Presiding Officer would create the appearance that the government's ability to communicate with the public is subject to a private party's control. EPA therefore rejects this suggestion.

b. Final Rule. EPA has made no changes to the proposed rule in response to CEEC's suggestion that the CROP should provide respondents an opportunity to review enforcement related press releases and raise objections to the Presiding Officer.

III. Miscellaneous Revisions

Through the process of analyzing the public comments, and pursuant to EPA's own internal review of the proposed rule, EPA has identified a number of typographical and drafting errors. In addition, EPA has identified parts of the proposed rule that could be stated more clearly, as mandated by Executive Order 12866 (September 30, 1993) and the President's memorandum of June 1, 1998, which require each agency to write all rules in plain language. In this final rule EPA adopts a number of changes on its own initiative, and not in response to any particular public comment. Where such revisions pertain to a section of the proposed rule that received significant public comment, the changes have already been discussed above. This section identifies the remaining revisions, which pertain to sections of the proposed rule that received no significant public comment. Public notice of proposed rule making is not required "when the agency for good cause finds * * * that notice and public procedure thereon are impractical, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(3)(B). EPA has determined that the following revisions do not significantly affect respondents' substantive or procedural rights. Accordingly, EPA has determined that providing an additional round of public notice before making these minor changes to this procedural rule would be unnecessary and contrary to the public interest.

A. Section Numbering

EPA has converted those section numbers that had contained a preceding zero (§§ 22.01, 22.02, etc.) to conform the CROP to the standard numbering of the Code of Federal Regulations set out in the regulations of the Administrative

Committee of the Federal Register at CFR 21.11 (§§ 22.1, 22.2, etc.) in this final rule. For simplicity, this preamble uses the new numbering system throughout, even when referring to sections of the proposed rule or the 1980 CROP.

B. Definitions (40 CFR 22.3)

EPA has deleted from the definition of "Administrative Law Judge" the superfluous Public Law citation.

EPA has revised the definition of "Clerk of the Board" to clarify that it means the Clerk of the Environmental Appeals Board.

In the definition of "Complainant", EPA has replaced the ambiguous word "decision" with "adjudication".

Under the proposed § 22.3, "Hearing means a hearing on the record open to the public and conducted under these Consolidated Rules of Practice." It is not clear from this definition whether the hearing is the proceeding as a whole, or just the oral evidentiary hearing. "Hearing" is used throughout the CROP, most often in reference to the oral evidentiary hearing (e.g., prehearing exchange, motion to reopen a hearing), and sometimes in the more general sense (e.g., in the definition of "party" and "Hearing Clerk"). Moreover, the definition of hearing does not acknowledge the fact that protection of confidential business information may require that all or part of a hearing be closed to the public. EPA has clarified the definition of "hearing" as follows:

Hearing means an evidentiary hearing on the record, open to the public (to the extent consistent with § 22.22(a)(2)), conducted as part of a proceeding under these Consolidated Rules of Practice.

Although the terms "proceeding" and "action" are used throughout the CROP, they have not previously been defined. In the final rule, EPA avoids the term "action" in reference to a particular proceeding, and has added to the CROP the following definition:

Proceeding means the entirety of a single administrative adjudication, from the filing of the complaint through the issuance of a final order, including any action on a motion to reconsider under § 22.32.

For consistency with these new definitions of "hearing" and "proceeding", EPA has substituted "proceeding" for "hearing" in the definition of "party."

EPA has simplified the definition of "Initial Decision" by deleting the superfluous phrase "based on the record of the proceedings out of which it arises."

EPA has converted the definition of "permit" into a definition of a new term "Permit Action." By its nature, the CROP provides a set of common procedures applicable to various administrative proceedings under a large number of regulatory statutes, each of which have their own specific terminology. In order to avoid conflict between terms used differently in different regulatory programs, EPA has adopted the new term "Permit Action" as a generic term applicable solely within the CROP. This change allows EPA to replace the unwieldy "permit revocation, termination or suspension" language elsewhere in the CROP with "Permit Action," improving the clarity of the CROP and facilitating any future efforts to bring other permit actions within the scope of the CROP.

EPA has deleted from this definition the references to permits issued under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) and permits issued under sections 3005(d) and 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and 6928(h)). EPA anticipates that these references will be restored when the Round Two permit streamlining rule (61 FR 65,268) is finalized, involving revocation of 40 CFR part 124, subpart E. In addition, EPA has added a parallel citation to the U.S. Code.

EPA has made two revisions to the definition of "Regional Hearing Clerk." First, EPA has added a clause to the first sentence, specifying that the Regional Hearing Clerk "shall be neutral in every proceeding." Second, EPA has revised the second sentence, which in the proposed rule states that "Correspondence may be addressed to the Regional Hearing Clerk, U.S. Environmental Protection Agency (address of Regional Office—see Appendix A)." EPA has created a new § 22.14(a)(7) which requires that the complaint contain the address of the Regional Hearing Clerk, which should provide more effective and more specific notice than the reference to Appendix A contained in the definition of Regional Hearing Clerk. EPA has therefore revised this sentence as follows: "Correspondence with the Regional Hearing Clerk shall be addressed to the Regional Hearing Clerk at the address specified in the complaint."

EPA has revised the definition of "Respondent" for clarity, replacing "any person proceeded against in the complaint" with "any person against whom the complaint states a claim for relief."

C. Filing and Service of Rulings, Orders and Decisions (40 CFR 22.6)

The proposed revisions to § 22.6 were intended to delete certain references as surplusage and to allow documents issued by adjudicators to be served by any reliable commercial delivery service. The proposed deletions, however, are inconsistent with the current practice that copies of all rulings, orders and decisions (except initial decisions) issued by an Administrative Law Judge are served on all parties by the Administrative Law Judge's legal staff assistant. Copies of all initial decisions are served on the parties by the Regional Hearing Clerk. Section 22.6 is amended to be consistent with this practice.

As noted in the response to comments on § 22.5(b)(2), the U.S. Postal Service considers overnight express and priority mail to be forms of first class mail. In addition, the proposed rule makes no mention of EPA's internal mail system. EPA's internal mail delivery system has proven to be generally effective, and it is in fact ultimately responsible for delivering first class mail (including certified mail) to individual EPA personnel. To address these points, EPA has revised § 22.6 to allow service "by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), by EPA's internal mail, or by any reliable commercial delivery service."

EPA has also replaced the expression "Clerk of the Environmental Appeals Board" with "Clerk of the Board," using the term defined at § 22.3(a) for consistency.

D. Examination of Documents Filed (40 CFR 22.9)

EPA has replaced the term "Environmental Appeals Board" with "Clerk of the Board," to specify the official document custodian.

E. Consolidation and Severance (40 CFR 22.12)

EPA has added "or the Environmental Appeals Board" to § 22.12(a) and (b), in order to clarify that the EAB has authority to consolidate or sever cases. This authority applies to cases pending before the EAB and to cases before a Presiding Officer through interlocutory appeal of a denial of a motion to consolidate or sever. In order to keep subpart I proceedings expeditious, EPA has also added a new requirement that subpart I proceedings may be consolidated only where all parties agree. This should eliminate the risk of litigation delays over whether one proceeding might be consolidated with another.

F. Motions (40 CFR 22.16)

EPA is adopting § 22.16 as proposed, except that a reference to § 22.51 has been added to § 22.16(c) in order to avoid any apparent conflict between § 22.16(c) and § 22.51, and the implication that an ALJ must rule on motions in proceedings under subpart I. EPA has also rearranged the sentences of § 22.16(a) to improve clarity. To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.16(b) to state the time allowed for responses and replies with the numerals "15" and "10", respectively.

G. Record of the Prehearing Conference (40 CFR 22.19(c))

The scope of the requirement that the Presiding Officer prepare and file "for the record a written summary of the action taken" at a prehearing conference is not clear. Just as a transcript of a prehearing conference may discourage frank and open discussion, the implication that the Presiding Officer may produce a formal summary of the conference may also reduce the effectiveness of such conferences. Moreover, the CROP is not clear whether the Presiding Officer's summary is supposed to constitute a finding of law or fact, nor is it clear whether the parties have the right to object and change the summary. EPA has revised the last two sentences in order to clarify that the Presiding Officer is only responsible for ensuring that the record of the proceeding includes any stipulations and agreements reached, and rulings and orders issued, during the conference.

H. Accelerated Decision; Decision to Dismiss (40 CFR 22.20)

Section 22.20(b)(2) provides for accelerated decisions and decisions to dismiss some but not all issues or claims in a proceeding. The last sentence requires that the Presiding Officer "shall issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed." This sentence is somewhat ambiguous, in that it might be construed as requiring an interlocutory order separate from, and in addition to, any partial accelerated decision or decision to dismiss certain counts. Such an interpretation would be unwarranted, would unnecessarily complicate the CROP, and would be contrary to the customary practice of the Agency's ALJs. Rule 56(d) of the Federal Rules of Civil Procedure, from which this language is derived, does not require a separate interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed. To clarify that a single decision or order can accomplish all the requirements of § 22.20(b)(2), EPA has amended the last sentence of that paragraph to state that: "The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed."

I. Assignment of Presiding Officer; Scheduling a Hearing (40 CFR 22.21)

EPA has amended § 22.21(a) to clarify that the Regional Hearing Clerk forwards copies, not originals, of the complaint, answer, and other documents in the record to the Chief Administrative Law Judge upon receipt of the answer.

According to § 22.20(a), an accelerated decision is appropriate "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." Where this standard is not met, a hearing is appropriate. EPA has revised § 22.21(b) to use the same criterion as § 22.20(a): The first sentence of § 22.21(b) now states that, "The Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact." In addition to making § 22.20 and § 22.21 more clearly complementary, this change clarifies that the mere request for a hearing does not require that a hearing be held. Neither § 22.21(b) nor § 22.15(c) of the 1980 CROP required an oral evidentiary hearing merely upon respondent's request for a hearing. See, e.g., In re Green Thumb Nursery, Inc., 6 E.A.D. 782 (EAB 1997) (holding that there is no right to an oral evidentiary hearing).

EPA has also expanded the notice period before a hearing from 20 to 30 days. This will allow the parties, their attorneys, and witnesses additional time to make travel arrangements and to prepare for the hearing.

As noted in the discussion of § 22.19(e), EPA has added to § 22.21(b) an explicit statement of the Presiding Officer's authority (where provided by the Act) to require the attendance of witnesses or the production of documentary evidence by subpoena. This statement includes criteria for issuing subpoenas that appeared in the 1980 CROP (see, e.g., § 22.37(f)(1).

J. Offers of Proof (40 CFR 22.23(b))

The proposed § 22.23(b) provides for offers of proof regarding "evidence * * * excluded from the record." Although the Presiding Officer may decline to admit certain documents, exhibits or testimony into evidence, and may refuse to consider them in his or her decision, it is incorrect to describe the status of such documents as "excluded from the record." This information is indisputably part of "the record" of the proceeding for purposes of appellate review. Accordingly, EPA has revised this paragraph to state that "Whenever the Presiding Officer denies a motion for admission into evidence, the party offering the information may make an offer of proof * * *." For purposes of clarity, EPA has revised this paragraph (b) using the word "information" in place of "evidence" where the subject is information which has not been admitted into evidence.

K. Proposed Findings, Conclusions, and Order (40 CFR 22.26)

Section 22.26 provides that the Presiding Officer must allow 20 days after receipt of notice of the availability of the transcript before requiring the parties to file proposed findings of fact, conclusions of law, and a proposed order. In the response to public comments on § 22.25 above, EPA announced that it would amend that section to allow motions to conform the transcript to the actual testimony to be filed "within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is less." EPA has amended § 22.26 in order to assure that parties need not file proposed findings of fact, conclusions of law, and the proposed order before the last date for filing motions to conform the transcript to the actual testimony pursuant to § 22.26. For additional clarity, EPA has reorganized this section and has also substituted the word "filed" for the undefined term "submitted."

After the hearing, any party may file proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a schedule for filing these documents and any reply briefs, but shall not require them before the last date for filing motions under § 22.25 to conform the transcript to the actual testimony. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

L. Motion to Reopen a Hearing (40 CFR 22.28)

The CROP does not specify when a motion is "made", so in the interest of clarity, EPA has substituted the word "filed" for "made" in the first sentence of § 22.28(a). To conform to the

preferred style of the U.S. Government Printing Office, EPA has revised § 22.28(a) and (b) to state the time periods associated with a motion to reopen a hearing with numerals only.

M. Interlocutory Appeals (40 CFR 22.29)

EPA has corrected a typographical error in the last sentence of the proposed § 22.29(a) "forward the order or ruling to the Environmental Appeals Board * * *." EPA has corrected a typographical error in the proposed § 22.29(b) by replacing the semicolon that follows "proceeding" with a comma. EPA has also changed the title of paragraph (c) from "Decision" to "Interlocutory review." The CROP does not specify when a motion is "made", so in the interest of clarity, EPA has substituted the word "filed" for "made" in the last sentence of § 22.29(c). To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.29 to state all time periods with numerals only.

N. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act (40 CFR 22.35)

As discussed below, EPA has deleted Appendix A. In § 22.35(b), EPA has replaced the reference to Appendix A with a reference to 40 CFR 1.7, which contains the same EPA offices.

O. Supplemental Rules of Practice Governing the Administrative Assessment of Civil Penalties Under the Clean Water Act (40 CFR 22.38)

EPA has revised § 22.38(b) to provide notice to State agencies in proceedings commenced without a complaint, pursuant to § 22.13(b). For ease of administration, EPA has made the timing of such notice consistent with the public notice requirements of § 22.45(b)(1). Where § 22.38(c) refers to section 509(b)(1) of the CWA, EPA has added a parallel citation to 33 U.S.C. 1369(b)(1). As discussed above, EPA deleted from the proposed § 22.31(c) the requirement specifying to whom payment of penalties must be made, in favor of the more flexible requirement that complainant direct respondent as to how payment should be made. In view of this change to § 22.31(c), the proposed § 22.38(d) is unnecessary and has been deleted.

P. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under CERCLA Section 109 (40 CFR 22.39)

The proposed § 22.39(b) says petitions for judicial review must be filed "within 30 days of the date the order making the assessment was issued." As the CROP does not specify when an order is "issued," EPA has amended this provision to state that petitions for judicial review must be filed within 30 days after the order has been served on the parties. Where § 22.39(b) refers to CERCLA section 109, EPA has specified the relevant paragraphs and has added parallel citations to the U.S. Code.

EPA has deleted from § 22.39 a superfluous quotation mark that appeared in the proposed rule.

Q. Supplemental Rules Governing The Administrative Assessment of Civil Penalties for Violations of Compliance Orders Issued to Owners or Operators of Public Water Systems Under Part B of the Safe Drinking Water Act (40 CFR 22.42)

EPA has revised the title of this section to explicitly state that it applies to cases against owners or operators of public water systems.

Where § 22.42(a) refers to section 1414(g)(3)(B) of the SDWA, EPA has added a parallel citation to 42 U.S.C. § 300g-3(g)(3)(B).

EPA has also revised § 22.42(b) to provide more certain notice to respondents in subpart I proceedings of their right to choose that hearings be conducted in accordance with section 554 of the APA. Paragraph (b) now requires that the complaint must include notice of such right to choose, and notice that the right is waived if respondent does not indicate such choice in its answer. EPA has also revised the final sentence to require that the hearing clerk notify the parties of any changes if the pleadings have been recaptioned.

R. Supplemental Rules Governing the Administrative Assessment of Civil Penalties Against a Federal Agency Under the Safe Drinking Water Act (40 CFR 22.43)

Where § 22.43(a) refers to section 1447(b) of the SDWA, EPA has added a parallel citation to 42 U.S.C. § 300j-6(b). To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.43(b) and (c)(6) to state time periods with the numeral "30".

In paragraph (c)(6), EPA has added a missing comma after the word "may", and has clarified the reference to 40 CFR part 135. The proposed rule required that the public notice include reference to the requirements of 40 CFR 135. EPA has expanded this clause to state that the public notice shall instruct prospective appellants to provide copies of any appeal to the persons described in 40 CFR 135.11(a).

S. Supplemental Rules Governing the Termination of Permits Under Section 402(a) of the Clean Water Act or Under Section 3005(d) of the Resource Conservation and Recovery Act (40 CFR 22.44)

In the December 11, 1996, "Round Two" permit streamlining proposed rule, EPA proposed to remove the procedures existing in 40 CFR part 124, subpart E, for proceedings to revoke or suspend a permit issued under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) or to revoke or suspend a permit under sections 3005(d) and 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and 6928(h)). See 61 FR 65,268 (December 11, 1996). EPA proposed that such proceedings would be conducted pursuant to the CROP procedures, and proposed CROP revisions to accomplish this. These changes were incorporated into the February 25, 1998, proposed CROP revisions. As EPA has not yet finalized the Round Two permit streamlining rule and 40 CFR part 124, subpart E remains in effect, EPA has removed and reserved § 22.44. EPA anticipates that this section will be restored when the Round Two permit streamlining rule is finalized.

T. Supplemental Rules Governing Public Notice and Comment in Proceedings Under Section 309(g) of the Clean Water Act and Section 300h-2(c) of the Safe Drinking Water Act (40 CFR 22.45)

The proposed § 22.45 contains several minor errors. The paragraph number "(1)" was omitted from § 22.45(b), and the reference to "paragraph (d)(1) of this section" in § 22.45(c)(3) should instead refer to section (c)(1). EPA has corrected these typographical errors in today's final rule. EPA has revised the heading of this section to refer to "section 1423(c)" of the SDWA, rather than "section 300h-2(c)," which is the U.S. Code section number.

In addition to correcting the above-mentioned errors, EPA has expanded the scope of § 22.45 so that these public comment procedures shall apply to class II civil penalty cases under the oil pollution provisions of Section 311(b)(6)(B)(ii) of the Clean Water Act (33 U.S.C. 1321(b)(6)(B)(ii)). Section 311(b)(6)(C)(i) (33 U.S.C. 1321(b)(6)(C)(i)) requires that EPA provide public notice of and reasonable opportunity to comment on the proposed issuance of a class II civil penalty order.

EPA has also revised paragraphs (b)(1), (b)(2)(i), (c)(1) and (c)(3) to better accommodate cases commenced through the filing of a consent

agreement and final order pursuant to § 22.13(b).

EPA has revised paragraphs (b)(1) and (c)(1) to clarify when the public comment period begins and ends.

EPA has revised § 22.45(b)(2)(ii) and (v) to clarify that comments must be submitted to the Regional Hearing Clerk.

EPA has replaced the undefined word "action" in paragraphs (b)(2)(ii), (c)(1)(i), (c)(4)(v)(C), (c)(4)(vii) and (c)(4)(viii), with the word "proceeding," which today's rule defines as discussed above.

In § 22.45(b)(2)(iv), EPA has added the word "and" after the semi-colon.

EPA has edited § 22.45(c)(1)(iii) and (iv) to refer to commenters in the singular, for consistency with the other provisions of § 22.45.

EPA has also revised § 22.45(c)(4)(ii) to more clearly and succinctly state that a commenter may petition to set aside a consent agreement and proposed final order only on the basis that material evidence was not considered.

EPA has edited the proposed § 22.45(c)(4)(vii) to correct deficiencies in grammar.

U. Appendices

The information in Appendix A of the proposed CROP ("Appendix" in the 1980 CROP) is redundant with 40 CFR 1.7. For that reason, EPA has deleted Appendix A. This deletion should have no substantive effect. Section 22.5(c)(4) requires that the complaint include complainant's address, and the revised § 22.14(a)(7) requires that the complaint contain the address of the Regional Hearing Clerk, so respondents will have ample notice of the addresses relevant to their cases.

EPA has observed that the names and addresses of the lock box banks change often, and that it would be difficult to keep the proposed Appendix B up to date. EPA has decided to delete the proposed Appendix B, and instead to require under § 22.14(a)(8) that the complaint provide information on how to pay penalties.

IV. Administrative Requirements

A. The Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, whenever an agency is required to publish a general notice of rule making for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small entities, *i.e.*, small business, small organizations, and small governmental jurisdictions. The analysis is not required, however, where the Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities.

This regulation will impose no significant costs on any small entities, because it creates no new regulatory requirements, but instead simplifies existing procedural rules. The overall economic impact on small entities is therefore believed to be nominal, if any at all. Accordingly, I hereby certify that this final regulation will not have a significant impact on a substantial number of small entities.

B. Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

C. Paperwork Reduction Act

This rule contains no information collection activities and, therefore, no information collection request ("ICR") will be submitted to the Office of Management and Budget for review in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 ("UMRA"), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When a written statement is needed for an EPA rule, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, giving them meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising them on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The rule imposes no enforceable duties on any of these governmental entities or the private sector.

E. Executive Order 12875

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to

develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input to the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on State, local or tribal governments. This rule does not impose any enforceable duties on these entities. Instead, it merely revises the procedural rules governing EPA's administrative enforcement proceedings.

F. Executive Order 13045

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the E.O. 13045 because it is not "economically significant" as defined in E.O. 12866, and because it does not involve decisions based on environmental health or safety risks.

G. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

H. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

I. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 22

Environment protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Hazardous waste, Penalties, Pesticides and pests, Poison prevention, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Dated: June 30, 1999.

Carol M. Browner,

Administrator.

Therefore, 40 CFR part 22 is revised to read as follows:

PART 22—COSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

Sec.

22.1 Scope of this part.
22.2 Use of number and gender.
22.3 Definitions.
22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.
22.5 Filing, service, and form of all filed documents; business confidentiality claims.
22.6 Filing and service of rulings, orders and decisions.
22.7 Computation and extension of time.
22.8 Ex parte discussion of proceeding.
22.9 Examination of documents filed.

Subpart B—Parties and Appearances

22.10 Appearances.
22.11 Intervention and non-party briefs.
22.12 Consolidation and severance.

Subpart C—Prehearing Procedures

22.13 Commencement of a proceeding.
22.14 Complaint.
22.15 Answer to the complaint.
22.16 Motions.
22.17 Default.
22.18 Quick resolution; settlement; alternative dispute resolution.
22.19 Prehearing information exchange; prehearing conference; other discovery.
22.20 Accelerated decision; decision to dismiss.

Subpart D—Hearing Procedures

22.21 Assignment of Presiding Officer; scheduling the hearing.
22.22 Evidence.
22.23 Objections and offers of proof.
22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.
22.25 Filing the transcript.
22.26 Proposed findings, conclusions, and order.

Subpart E—Initial Decision and Motion to Reopen a Hearing

22.27 Initial decision.
22.28 Motion to reopen a hearing.

Subpart F—Appeals and Administrative Review

22.29 Appeal from or review of interlocutory orders or rulings.
22.30 Appeal from or review of initial decision.

Subpart G—Final Order

22.31 Final order.
22.32 Motion to reconsider a final order.

Subpart H—Supplemental Rules

22.33 [Reserved]
22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.
22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.
22.36 [Reserved]
22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.
22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.
22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.
22.40 [Reserved]
22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substance Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).
22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.
22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.
22.44 [Reserved]
22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.
22.46–22.49 [Reserved]

Subpart I—Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act

22.50 Scope of this subpart.
22.51 Presiding Officer.
22.52 Information exchange and discovery.

Authority: 7 U.S.C. 136*l*; 15 U.S.C. 2610(c), 2615(a) and 2647; 33 U.S.C. 1319(g), 1321(b)(6), 1342(a), 1415(a) and (f) and 1418; 42 U.S.C. 300g-3(g)(3)(B), 300h-2(c), 300j-6(a), 6912, 6925, 6928, 6945(c)(2), 6961, 6991b, 6991e, 7413(d), 7524(c), 7545(d), 7547(d), 7601, 7607(a), 9609, 11045, and 14304.

Subpart A—General

§ 22.1 Scope of this part.

(a) These Consolidated Rules of Practice govern all administrative adjudicatory proceedings for:

(1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136*l*(a));

(2) The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d) and 7547(d));

(3) The assessment of any administrative civil penalty or for the revocation or suspension of any permit under section 105(a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f));

(4)(i) The issuance of a compliance order pursuant to section 3008(a), section 4005(c)(2), section 6001(b), or section 9006(a) of the Solid Waste Disposal Act ("SWDA") (42 U.S.C. 6925(d) & (e), 6928(a), 6945(c)(2), 6961(b), or 6991e(a)); or the assessment of any administrative civil penalty under sections 3008, 4005(c)(2), 6001(b), and 9006 of the SWDA (42 U.S.C. 6928, 6945(c)(2), 6961(b), and 6991e), except as provided in 40 CFR parts 24 and 124.

(ii) The issuance of corrective action orders under section 3008(h) of the SWDA only when such orders are contained within an administrative order which:

(A) Includes claims under section 3008(a) of the SWDA; or

(B) Includes a suspension or revocation of authorization to operate under section 3005(e) of the SWDA; or

(C) Seeks penalties under section 3008(h)(2) of the SWDA for non-compliance with a order issued pursuant to section 3008(h).

(iii) The issuance of corrective action orders under section 9003(h)(4) of the SWDA only when such orders are contained within administrative orders which include claims under section 9006 of the SWDA;

(5) The assessment of any administrative civil penalty under sections 16(a) and 207 of the Toxic Substances Control Act (15 U.S.C. 2615(a) and 2647);

(6) The assessment of any administrative civil penalty under sections 309(g) and 311(b)(6) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6));

(7) The assessment of any administrative civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609);

(8) The assessment of any administrative civil penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA") (42 U.S.C. 11045);

(9) The assessment of any administrative civil penalty under sections 1414(g)(3)(B), 1423(c), and 1447(b) of the Safe Drinking Water Act as amended (42 U.S.C. 300g-3(g)(3)(B), 300h-2(c), and 300j-6(b)), or the issuance of any order requiring both compliance and the assessment of an administrative civil penalty under section 1423(c);

(10) The assessment of any administrative civil penalty or the issuance of any order requiring compliance under Section 5 of the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. 14304).

(b) The supplemental rules set forth in subparts H and I of this part establish special procedures for proceedings identified in paragraph (a) of this section where the Act allows or requires procedures different from the procedures in subparts A through G of this part. Where inconsistencies exist between subparts A through G of this part and subpart H or I of this part, subparts H or I of this part shall apply.

(c) Questions arising at any stage of the proceeding which are not addressed in these Consolidated Rules of Practice shall be resolved at the discretion of the Administrator, Environmental Appeals Board, Regional Administrator, or Presiding Officer, as provided for in these Consolidated Rules of Practice.

§ 22.2 Use of number and gender.

As used in these Consolidated Rules of Practice, words in the singular also include the plural and words in the masculine gender also include the feminine, and vice versa, as the case may require.

§ 22.3 Definitions.

(a) The following definitions apply to these Consolidated Rules of Practice:

Act means the particular statute authorizing the proceeding at issue.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105.

Administrator means the Administrator of the U.S. Environmental Protection Agency or his delegate.

Agency means the United States Environmental Protection Agency.

Business confidentiality claim means a confidentiality claim as defined in 40 CFR 2.201(h).

Clerk of the Board means the Clerk of the Environmental Appeals Board, Mail Code 1103B, U.S. Environmental Protection Agency, 401 M St. S.W., Washington, DC 20460.

Commenter means any person (other than a party) or representative of such person who timely:

(1) Submits in writing to the Regional Hearing Clerk that he is providing or intends to provide comments on the proposed assessment of a penalty pursuant to sections 309(g)(4) and 311(b)(6)(C) of the Clean Water Act or section 1423(c) of the Safe Drinking Water Act, whichever applies, and intends to participate in the proceeding; and

(2) Provides the Regional Hearing Clerk with a return address.

Complainant means any person authorized to issue a complaint in accordance with §§ 22.13 and 22.14 on behalf of the Agency to persons alleged to be in violation of the Act. The complainant shall not be a member of the Environmental Appeals Board, the Regional Judicial Officer or any other person who will participate or advise in the adjudication.

Consolidated Rules of Practice means the regulations in this part.

Environmental Appeals Board means the Board within the Agency described in 40 CFR 1.25.

Final order means:

(1) An order issued by the Environmental Appeals Board or the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order, disposing of the matter in controversy between the parties;

(2) An initial decision which becomes a final order under § 22.27(c); or

(3) A final order issued in accordance with § 22.18.

Hearing means an evidentiary hearing on the record, open to the public (to the extent consistent with § 22.22(a)(2)), conducted as part of a proceeding under these Consolidated Rules of Practice.

Hearing Clerk means the Hearing Clerk, Mail Code 1900, U.S. Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

Initial decision means the decision issued by the Presiding Officer pursuant to §§ 22.17(c), 22.20(b) or 22.27 resolving all outstanding issues in the proceeding.

Party means any person that participates in a proceeding as complainant, respondent, or intervenor.

Permit Action means the revocation, suspension or termination of all or part of a permit issued under section 102 of the Marine Protection, Research and Sanctuaries Act (33 U.S.C. 1412).

Person includes any individual, partnership, association, corporation, and any trustee, assignee, receiver or legal successor thereof; any organized group of persons whether incorporated or not; and any officer, employee, agent, department, agency or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

Presiding Officer means an individual who presides in an administrative adjudication until an initial decision becomes final or is appealed. The Presiding Officer shall be an Administrative Law Judge, except where §§ 22.4(b), 22.16(c) or 22.51 allow a Regional Judicial Officer to serve as Presiding Officer.

Proceeding means the entirety of a single administrative adjudication, from the filing of the complaint through the issuance of a final order, including any action on a motion to reconsider under § 22.32.

Regional Administrator means, for a case initiated in an EPA Regional Office, the Regional Administrator for that Region or any officer or employee thereof to whom his authority is duly delegated.

Regional Hearing Clerk means an individual duly authorized to serve as hearing clerk for a given region, who shall be neutral in every proceeding. Correspondence with the Regional Hearing Clerk shall be addressed to the Regional Hearing Clerk at the address specified in the complaint. For a case initiated at EPA Headquarters, the term Regional Hearing Clerk means the Hearing Clerk.

Regional Judicial Officer means a person designated by the Regional Administrator under § 22.4(b).

Respondent means any person against whom the complaint states a claim for relief.

(b) Terms defined in the Act and not defined in these Consolidated Rules of Practice are used consistent with the meanings given in the Act.

§ 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.

(a) *Environmental Appeals Board.* (1) The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice; acts as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters; and approves settlement of proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters. The Environmental Appeals Board may refer any case or motion to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and references to the Environmental Appeals Board in these Consolidated Rules of Practice shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate § 22.8. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or motions filed in matters that the Environmental Appeals Board has referred to the Administrator.

(2) In exercising its duties and responsibilities under these Consolidated Rules of Practice, the Environmental Appeals Board may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding, including imposing procedural sanctions against a party who without adequate justification fails or refuses to comply with these Consolidated Rules of Practice or with an order of the Environmental Appeals Board. Such sanctions may include drawing adverse inferences against a party, striking a party's pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding.

(b) *Regional Judicial Officer.* Each Regional Administrator shall delegate to one or more Regional Judicial Officers authority to act as Presiding Officer in proceedings under subpart I of this part, and to act as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice to which subpart I of this part does not apply. The Regional Administrator may also delegate to one or more Regional Judicial Officers the authority to approve settlement of proceedings pursuant to § 22.18(b)(3). These delegations will not prevent a Regional Judicial Officer from referring any motion or case to the Regional Administrator. A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or another Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer. A Regional Judicial Officer shall not knowingly preside over a case involving any party concerning whom the

Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.

(c) *Presiding Officer.* The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer may:

(1) Conduct administrative hearings under these Consolidated Rules of Practice;

(2) Rule upon motions, requests, and offers of proof, and issue all necessary orders;

(3) Administer oaths and affirmations and take affidavits;

(4) Examine witnesses and receive documentary or other evidence;

(5) Order a party, or an officer or agent thereof, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

(7) Hear and decide questions of facts, law, or discretion;

(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(9) Issue subpoenas authorized by the Act; and

(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice.

(d) *Disqualification, withdrawal and reassignment.* (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may not perform functions provided for in these Consolidated Rules of Practice regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion to the Administrator, Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer or the Administrative Law Judge request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional Administrator, Regional Judicial Officer or Administrative Law Judge is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator. There shall be no interlocutory appeal of the ruling on a motion for disqualification. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.

(2) If the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Administrative Law Judge is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall be assigned as a replacement. The Administrator shall assign a replacement for a Regional Administrator who withdraws or is disqualified. Should the Administrator withdraw or be disqualified, the Regional Administrator from the Region where the case originated shall replace the Administrator. If that Regional Administrator would be disqualified, the Administrator shall assign a Regional Administrator from another Region to replace the Administrator. The Regional Administrator shall assign a new Regional Judicial Officer if the original Regional Judicial Officer withdraws or is disqualified. The Chief Administrative Law Judge shall assign a new Administrative Law Judge if the original Administrative Law Judge withdraws or is disqualified.

(3) The Chief Administrative Law Judge, at any stage in the proceeding, may reassign the case to an Administrative Law Judge other than the one originally assigned in the event of the unavailability of the Administrative Law Judge or where reassignment will result in efficiency in the scheduling of hearings and would not prejudice the parties.

§ 22.5 Filing, service, and form of all filed documents; business confidentiality claims.

(a) *Filing of documents.* (1) The original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer, or filed with the Clerk of the Board when the proceeding is before the Environmental Appeals Board. A document is filed when it is received by the appropriate Clerk. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic filing, subject to any appropriate conditions and limitations.

(2) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be filed with the Regional Hearing Clerk. Parties who correspond directly with the Presiding Officer shall file a copy of the correspondence with the Regional Hearing Clerk.

(3) A certificate of service shall accompany each document filed or served in the proceeding.

(b) *Service of documents.* A copy of each document filed in the proceeding shall be served on the Presiding Officer or the Environmental Appeals Board, and on each party.

(1) *Service of complaint.* (i) Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

(ii)(A) Where respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.

(B) Where respondent is an agency of the United States complainant shall serve that agency as provided by that agency's regulations, or in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii)(A) of this section.

(C) Where respondent is a State or local unit of government, agency, department, corporation or other instrumentality, complainant shall serve the chief executive officer thereof, or as otherwise permitted by law. Where respondent is a State or local officer, complainant shall serve such officer.

(iii) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt. Such proof of service

shall be filed with the Regional Hearing Clerk immediately upon completion of service.

(2) *Service of filed documents other than the complaint, rulings, orders, and decisions.* All filed documents other than the complaint, rulings, orders, and decisions shall be served personally, by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), or by any reliable commercial delivery service. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic service, subject to any appropriate conditions and limitations.

(c) *Form of documents.* (1) Except as provided in this section, or by order of the Presiding Officer or of the Environmental Appeals Board there are no specific requirements as to the form of documents.

(2) The first page of every filed document shall contain a caption identifying the respondent and the docket number. All legal briefs and legal memoranda greater than 20 pages in length (excluding attachments) shall contain a table of contents and a table of authorities with page references.

(3) The original of any filed document (other than exhibits) shall be signed by the party filing or by its attorney or other representative. The signature constitutes a representation by the signer that he has read the document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The first document filed by any person shall contain the name, address, and telephone number of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Regional Hearing Clerk, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (b)(2) of this section and § 22.6.

(5) The Environmental Appeals Board or the Presiding Officer may exclude from the record any document which does not comply with this section. Written notice of such exclusion, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any excluded document upon motion granted by the Environmental Appeals Board or the Presiding Officer, as appropriate.

(d) *Confidentiality of business information.* (1) A person who wishes to assert a business confidentiality claim with regard to any information contained in any document to be filed in a proceeding under these Consolidated Rules of Practice shall assert such a claim in accordance with 40 CFR part 2 at the time that the document is filed. A document filed without a claim of business confidentiality shall be available to the public for inspection and copying.

(2) Two versions of any document which contains information claimed confidential shall be filed with the Regional Hearing Clerk:

(i) One version of the document shall contain the information claimed confidential. The cover page shall include the information required under paragraph (c)(2) of this section and the words "Business Confidentiality Asserted". The specific portion(s) alleged to be confidential shall be clearly identified within the document.

(ii) A second version of the document shall contain all information except the specific information claimed confidential, which shall be redacted and replaced with notes indicating the nature of the information redacted. The cover page shall state that information claimed confidential has been deleted and that a complete copy of the document containing the information claimed confidential has been filed with the Regional Hearing Clerk.

(3) Both versions of the document shall be served on the Presiding Officer and the complainant. Both versions of the document shall be served on any party, non-party participant, or representative thereof, authorized to receive the information claimed confidential by the person making the claim of confidentiality. Only the redacted version shall be served on persons not authorized to receive the confidential information.

(4) Only the second, redacted version shall be treated as public information. An EPA officer or employee may disclose information claimed confidential in accordance with paragraph (d)(1) of this section only as authorized under 40 CFR part 2.

§ 22.6 Filing and service of rulings, orders and decisions.

All rulings, orders, decisions, and other documents issued by the Regional Administrator or Presiding Officer shall be filed with the Regional Hearing Clerk. All such documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Board. Copies of such rulings, orders, decisions or other documents shall be served personally, by first class mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), by EPA's internal mail, or any reliable commercial delivery service, upon all parties by the Clerk of the Environmental Appeals Board, the Office of Administrative Law Judges or the Regional Hearing Clerk, as appropriate.

§ 22.7 Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed in these Consolidated Rules of Practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal holiday, the stated time period shall be extended to include the next business day.

(b) *Extensions of time.* The Environmental Appeals Board or the Presiding Officer may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative. Any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer or Environmental Appeals Board reasonable opportunity to issue an order.

(c) *Service by mail or commercial delivery service.* Service of the complaint is complete when the return receipt is signed. Service of all other documents is complete upon mailing or when placed in the custody of a reliable commercial delivery service. Where a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document.

§ 22.8 Ex parte discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication

addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication. The requirements of this section shall not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to § 22.18(b)(3).

§ 22.9 Examination of documents filed.

(a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Agency business hours inspect and copy any document filed in any proceeding. Such documents shall be made available by the Regional Hearing Clerk, the Hearing Clerk, or the Clerk of the Board, as appropriate.

(b) The cost of duplicating documents shall be borne by the person seeking copies of such documents. The Agency may waive this cost in its discretion.

Subpart B—Parties and Appearances

§ 22.10 Appearances.

Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

§ 22.11 Intervention and non-party briefs.

(a) *Intervention.* Any person desiring to become a party to a proceeding may move for leave to intervene. A motion for leave to intervene that is filed after the exchange of information pursuant to § 22.19(a) shall not be granted unless the movant shows good cause for its failure to file before such exchange of information. All requirements of these Consolidated Rules of Practice shall apply to a motion for leave to intervene as if the movant were a party. The Presiding Officer shall grant leave to intervene in all or part of the proceeding if: the movant claims an interest relating to the cause of action; a final order may as a practical matter impair the movant's ability to protect that interest; and the movant's interest is not adequately represented by existing parties. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding unless otherwise ordered by the Presiding Officer or the Environmental Appeals Board for good cause.

(b) *Non-party briefs.* Any person who is not a party to a proceeding may move for leave to file a non-party brief. The motion shall identify the interest of the applicant and shall explain the relevance of the brief to the proceeding. All requirements of these Consolidated Rules of Practice shall apply to the motion as if the movant were a party. If the motion is granted, the Presiding Officer or Environmental Appeals Board shall issue an order setting the time for filing such brief. Any party to the proceeding may file a response to a non-party brief within 15 days after service of the non-party brief.

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings. Proceedings subject to subpart I of this part may be consolidated only upon the approval of all parties. Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part shall not apply to the consolidated proceeding.

(b) *Severance.* The Presiding Officer or the Environmental Appeals Board may, for good cause, order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures

§ 22.13 Commencement of a proceeding.

(a) Any proceeding subject to these Consolidated Rules of Practice is commenced by filing with the Regional Hearing Clerk a complaint conforming to § 22.14.

(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to § 22.18(b)(2) and (3).

§ 22.14 Complaint.

(a) *Content of complaint.* Each complaint shall include:

(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;

(2) Specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated;

(3) A concise statement of the factual basis for each violation alleged;

(4) A description of all relief sought, including one or more of the following:

(i) The amount of the civil penalty which is proposed to be assessed, and a brief explanation of the proposed penalty;

(ii) Where a specific penalty demand is not made, the number of violations (where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint;

(iii) A request for a Permit Action and a statement of its proposed terms and conditions; or

(iv) A request for a compliance or corrective action order and a statement of the terms and conditions thereof;

(5) Notice of respondent's right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of any proposed penalty, compliance or corrective action order, or Permit Action;

(6) Notice if subpart I of this part applies to the proceeding;

(7) The address of the Regional Hearing Clerk; and

(8) Instructions for paying penalties, if applicable.

(b) *Rules of practice.* A copy of these Consolidated Rules of Practice shall accompany each complaint served.

(c) *Amendment of the complaint.* The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer. Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.

(d) *Withdrawal of the complaint.* The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer.

§ 22.15 Answer to the complaint.

(a) *General.* Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

(b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested.

(c) *Request for a hearing.* A hearing upon the issues raised by the complaint and answer may be held if requested by respondent in its answer. If the respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

(d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

(e) *Amendment of the answer.* The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

§ 22.16 Motions.

(a) *General.* Motions shall be served as provided by § 22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate. All motions, except those made orally on the record during a hearing, shall:

(1) Be in writing;

(2) State the grounds therefor, with particularity;

(3) Set forth the relief sought; and

(4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

(b) *Response to motions.* A party's response to any written motion must be filed within 15 days after service of such motion. The movant's reply to any written response must be filed within 10 days after service of such response and shall be limited to issues raised in the response. The Presiding Officer or the Environmental Appeals Board may set a shorter or longer time for response or reply, or make other orders concerning the disposition of motions. The response or reply shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Any party who fails to respond within the designated period waives any objection to the granting of the motion.

(c) *Decision.* The Regional Judicial Officer (or in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board) shall rule on all motions filed or made before an answer to the complaint is filed. Except as provided in §§ 22.29(c) and 22.51, an Administrative Law Judge shall rule on all motions filed or made after an answer is filed and before an initial decision has become final or has been appealed. The Environmental Appeals Board shall rule as provided in § 22.29(c) and on all motions filed or made after an appeal of the initial decision is filed, except as provided pursuant to § 22.28.

(d) *Oral argument.* The Presiding Officer or the Environmental Appeals Board may permit oral argument on motions in its discretion.

§ 22.17 Default.

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

(d) *Payment of penalty; effective date of compliance or corrective action orders, and Permit Actions.* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c). Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under § 22.27(c). Any Permit Action ordered in the default order shall become effective without further proceedings on the date that the default order becomes final under § 22.27(c).

§ 22.18 Quick resolution; settlement; alternative dispute resolution.

(a) *Quick resolution.* (1) A respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed. This paragraph (a) shall not apply to any complaint which seeks a compliance or corrective action order or Permit Action. In a proceeding subject to the public comment provisions of § 22.45, this quick resolution is not available until 10 days after the close of the comment period.

(2) Any respondent who wishes to resolve a proceeding by paying the proposed penalty instead of filing an answer, but who needs additional time to pay the penalty, may file a written statement with the Regional Hearing Clerk within 30 days after receiving the complaint stating that the respondent agrees to pay the proposed penalty in accordance with paragraph (a)(1) of this section. The written statement need not contain any response to, or admission of, the allegations in the complaint.

Within 60 days after receiving the complaint, the respondent shall pay the full amount of the proposed penalty. Failure to make such payment within 60 days of receipt of the complaint may subject the respondent to default pursuant to § 22.17.

(3) Upon receipt of payment in full, the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, shall issue a final order. Payment by respondent shall constitute a waiver of respondent's rights to contest the allegations and to appeal the final order.

(b) *Settlement.* (1) The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The parties may engage in settlement discussions whether or not the respondent requests a hearing. Settlement discussions shall not affect the respondent's obligation to file a timely answer under § 22.15.

(2) *Consent agreement.* Any and all terms and conditions of a settlement shall be recorded in a written consent agreement signed by all parties or their representatives. The consent agreement shall state that, for the purpose of the proceeding, respondent: Admits the jurisdictional allegations of the complaint; admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; consents to the assessment of any stated civil penalty, to the issuance of any specified compliance or corrective action order, to any conditions specified in the consent agreement, and to any stated Permit Action; and waives any right to contest the allegations and its right to appeal the proposed final order accompanying the consent agreement. Where complainant elects to commence a proceeding pursuant to § 22.13(b), the consent agreement shall also contain the elements described at § 22.14(a)(1)-(3) and (8). The parties shall forward the executed consent agreement and a proposed final order to the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board.

(3) *Conclusion of proceeding.* No settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without a final order from the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, ratifying the parties' consent agreement.

(c) *Scope of resolution or settlement.* Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall only resolve respondent's liability for Federal civil penalties for the violations and facts alleged in the complaint.

(d) *Alternative means of dispute resolution.* (1) The parties may engage in any process within the scope of the Alternative Dispute Resolution Act ("ADRA"), 5 U.S.C. 581 *et seq.*, which may facilitate voluntary settlement efforts. Such process shall be subject to the confidentiality provisions of the ADRA.

(2) Dispute resolution under this paragraph (d) does not divest the Presiding Officer of jurisdiction and does not automatically stay the proceeding. All provisions of these Consolidated Rules of Practice remain in effect notwithstanding any dispute resolution proceeding.

(3) The parties may choose any person to act as a neutral, or may move for the appointment of a neutral. If the Presiding Officer grants a motion for the appointment of a neutral, the Presiding Officer shall forward the motion to the Chief Administrative Law Judge, except in proceedings under subpart I of this part, in which the Presiding Officer shall forward the motion to the Regional Administrator. The Chief Administrative Law Judge or Regional Administrator, as appropriate, shall designate a qualified neutral.

§ 22.19 Prehearing information exchange; prehearing conference; other discovery.

(a) *Prehearing information exchange.* (1) In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify. Parties are not required to exchange information relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer.

(2) Each party's prehearing information exchange shall contain:

(i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

(3) If the proceeding is for the assessment of a penalty and complainant has already specified a proposed penalty, complainant shall explain in its prehearing information exchange how the proposed penalty was calculated in accordance with any criteria set forth in the Act, and the respondent shall explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated.

(4) If the proceeding is for the assessment of a penalty and complainant has not specified a proposed penalty, each party shall include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty. Within 15 days after respondent files its prehearing information exchange, complainant shall file a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in the Act.

(b) *Prehearing conference.* The Presiding Officer, at any time before the hearing begins, may direct the parties and their counsel or other representatives to participate in a conference to consider:

(1) Settlement of the case;

(2) Simplification of issues and stipulation of facts not in dispute;

(3) The necessity or desirability of amendments to pleadings;

(4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;

(5) The limitation of the number of expert or other witnesses;

(6) The time and place for the hearing; and

(7) Any other matters which may expedite the disposition of the proceeding.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer. The Presiding Officer

shall ensure that the record of the proceeding includes any stipulations, agreements, rulings or orders made during the conference.

(d) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, DC, unless the Presiding Officer determines that there is good cause to hold it at another location or by telephone.

(e) *Other discovery.* (1) After the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if it:

(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

(ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

(2) Settlement positions and information regarding their development (such as penalty calculations for purposes of settlement based upon Agency settlement policies) shall not be discoverable.

(3) The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this section and upon an additional finding that:

(i) The information sought cannot reasonably be obtained by alternative methods of discovery; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(4) The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act. The Presiding Officer may issue a subpoena for discovery purposes only in accordance with paragraph (e)(1) of this section and upon an additional showing of the grounds and necessity therefor. Subpoenas shall be served in accordance with § 22.5(b)(1). Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Any fees shall be paid by the party at whose request the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(5) Nothing in this paragraph (e) shall limit a party's right to request admissions or stipulations, a respondent's right to request Agency records under the Federal Freedom of Information Act, 5 U.S.C. 552, or EPA's authority under any applicable law to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information.

(f) *Supplementing prior exchanges.* A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

(g) *Failure to exchange information.* Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

(1) Infer that the information would be adverse to the party failing to provide it;

(2) Exclude the information from evidence; or

(3) Issue a default order under § 22.17(c).

§ 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedures

§ 22.21 Assignment of Presiding Officer; scheduling the hearing.

(a) *Assignment of Presiding Officer.* When an answer is filed, the Regional Hearing Clerk shall forward a copy of the complaint, the answer, and any other documents filed in the proceeding to the Chief Administrative Law Judge who shall serve as Presiding Officer or assign another Administrative Law Judge as Presiding Officer. The Presiding Officer shall then obtain the case file from the Chief Administrative Law Judge and notify the parties of his assignment.

(b) *Notice of hearing.* The Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact. The Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing not later than 30 days prior to the date set for the hearing. The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.

(c) *Postponement of hearing.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) *Location of the hearing.* The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under § 22.19(d).

§ 22.22 Evidence.

(a) *General.* (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly

repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible. If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

(2) In the presentation, admission, disposition, and use of oral and written evidence, EPA officers, employees and authorized representatives shall preserve the confidentiality of information claimed confidential, whether or not the claim is made by a party to the proceeding, unless disclosure is authorized pursuant to 40 CFR part 2. A business confidentiality claim shall not prevent information from being introduced into evidence, but shall instead require that the information be treated in accordance with 40 CFR part 2, subpart B. The Presiding Officer or the Environmental Appeals Board may consider such evidence in a proceeding closed to the public, and which may be before some, but not all, parties, as necessary. Such proceeding shall be closed only to the extent necessary to comply with 40 CFR part 2, subpart B, for information claimed confidential. Any affected person may move for an order protecting the information claimed confidential.

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in paragraphs (c) and (d) of this section or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) *Written testimony.* The Presiding Officer may admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness. The admissibility of any part of the testimony shall be subject to the same rules as if the testimony were produced under oral examination. Before any such testimony is read or admitted into evidence, the party who has called the witness shall deliver a copy of the testimony to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the testimony shall swear to or affirm the testimony and shall be subject to appropriate oral cross-examination.

(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

(e) *Exhibits.* Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) *Official notice.* Official notice may be taken of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offers of proof.* Whenever the Presiding Officer denies a motion for admission into evidence, the party offering the information may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the information excluded. The offer of proof for excluded documents or exhibits shall consist of the documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the information from evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

§ 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

§ 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript ordered to be kept confidential by the Presiding Officer. Any party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner.

§ 22.26 Proposed findings, conclusions, and order.

After the hearing, any party may file proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a schedule for filing these documents and any reply briefs, but shall not require them before the last date for filing motions under § 22.25 to conform the transcript to the actual testimony. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial Decision.

(a) *Filing and contents.* After the period for filing briefs under § 22.26 has expired, the Presiding Officer shall issue an initial decision. The initial decision shall contain findings of fact,

conclusions regarding all material issues of law or discretion, as well as reasons therefor, and, if appropriate, a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward copies of the initial decision to the Environmental Appeals Board and the Assistant Administrator for the Office of Enforcement and Compliance Assurance.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become a final order 45 days after its service upon the parties and without further proceedings unless:

(1) A party moves to reopen the hearing;

(2) A party appeals the initial decision to the Environmental Appeals Board;

(3) A party moves to set aside a default order that constitutes an initial decision; or

(4) The Environmental Appeals Board elects to review the initial decision on its own initiative.

(d) *Exhaustion of administrative remedies.* Where a respondent fails to appeal an initial decision to the Environmental Appeals Board pursuant to § 22.30 and that initial decision becomes a final order pursuant to paragraph (c) of this section, respondent waives its rights to judicial review. An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board's issuance of a final order.

§ 22.28 Motion to reopen a hearing.

(a) *Filing and content.* A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall: state briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

(b) *Disposition of motion to reopen a hearing.* Within 15 days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties a response. A reopened hearing shall be governed by the applicable sections of these Consolidated Rules of Practice. The filing of a motion to reopen a hearing shall automatically stay the running of the time periods for an initial decision becoming final under § 22.27(c) and for appeal under § 22.30. These time periods shall begin again in full when the motion is denied or an amended initial decision is served.

Subpart F—Appeals and Administrative Review

§ 22.29 Appeal from or review of interlocutory orders or rulings.

(a) *Request for interlocutory appeal.* Appeals from orders or rulings other than an initial decision shall be allowed only at the discretion of the Environmental Appeals Board. A party seeking interlocutory appeal of such orders or rulings to the Environmental Appeals Board shall file a motion within 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the Environmental Appeals Board for review, and stating briefly the grounds for the appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may recommend any order or ruling for review by the Environmental Appeals Board when:

(1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and

(2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

(c) *Interlocutory review.* If the Presiding Officer has recommended review and the Environmental Appeals Board determines that interlocutory review is inappropriate, or takes no action within 30 days of the Presiding Officer's recommendation, the appeal is dismissed. When the Presiding Officer declines to recommend review of an order or ruling, it may be reviewed by the Environmental Appeals Board only upon appeal from the initial decision, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be filed within 10 days of service of an order of the Presiding Officer refusing to recommend such order or ruling for interlocutory review.

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal.* (1) Within 30 days after the initial decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board (Clerk of the Board (Mail Code 1103B), United States Environmental Protection Agency, 401 M Street, SW, Washington, DC, 20460. Hand deliveries may be made at Suite 500, 607 14th Street, NW.). One copy of any document filed with the Clerk of the Board shall also be served on the Regional Hearing Clerk. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants. The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal on any issue within 20 days after the date on which the first notice of appeal was served.

(2) Within 20 days of service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or non-party participant may

file with the Environmental Appeals Board an original and one copy of a response brief responding to argument raised by the appellant, together with reference to the relevant portions of the record, initial decision, or opposing brief. Appellee shall simultaneously serve one copy of the response brief upon each party , non-party participant, and the Regional Hearing Clerk. Response briefs shall be limited to the scope of the appeal brief. Further briefs may be filed only with the permission of the Environmental Appeals Board.

(b) *Review initiated by the Environmental Appeals Board.* Whenever the Environmental Appeals Board determines to review an initial decision on its own initiative, it shall file notice of its intent to review that decision with the Clerk of the Board, and serve it upon the Regional Hearing Clerk, the Presiding Officer and the parties within 45 days after the initial decision was served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the filing and service of briefs.

(c) *Scope of appeal or review.* The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction. If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give the parties reasonable written notice of such determination to permit preparation of adequate argument. The Environmental Appeals Board may remand the case to the Presiding Officer for further proceedings.

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, at its discretion, order oral argument on any or all issues in a proceeding.

(e) *Motions on appeal.* All motions made during the course of an appeal shall conform to § 22.16 unless otherwise provided.

(f) *Decision.* The Environmental Appeals Board shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions. The Environmental Appeals Board may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint, except that if the order being reviewed is a default order, the Environmental Appeals Board may not increase the amount of the penalty above that proposed in the complaint or in the motion for default, whichever is less. The Environmental Appeals Board may adopt, modify or set aside any recommended compliance or corrective action order or Permit Action. The Environmental Appeals Board may remand the case to the Presiding Officer for further action.

Subpart G—Final Order

§ 22.31 Final order.

(a) *Effect of final order.* A final order constitutes the final Agency action in a proceeding. The final order shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. The final order shall resolve only those causes of action alleged in the complaint, or for proceedings commenced pursuant to § 22.13(b), alleged in the consent agreement. The final order does not waive, extinguish or otherwise affect respondent's obligation to comply with all applicable provisions of the Act and regulations promulgated thereunder.

(b) *Effective date.* A final order is effective upon filing. Where an initial decision becomes a final order pursuant to § 22.27(c), the final order is effective 45 days after the initial decision is served on the parties.

(c) *Payment of a civil penalty.* The respondent shall pay the full amount of any civil penalty assessed in the final order within 30 days after the effective date of the final order unless otherwise ordered. Payment shall be made by sending a cashier's check or certified check to the payee specified in the complaint, unless otherwise instructed by the complainant. The check shall note the case title and docket number. Respondent shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on complainant. Collection of interest on overdue payments shall be in accordance with the Debt Collection Act, 31 U.S.C. 3717.

(d) *Other relief.* Any final order requiring compliance or corrective action, or a Permit Action, shall become effective and enforceable without further proceedings on the effective date of the final order unless otherwise ordered.

(e) *Final orders to Federal agencies on appeal.* (1) A final order of the Environmental Appeals Board issued pursuant to § 22.30 to a department, agency, or instrumentality of the United States shall become effective 30 days after its service upon the parties unless the head of the affected department, agency, or instrumentality requests a conference with the Administrator in writing and serves a copy of the request on the parties of record within 30 days of service of the final order. If a timely request is made, a decision by the Administrator shall become the final order.

(2) A motion for reconsideration pursuant to § 22.32 shall not toll the 30-day period described in paragraph (e)(1) of this section unless specifically so ordered by the Environmental Appeals Board.

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order issued pursuant to § 22.30 shall be filed within 10 days after service of the final order. Motions must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to § 22.4(a) and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless so ordered by the Environmental Appeals Board.

Subpart H—Supplemental Rules

§ 22.33 [Reserved]

§ 22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d), and 7547(d)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Issuance of notice.* Prior to the issuance of a final order assessing a civil penalty, the person to whom the order is to be issued shall be given written notice of the proposed issuance of the order. Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies this notice requirement.

§ 22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1361(a)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Venue.* The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties. For a person whose residence is outside the United States and outside any territory or possession of the United States, the prehearing conference and the hearing shall be held at the EPA office listed at 40 CFR 1.7 that is closest to either the person's primary place of business within the United States, or the primary place of business of the person's U.S. agent, unless otherwise agreed by all parties.

§ 22.36 [Reserved].

§ 22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings under sections 3005(d) and (e), 3008, 9003 and 9006 of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and (e), 6928, 6991b and 6991e) ("SWDA"). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Corrective action and compliance orders.* A complaint may contain a compliance order issued under section 3008(a) or section 9006(a), or a corrective action order issued under section 3008(h) or section 9003(h)(4) of the SWDA. Any such order shall automatically become a final order unless, no later than 30 days after the order is served, the respondent requests a hearing pursuant to § 22.15.

§ 22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32 and § 22.45, in administrative proceedings for the assessment of any civil penalty under section 309(g) or section 311(b)(6) of the Clean Water Act ("CWA")(33 U.S.C. 1319(g) and 1321(b)(6)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Consultation with States.* For proceedings pursuant to section 309(g), the complainant shall provide the State agency with the most direct authority over the matters at issue in the case an opportunity to consult with the complainant. Complainant shall notify the State agency within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty.

(c) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the CWA, 33 U.S.C. 1369(b)(1), shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under section 309(g) or section 311(b)(6).

§ 22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.10 through 22.32, in administrative proceedings for the assessment of any civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Judicial review.* Any person who requested a hearing with respect to a Class II civil penalty under section 109(b) of CERCLA, 42 U.S.C. 9609(b), and who is the recipient of a final order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia or for any other circuit in which such person resides or transacts business. Any person who requested a hearing with respect to a Class I civil penalty under section 109(a)(4) of CERCLA, 42 U.S.C. 9609(a)(4), and who is the recipient of a final order assessing the civil penalty may file a petition for judicial review of such order with the appropriate district court of the United States. All petitions must be filed within 30 days of the date the order making the assessment was served on the parties.

(c) *Payment of civil penalty assessed.* Payment of civil penalties assessed in the final order shall be made by forwarding a cashier's check, payable to the "EPA, Hazardous Substances Superfund," in the amount assessed, and noting the case title and docket number, to the appropriate regional Superfund Lockbox Depository.

§ 22.40 [Reserved].

§ 22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substance Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 207 of the Toxic Substances Control Act ("TSCA") (15 U.S.C. 2647). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Collection of civil penalty.* Any civil penalty collected under TSCA section 207 shall be used by the local educational agency for purposes of complying with Title II of TSCA. Any portion of a civil penalty remaining unspent after a local educational agency achieves compliance shall be deposited into the Asbestos Trust Fund established under section 5 of AHERA.

§ 22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty under section 1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. 300g-3(g)(3)(B). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Choice of forum.* A complaint which specifies that subpart I of this part applies shall also state that respondent has a right to elect a hearing on the record in accordance with 5 U.S.C. 554, and that respondent waives this right unless it requests in its answer a hearing on the record in accordance with 5 U.S.C. 554. Upon such request, the Regional Hearing Clerk shall recaption the documents in the record as necessary, and notify the parties of the changes.

§ 22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty against a federal agency under section 1447(b) of the Safe Drinking Water Act, 42 U.S.C. 300j-6(b).

Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Effective date of final penalty order.* Any penalty order issued pursuant to this section and section 1447(b) of the Safe Drinking Water Act shall become effective 30 days after it has been served on the parties.

(c) *Public notice of final penalty order.* Upon the issuance of a final penalty order under this section, the Administrator shall provide public notice of the order by publication, and by providing notice to any person who requests such notice. The notice shall include:

(1) The docket number of the order;

(2) The address and phone number of the Regional Hearing Clerk from whom a copy of the order may be obtained;

(3) The location of the facility where violations were found;

(4) A description of the violations;

(5) The penalty that was assessed; and

(6) A notice that any interested person may, within 30 days of the date the order becomes final, obtain judicial review of the penalty order pursuant to section 1447(b) of the Safe Drinking Water Act, and instruction that persons seeking judicial review shall provide copies of any appeal to the persons described in 40 CFR 135.11(a).

§ 22.44 [Reserved]

§ 22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings for the assessment of any civil penalty under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6)(B)(ii)), and under section 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300h-2(c)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Public notice.*—(1) *General.* Complainant shall notify the public before assessing a civil penalty. Such notice shall be provided within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty. The notice period begins upon first publication of notice.

(2) *Type and content of public notice.* The complainant shall provide public notice of the complaint (or the proposed consent agreement if § 22.13(b) is applicable) by a method reasonably calculated to provide notice, and shall also provide notice directly to any person who requests such notice. The notice shall include:

(i) The docket number of the proceeding;

(ii) The name and address of the complainant and respondent, and the person from whom information on the proceeding may be obtained, and the address of the Regional Hearing Clerk to whom appropriate comments shall be directed;

(iii) The location of the site or facility from which the violations are alleged, and any applicable permit number;

(iv) A description of the violation alleged and the relief sought; and

(v) A notice that persons shall submit comments to the Regional Hearing Clerk, and the deadline for such submissions.

(c) *Comment by a person who is not a party.* The following provisions apply in regard to comment by a person not a party to a proceeding:

(1) *Participation in proceeding.* (i) Any person wishing to participate in the proceedings must notify the Regional Hearing Clerk in writing within the public notice period under paragraph (b)(1) of this section. The person must provide his name, complete mailing address, and state that he wishes to participate in the proceeding.

(ii) The Presiding Officer shall provide notice of any hearing on the merits to any person who has met the requirements of paragraph (c)(1)(i) of this section at least 20 days prior to the scheduled hearing.

(iii) A commenter may present written comments for the record at any time prior to the close of the record.

(iv) A commenter wishing to present evidence at a hearing on the merits shall notify, in writing, the Presiding Officer and the parties of its intent at least 10 days prior to the scheduled hearing. This notice must include a copy of any document to be introduced, a description of the evidence to be presented, and the identity of any witness (and qualifications if an expert), and the subject matter of the testimony.

(v) In any hearing on the merits, a commenter may present evidence, including direct testimony subject to cross examination by the parties.

(vi) The Presiding Officer shall have the discretion to establish the extent of commenter participation in any other scheduled activity.

(2) *Limitations.* A commenter may not cross-examine any witness in any hearing and shall not be subject to or participate in any discovery or prehearing exchange.

(3) *Quick resolution and settlement.* No proceeding subject to the public notice and comment provisions of paragraphs (b) and (c) of this section may be resolved or settled under § 22.18, or commenced under § 22.13(b), until 10 days after the close of the comment period provided in paragraph (c)(1) of this section.

(4) *Petition to set aside a consent agreement and proposed final order.* (i) Complainant shall provide to each commenter, by certified mail, return receipt requested, but not to the Regional Hearing Clerk or Presiding Officer, a copy of any consent agreement between the parties and the proposed final order.

(ii) Within 30 days of receipt of the consent agreement and proposed final order a commenter may petition the Regional Administrator (or, for cases commenced at EPA Headquarters, the Environmental Appeals Board), to set aside the consent agreement and proposed final order on the basis that material evidence was not considered. Copies of the petition shall be served on the parties, but shall not be sent to the Regional Hearing Clerk or the Presiding Officer.

(iii) Within 15 days of receipt of a petition, the complainant may, with notice to the Regional Administrator or Environmental Appeals Board and to the commenter, withdraw the consent agreement and proposed final order to consider the matters raised in the petition. If the complainant does not give notice of withdrawal within 15 days of receipt of the petition, the Regional Administrator or Environmental Appeals Board shall assign a Petition Officer to consider and rule on the petition. The Petition Officer shall be another Presiding Officer, not otherwise involved in the case. Notice of this assignment shall be sent to the parties, and to the Presiding Officer.

(iv) Within 30 days of assignment of the Petition Officer, the complainant shall present to the Petition Officer a copy of the complaint and a written response to the petition. A copy of the response shall be provided to the parties and to the commenter, but not to the Regional Hearing Clerk or Presiding Officer.

(v) The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:

(A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;

(B) Whether complainant adequately considered and responded to the petition; and

(C) Whether a resolution of the proceeding by the parties is appropriate without a hearing.

(vi) Upon a finding by the Petition Officer that a hearing is appropriate, the Presiding Officer shall order that the consent agreement and proposed final order be set aside and shall establish a schedule for a hearing.

(vii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial. The Petition Officer shall:

(A) File the order with the Regional Hearing Clerk;

(B) Serve copies of the order on the parties and the commenter; and

(C) Provide public notice of the order.

(viii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Regional Administrator may issue the proposed final order, which shall become final 30 days after both the order denying the petition and a properly signed consent agreement are filed with the Regional Hearing Clerk, unless further petition for review is filed by a notice of appeal in the appropriate United States District Court, with coincident notice by certified mail to the Administrator and the Attorney General. Written notice of appeal also shall be filed with the Regional Hearing Clerk, and sent to the Presiding Officer and the parties.

(ix) If judicial review of the final order is denied, the final order shall become effective 30 days after such denial has been filed with the Regional Hearing Clerk.

§§ 22.46–22.49 [Reserved].

Subpart I—Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act

§ 22.50 Scope of this subpart.

(a) *Scope.* This subpart applies to all adjudicatory proceedings for:

(1) The assessment of a penalty under sections 309(g)(2)(A) and 311(b)(6)(B)(i) of the Clean Water Act (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)).

(2) The assessment of a penalty under sections 1414(g)(3)(B) and 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300g–3(g)(3)(B) and 300h–2(c)), except where a respondent in a proceeding under section 1414(g)(3)(B) requests in its answer a hearing on the record in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 554.

(b) *Relationship to other provisions.* Sections 22.1 through 22.45 apply to proceedings under this subpart, except for the following provisions which do not apply: §§ 22.11, 22.16(c), 22.21(a), and 22.29. Where inconsistencies exist between this subpart and subparts A through G of this part, this subpart shall apply. Where inconsistencies exist between this subpart and subpart H of this part, subpart H shall apply.

§ 22.51 Presiding Officer.

The Presiding Officer shall be a Regional Judicial Officer. The Presiding Officer shall conduct the hearing, and rule on all motions until an initial decision has become final or has been appealed.

§ 22.52 Information exchange and discovery.

Respondent's information exchange pursuant to § 22.19(a) shall include information on any economic benefit resulting from any activity or failure to act which is alleged in the administrative complaint to be a violation of applicable law, including its gross revenues, delayed or avoided costs. Discovery under § 22.19(e) shall not be authorized, except for discovery of information concerning respondent's economic benefit from alleged violations and information concerning respondent's ability to pay a penalty.

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