

appropriate agreement for disposing of the case by consent for the consideration of the ALJ. The agreement is filed with the ALJ who may accept it, reject it, and direct that proceedings in the case continue, or take such other action as he/she deems appropriate. If the ALJ accepts the agreement, he/she shall enter an order in accordance with its terms. The settlement agreement becomes the Final Agency Order as per § 386.61.

(e) *Civil penalty proceedings before Hearing Officer.* When a respondent has agreed to a settlement of a civil penalty before the hearing is concluded, the parties may execute an appropriate agreement for disposal of the case for the consideration of the Hearing Officer. The agreement is filed with the Hearing Officer, who, within 20 days of receipt, will make a report and recommendation to the Assistant Administrator who may accept it, reject it, and direct that proceedings in the case continue, or take such other action as he/she deems appropriate. If the Assistant Administrator accepts the agreement, he/she will enter an order in accordance with its terms. The settlement agreement becomes the Final Agency Order as of the date the Assistant Administrator enters an order accepting the settlement agreement.

[70 FR 28482, May 18, 2005]

Subpart D—General Rules and Hearings

§ 386.31 Official notice.

Upon notification to all parties, the Assistant Administrator or Administrative Law Judge may take official notice of any fact or document not appearing in evidence in the record. Any party objecting to the official notice must file an objection within 10 days after service of the notice. If a Final Agency Order has been issued, and the decision rests on a material and disputable fact of which the Agency decision-maker has taken official notice, a party may challenge the action of official notice in accordance with § 386.64 of this part.

[70 FR 28483, May 18, 2005]

§ 386.34 Motions.

(a) *General.* An application for an order or ruling not otherwise covered by these rules shall be by motion. All motions filed prior to the calling of the matter for a hearing shall be to the Assistant Administrator. All motions filed after the matter is called for hearing shall be to the administrative law judge.

(b) *Form.* Unless made during hearing, motions shall be made in writing, shall state with particularity the grounds for relief sought, and shall be accompanied by affidavits or other evidence relied upon.

(c) *Answers.* Except when a motion is filed during a hearing, any party may file an answer in support or opposition to a motion, accompanied by affidavits or other evidence relied upon. Such answers shall be served within 20 days after the motion is served or within such other time as the Assistant Administrator or administrative law judge may set.

(d) *Argument.* Oral argument or briefs on a motion may be ordered by the Assistant Administrator or the administrative law judge.

(e) *Disposition.* Motions may be ruled on immediately or at any other time specified by the administrative law judge or the Assistant Administrator.

(f) *Suspension of time.* The pendency of a motion shall not affect any time limits set in these rules unless expressly ordered by the Assistant Administrator or administrative law judge.

[50 FR 40306, Oct. 2, 1985. Redesignated and amended at 70 FR 28483, May 18, 2005]

§ 386.35 Motions to dismiss and motions for a more definite statement.

(a) Motions to dismiss must be made within the time set for reply or petition to review, except motions to dismiss for lack of jurisdiction, which may be made at any time.

(b) Motions for a more definite statement may be made in lieu of a reply. The motion must point out the defects complained of and the details desired. If the motion is granted, the pleading complained of must be remedied within 15 days of the granting of the motion or it will be stricken. If the motion is denied, the party who requested the

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more definite statement must file his/her pleading within 10 days after the denial.

[50 FR 40306, Oct. 2, 1985. Redesignated at 70 FR 28483, May 18, 2005]

§ 386.36 Motions for final agency order.

(a) *Generally.* Unless otherwise provided in this section, the motion and answer will be governed by § 386.34. Either party may file a motion for final order. The motion must be served in accordance with §§ 386.6 and 386.7. If the matter is still pending before the service center, upon filing, the matter is officially transferred from the service center to the Agency decisionmaker, who will then preside over the matter.

(b) *Form and content.* (1) Movant's filing must contain a motion and memorandum of law, which may be separate or combined and must include all responsive pleadings, notices, and other filings in the case to date.

(2) The motion for final order must be accompanied by written evidence in accordance with § 386.49.

(3) The motion will state with particularity the grounds upon which it is based and the substantial matters of law to be argued. A Final Agency Order may be issued if, after reviewing the record in a light most favorable to the non-moving party, the Agency decisionmaker determines no genuine issue exists as to any material fact.

(c) *Answer to Motion.* The non-moving party will, within 45 days of service of the motion for final order, submit and serve a response to rebut movant's motion.

[70 FR 28483, May 18, 2005]

§ 386.37 Discovery.

(a) Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; request for production of documents or other evidence for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery may not commence until the matter is pending before the Assistant Administrator or referred to the Office of Hearings.

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(c) Except as otherwise provided in these rules, in the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, or by the Assistant Administrator or Administrative Law Judge, in the absence of specific Agency provisions or regulations, the Federal Rules of Civil Procedure may serve as guidance in administrative adjudications.

[70 FR 28483, May 18, 2005]

§ 386.38 Scope of discovery.

(a) Unless otherwise limited by order of the Assistant Administrator or, in cases that have been called for a hearing, the administrative law judge, in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

(b) It is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Assistant Administrator or the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

§ 386.39 Protective orders.

Upon motion by a party or other person from whom discovery is sought,