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(d) If the Director determines that a substance previously designated a designated pollutant no longer displays the characteristics described in paragraph (b) of this section, the Director may remove such substance from the list of designated pollutants.

(e) In making the determinations referred to in paragraphs (a) through (d) of this section, the Director shall take into account all relevant new information obtained through monitoring activities or otherwise.

§ 671.15 Publication of preliminary determination

Prior to any designation or redesignation of substances pursuant to § 671.14 (including removal of such substances from lists of banned substances or designated pollutants), the Director shall publish notice in the *FEDERAL REGISTER* of any proposed designation or redesignation, including the basis therefor. The notice shall invite the submission by interested parties, the Environmental Protection Agency and other federal agencies, within 30 days after the date of publication of notice, of written data, comments, or views with respect to such action.

§ 671.16 Designation and redesignation of pollutants

After review of any comments or suggestions received from interested parties, the Environmental Protection Agency and other Federal agencies pursuant to § 671.15, the Director will make a final determination to designate and redesignate various substances as set forth above. Within 10 days after the date of such final determination, the Director shall publish notice of any action taken in the *FEDERAL REGISTER*. Such action shall become effective no earlier than thirty days following publication of notice.

Subpart F—Cases of Emergency

§ 671.17 Cases of emergency.

The provisions of this part shall not apply in cases of emergency relating to the safety of human life or of ships, aircraft or other equipment and facilities of high value, or the protection of the environment. Notice of any acts or omissions resulting from such emer-

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gency situations shall be reported promptly to the Director, who shall notify the Treaty parties in accordance with the requirements of the Treaty and the Protocol, and publish notice of such acts or omissions in the *FEDERAL REGISTER*.

PART 672—ENFORCEMENT AND HEARING PROCEDURES

Sec.

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AUTHORITY: 16 U.S.C. 2401 *et seq.*, 28 U.S.C. 2461 note.

SOURCE: 54 FR 7132, Feb. 16, 1989, unless otherwise noted. Redesignated at 58 FR 34718, June 29, 1993.

§ 672.1 Hearing procedures—Scope of these rules.

(a) These hearing rules govern all adjudicatory proceedings for the assessment of civil penalties or imposition of other sanctions pursuant to the Antarctic Conservation Act of 1978, 16 U.S.C. 2407; 2404(f); 2401-2412; and

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(b) Other adjudicatory proceedings that the Foundation, in its discretion, determines are appropriate for handling under these rules, including proceedings governed by the Administrative Procedure Act requirements for "hearings on the record." 5 U.S.C. 554 (1982).

(c) Questions arising at any stage of the proceeding which are not addressed in these rules shall be resolved at the discretion of the Director or Presiding Officer.

§ 672.2 Definitions.

(a) Throughout these rules, words in the singular also include the plural, and words in the masculine gender also include the feminine, and vice versa.

(b) *Act* means the particular statute authorizing the initiation of the proceeding.

(c) *Administrative Law Judge* means an Administrative Law Judge appointed under 5 U.S.C. 3105 (see also Pub. L. 95-251, 92 Stat. 183).

(d) *Complainant* means any person authorized to issue a complaint on behalf of the Agency to persons alleged to be in violation of the Act. The complainant shall not be the Presiding Officer or any other person who will participate or advise in the decision.

(e) *Complaint* means a written communication, alleging one or more violations of specific provisions of the Act, Treaties, NSF regulations or a permit promulgated thereunder, issued by the complainant to a person under this subpart.

(f) *Consent Agreement* means any written document, signed by the parties, containing stipulations or conclusions of fact or law, and a proposed penalty, revocation or suspension of a permit, or other sanction.

(g) *Director* means the Director of the National Science Foundation (NSF) or his delegatee.

(h) *Final Order* means (1) an order issued by the Director after an appeal of an initial decision, accelerated decision, a decision to dismiss, or default order, or (2) an initial decision which becomes a final order.

(i) *Foundation, Agency, or NSF* means the National Science Foundation.

(j) *Hearing* means a hearing on the record open to the public and conducted under these rules.

(k) *Hearing Clerk* is the person with whom all pleadings, motions, and other documents required under this subpart are filed.

(l) *Initial Decision* means the decision issued by the Presiding Officer based upon the official record of the proceedings.

(m) *Party* means any person that participates in a hearing as complainant, respondent, or intervenor.

(n) *Permit* means a permit issued under section 5 of the Antarctic Conservation Act of 1978, 16 U.S.C. section 2404.

(o) *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.

(p) *Presiding Officer* means the attorney designated by the Director to conduct hearings or other proceedings under this subpart.

(q) *Respondent* means any person proceeded against in the complaint.

(r) Terms defined in the Act and not defined in these rules of practice are used consistent with the meanings given in the Act.

§ 672.3 Powers and duties of the Director; Presiding Official; Office of Polar Programs.

(a) *Director.* The Director of NSF shall exercise all powers and duties as prescribed or delegated under the Act and these rules.

(b) The Director may delegate all or part of his authority. Partial delegation does not prevent the Presiding Officer from referring any motion or case to the Director.

(c) *Presiding Officer.* The Director may designate one or more Presiding Officers to perform the functions described below. The Presiding Officers shall be attorneys who are permanent or temporary employees of the Foundation or some other Federal Agency and may perform other duties compatible

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with their authority as hearing officers. Administrative Law Judges may perform the functions of Presiding Officers. The Presiding Officer shall have performed no prosecutorial or investigatory functions in connection with any matter related to the hearing.

(d) 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 shall have authority to:

- (1) Conduct administrative hearings under these rules of practice;
- (2) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders;
- (3) Administer oaths and affirmations and take affidavits;
- (4) Examine witnesses and receive documentary or other evidence;
- (5) For good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce testimony, documents, or other nonprivileged evidence, and failing the production thereof or 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 facts, law or discretion;
- (9) Issue subpoenas authorized by the Act; and
- (10) Take all actions necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.

(e) *Disqualification; Withdrawal.* (1) The Presiding Officer may not participate in any matter in which he (i) has a financial interest or (ii) has any relationship with a party or with the subject matter which would make it inappropriate for him to act. Any party may at any time by motion made to the Director, or his delegatee, request that the Presiding Officer be disqualified from the proceeding.

(2) If the Presiding Officer is disqualified or withdraws from the proceeding, the Director shall assign a qualified replacement who has none of the infir-

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mities listed in paragraph (e)(1) of this section. The Director, should he withdraw or disqualify himself, shall assign the Deputy Director to be his replacement.

(f) *Office of Polar Programs.* The Office of Polar Programs (OPP) manages and operates the national program in Antarctica, including administration of the Antarctic Conservation Act (ACA) permit system. OPP is responsible for investigating alleged violations of the "prohibited acts" section of the ACA and alleged noncompliance with ACA permits. OPP will act as the official complainant in all proceedings under the ACA governed by these rules. OPP may delegate all or part of its investigatory duties to other appropriate NSF employees, other qualified federal employees, or consultants. OPP will prepare complaints with the assistance of designated prosecuting attorneys within NSF's Office of the General Counsel, other qualified federal attorneys, or other appropriate legal representative selected jointly by OPP and OGC. The designated prosecuting attorney will represent OPP in all proceedings governed by these rules.

(g) The Office of Polar Programs, acting on behalf of the Director, may designate qualified individuals as enforcement officers empowered to execute all of the law enforcement functions set forth in section 10 of the ACA, 16 U.S.C. 2409, as well as any other appropriate actions ancillary to those statutory duties. OPP will provide each enforcement officer with official enforcement credentials for identification purposes and use during execution of official duties.

OPP may also designate knowledgeable individuals to provide educational and other information regarding the Antarctic to tour operators, their clients and employees, and other visitors to the Antarctic.

(h) The Office of the General Counsel, with the concurrence of the Office of Polar Programs, may refer appropriate cases to the Department of Justice for

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possible prosecution of criminal violations of the Antarctic Conservation Act.

[54 FR 7132, Feb. 16, 1989. Redesignated at 58 FR 34718, June 29, 1993, and amended at 59 FR 37438, July 22, 1994; 61 FR 51022, Sept. 30, 1996; 66 FR 42451, Aug. 13, 2001]

§ 672.4 Filing, service, and form of pleadings and documents.**(a) Filing of pleadings and documents.**

(1) Except as otherwise provided, the original and one copy of the complaint, and the original of the answer and of all other documents served in the proceeding, shall be filed with the Hearing Clerk.

(2) A certificate of service shall accompany each document filed or served. Except as otherwise provided, a party filing documents with the Hearing Clerk, after the filing of the answer, shall serve copies thereof upon all other parties and the Presiding Officer. The Presiding Officer shall maintain a duplicate file during the course of the proceeding.

(3) When the Presiding Officer corresponds directly with the parties, he shall file the original of the correspondence with the Hearing Clerk, maintain a copy in the duplicate file, and send a copy to all parties. Parties who correspond directly with the Presiding Officer shall in addition to serving all other parties send a copy of all such correspondence to the Hearing Clerk. A certificate of service shall accompany each document served under this subsection.

(b) *Service of pleadings and documents*—(1) *Service of complaint*. (i) Service of a copy of the signed original of the complaint, together with a copy of these rules, may be made personally or by certified mail, return receipt requested, on the respondent or his representative.

(ii) Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name shall be made by personal service or certified mail, as prescribed by paragraph (b)(1)(i) of this section, directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or

by Federal or State law to receive service of process.

(iii) Service upon an officer or agency of the United States shall be made by delivering a copy of the complaint to the officer or agency, or in any manner prescribed for service by applicable regulations. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii) of this section.

(iv) Service upon a State or local unit of government, or a State or local officer, agency, department, corporation or other instrumentality shall be made by serving a copy of the complaint in the manner prescribed by the law of the State for the service of process on any such persons, or

(A) If upon a State or local unit of government, or a State or local department, agency, corporation or other instrumentality, by delivering a copy of the complaint to the chief executive officer thereof; or

(B) If upon a State or local officer by delivering a copy to such officer.

(v) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed return receipt. Such proof of service shall be filed with the complaint immediately upon completion of service.

(2) The first page of every pleading, letter, or other document shall contain a caption identifying the respondent and the docket number which is exhibited on the complaint.

(3) The original of any pleading, letter, or other document (other than exhibits) shall be signed by the party filing it or by his representative. The signature constitutes a representation by the signer that he has read the pleading, letter or other 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 initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Hearing Clerk, Presiding Officer, and all parties to the proceeding. A party who fails to furnish such information and any changes thereto shall be deemed to have waived

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his right to notice and service under these rules.

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

(a) All rulings, orders, decisions, and other documents issued by the Presiding Officer shall be filed with the Hearing Clerk. Copies of all such documents shall be served personally, or by certified mail, return receipt requested, upon all parties.

(b) *Computation.* In computing any period of time prescribed or allowed in these rules, except as otherwise provided, computation is by calendar days and does not include the day of the event from which the designated period begins to run. When a stated time expires on a Saturday, Sunday or legal holiday, the stated time period shall be extended to include the next business day.

(c) *Extensions of time.* The Presiding Officer may grant an extension of time for the filing of any pleading, document, or motion (1) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or (2) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(d) *Service by mail.* Service of the complaint is complete when the return receipt is signed. Service of all other pleadings and documents is complete upon mailing. Where a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document.

(e) *Ex parte discussion of proceeding.* At no time after the issuance of the complaint shall the Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a pros-

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ecutorial or investigative function in the proceeding or other factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to 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 Presiding Officer shall give the other parties an opportunity to reply.

(f) 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 Hearing Clerk.

(g) The person seeking copies of any documents filed in a proceeding shall bear the cost of duplication. Upon a formal request the Agency may waive this cost in appropriate cases.

§ 672.6 Appearances.

(a) *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.

(b) *Intervention.* A motion for leave to intervene in any proceeding conducted under these rules must set forth the grounds for the proposed intervention, the position and interest of the movant, and whether the intervention will cause delay. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the foregoing sentence and paragraph (c) of this section, within ten (10) days after service of the motion for leave to intervene.

(c) A motion for leave to intervene in a proceeding must ordinarily be filed before the first prehearing conference, or if there is no such conference, prior to the setting of a time and place for a hearing. Any motion filed after that time must include, in addition to the

information set forth in paragraph (b) of this section, a statement of good cause for the failure to file in a timely manner. Agreements, arrangements, and other matters previously resolved during the proceeding are binding on the intervenor.

(d) *Disposition.* The Presiding Officer may grant leave to intervene only if the movant demonstrates that (1) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (2) the movant will be adversely affected by a final order; and (3) the interests of the movant are not being adequately represented by the original parties. The intervenor becomes a full party to the proceeding upon the granting of leave to intervene.

(e) *Amicus curiae.* Persons not parties to the proceeding who wish to file briefs may so move. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Director shall issue an order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, motions, and orders relating to issues to be briefed.

(f) *Consolidation.* The Presiding Officer may, by motion or *sua sponte*, consolidate any or all matters at issue in two or more proceedings docketed under these rules where (1) there exists common parties or common questions of fact or law; (2) consolidation would expedite and simplify consideration of the issues; and (3) consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.

(g) *Severance.* The Presiding Officer may, by motion or *sua sponte*, for good cause shown order any proceedings severed with respect to any or all parties or issues.

§ 672.7 Issuance of complaint.

(a) *General.* If the complainant has reason to believe that a person has violated any provision of the Antarctic Conservation Act, other Act or attendant regulations, or a permit issued

under the ACA, he may institute a proceeding for the assessment of a civil penalty or other sanctions by issuing a complaint under the Act and these rules.

(b) If the complainant has reason to believe that (1) a permittee violated any term or condition of the permit, or (2) a permittee misrepresented or inaccurately described any material fact in the permit application or failed to disclose all relevant facts in the permit application, or (3) other good cause exists for such action, he may institute a proceeding for the revocation or suspension of a permit by issuing a complaint under the Act and these rules. A complaint may seek suspension or revocation of a permit in addition to the assessment of a civil penalty.

(c) *Content and amendment of the complaint.* All complaints shall include:

(1) A statement reciting the section(s) of the Act, regulations, and/or permit authorizing the issuance of the complaint;

(2) A concise statement of the factual basis for all alleged violations; and

(3) Notice of the respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the proposed sanction.

(d) Each complaint for the assessment of a civil penalty shall also include:

(1) Specific reference to each provision of the Act and implementing regulations which respondent is alleged to have violated;

(2) The amount of the civil penalty which is proposed to be assessed; and

(3) A statement explaining the reasoning behind the proposed penalty;

(e) Each complaint for the revocation or suspension of a permit shall also include:

(1) Specific reference to each term or condition of the permit which the respondent is alleged to have violated, to each alleged inaccuracy or misrepresentation in respondent's permit application, to each fact which the respondent allegedly failed to disclose in his permit application, or to other reasons which form the basis for the complaint;

(2) A request for an order to either revoke or suspend the permit and a statement of the terms and conditions

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of any proposed partial suspension or revocation; and

(3) A statement indicating the basis for recommending the revocation, rather than the suspension, of the permit, or vice versa.

A copy of these rules shall accompany each complaint served.

(f) *Derivation of proposed civil penalty.* The complainant shall determine the dollar amount of the proposed civil penalty in accordance with any criteria set forth in the Act and with any civil penalty guidance issued by NSF.

(g) *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 twenty (20) additional days from the date of service of the amended complaint to file his answer.

(h) *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.

(i) Complainant, in cooperation with the Office of General Counsel, may refer cases to the Department of Justice for possible criminal prosecution if there is reason to believe that respondent willfully violated the Antarctic Conservation Act or its attendant regulations. Such referral does not automatically preclude NSF from proceeding administratively under the Act and these rules against the same respondent.

§672.8 Answer to the complaint.

(a) *General.* Where respondent (1) contests any material fact upon which the complaint is based; (2) contends that the amount of the penalty proposed in the complaint or the proposed revocation or suspension, as the case may be, is inappropriate; or (3) contends that he is entitled to judgment as a matter of law, he shall file a written answer to the complaint with the Hearing Clerk.

Any such answer to the complaint must be filed with the Hearing Clerk within twenty (20) 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. If respondent asserts he has no knowledge of a particular factual allegation, the allegation is deemed denied. The answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts which respondent intends to place at issue; and (3) whether a hearing is requested.

(c) *Request for hearing.* A hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer. The Presiding Officer may deem the right to a hearing waived if it is not requested by respondent. In addition, a hearing may be held at the discretion of the Presiding Officer, *sua sponte*, to examine issues 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.

§672.9 Motions.

(a) *General.* All motions, except those made orally on the record during a hearing, shall (1) be in writing; (2) state the basis or grounds with particularity; (3) set forth the relief or order sought; and (4) be accompanied by any affidavit, certificate, or other evidence or legal memorandum relied upon.

(b) *Response to motions.* A party must file a response to any written motion within ten (10) days after service of such motion, unless the Presiding Officer allows additional time. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the Presiding Officer may deem the parties to have waived any objection to the granting of the motion. The

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Presiding Officer may also set a shorter time for response, or make such other appropriate orders concerning the disposition of motions.

(c) *Ruling on Motions.* The Presiding Officer shall rule on all motions, unless otherwise provided in these rules. The Presiding Officer may permit oral argument if he considers it necessary or desirable.

§ 672.10 Default order.

(a) *Default.* The Presiding Officer may find a party in default (1) after motion, upon failure to file a timely answer to the complaint; (2) after motion or *sua sponte*, upon failure to comply with a prehearing or hearing order of the Presiding Officer; or (3) after motion or *sua sponte*, upon failure to appear at a conference or hearing without good cause being shown. No finding of default on the basis of a failure to appear at a hearing shall be made against the respondent unless the complainant presents sufficient evidence to the Presiding Officer to establish a *prima facie* case against the respondent. Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged defaulting party shall have twenty (20) days from service to reply to the motion. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default. If the complaint is for the revocation or suspension of a permit, the conditions of revocation or suspension proposed in the complaint shall become effective without further proceedings on the date designated by the Presiding Officer in his final order issued upon default. Default by the complainant shall result in the dismissal of the complaint with prejudice.

(b) *Procedures upon default.* When the Presiding Officer finds a default has occurred, he shall issue a default order against the defaulting party. This

order shall constitute the initial decision, and shall be filed with the Hearing Clerk.

(c) *Contents of a default order.* A default order shall include findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended, or the terms and conditions of permit revocation or suspension, or other sanctions.

(d) The Presiding Officer may set aside a default order for good cause shown.

§ 672.11 Informal settlement; consent agreement and order.

(a) *Settlement policy.* 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 respondent may confer with complainant concerning settlement whether or not the respondent requests a hearing. Settlement conferences shall not affect the respondent's obligation to file a timely answer.

(b) *Consent agreement.* The parties shall forward a written consent agreement and a proposed consent order to the Presiding Officer whenever settlement or compromise is proposed. The consent agreement shall state that, for the purpose of this proceeding, respondent (1) admits the jurisdictional allegations of the complaint; (2) admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; and (3) consents to the assessment of a stated civil penalty or to the stated permit revocation or suspension, or to other sanctions or actions in mitigation. The consent agreement shall include any and all terms of the agreement, and shall be signed by all parties or their counsel or representatives.

(c) *Consent order.* No settlement or consent agreement shall dispose of any proceeding under the rules without a consent order from the Director or his delegatee. Before signing such an order, the Director or his delegatee may require that the parties to the settlement appear before him to answer inquiries relating to the consent agreement or order.

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(d) *Actions by respondent to clean, protect, enhance, or benefit the environment.* NSF may accept from respondent environmentally beneficial actions, in lieu of penalties, in whole or in part, assessed under the Antarctic Conservation Act. An assessment of the monetary value of any action in mitigation shall be made before that action is incorporated as a part of any consent agreement and order.

§ 672.12 Prehearing conference.

(a) *Purpose of prehearing conference.* Unless a conference appears unnecessary, the Presiding Officer, at any time before the hearing begins, shall direct the parties and their counsel or other representatives to appear at a conference before him to consider:

- (1) The settlement of the case;
- (2) The 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) Setting a time and place for the hearing; and
- (7) Any other matters which may expedite the proceeding.

(b) *Exchange of witness lists and documents.* Unless otherwise ordered by the Presiding Officer, each party at the prehearing conference shall make available to all other parties (1) the names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony, and (2) copies of all documents and exhibits which each party intends to introduce into evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer. The Presiding Officer may exclude from evidence any document or testimony not disclosed at the prehearing conference. If the Presiding Officer permits the submittal of new evidence, he will grant parties a reasonable opportunity to respond.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing

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conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer upon motion of a party or sua sponte. The Presiding Officer shall prepare and file for the record a written summary of the action taken at the conference. The summary shall incorporate any written stipulations or agreements of the parties and all rulings and appropriate orders containing directions to the parties.

(d) *Unavailability of a prehearing conference.* If a prehearing conference is unnecessary or impracticable, the Presiding Officer, on motion or sua sponte, may conduct a telephonic conference or direct the parties to correspond with him to accomplish any of the objectives set forth in this section.

(e) *Other discovery.* (1) Except as provided by paragraph (b) of this section, further discovery shall be permitted only upon determination by the Presiding Officer that (i) such discovery will not in any way unreasonably delay the proceeding; (ii) the information to be obtained is not otherwise obtainable; and (iii) such information has significant probative value.

(2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that (i) the information sought cannot be obtained by alternative methods; or (ii) there is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) Any party may request further discovery by motion. Such a motion shall set forth (i) the circumstances warranting the taking of the discovery; (ii) the nature of the information expected to be discovered; and (iii) the proposed time and place where it will be taken. If the Presiding Officer determines that the motion should be granted, he shall issue an order granting discovery, with any qualifying conditions and terms.

(4) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to (i) the inference that the information to be discovered would be adverse to the party from whom the

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information was sought; or (ii) the issuance of a default.

§ 672.13 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part 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 regarding all or any part of the proceeding. In addition, the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, if complainant fails to establish a *prima facie* case, or if other grounds show complainant has no right to relief.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the 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 in good faith. He shall then issue an interlocutory order specifying the facts which appear substantially uncontroversial, and the issues and claims upon which the hearing will proceed.

§ 672.14 Scheduling the hearing.

(a) When an answer is filed, the Hearing Clerk shall forward the complaint, the answer, and any other documents filed thus far in the proceeding to the Presiding Officer, who will notify the parties of his assignment.

(b) *Notice of hearing.* If the respondent requests a hearing in his answer, or one is ordered by the Presiding Officer, the Presiding Officer shall serve upon the parties a notice setting forth a time

and place for the hearing. The Presiding Officer may issue the notice of hearing at any appropriate time, but not later than twenty (20) days prior to the date set for the hearing.

(c) *Postponement of hearing.* The Presiding Officer will not grant a request for postponement of a hearing except upon motion and for good cause shown.

§ 672.15 Evidence.

(a) *General.* The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Notwithstanding the preceding sentence, evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is inadmissible. In the presentation, admission, disposition, and use of evidence, the Presiding Officer shall preserve the confidentiality of trade secrets and other commercial and financial information. The confidential or trade secret status of any information shall not, however, preclude its introduction into evidence. The Presiding Officer may review such evidence in camera, and issue appropriate protective orders.

(b) *Examination of witnesses.* Parties shall examine witnesses orally, under oath or affirmation, except as otherwise provided in these rules or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing.

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

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(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are “unavailable,” within the meaning of that term under 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 judicially noticeable 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.

§ 672.16 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be made 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) *Offer of proof.* Whenever evidence is excluded from the record, the party offering the evidence 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 evidence excluded. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded.

§ 672.17 Burden of presentation; burden of persuasion.

The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty, revocation, suspension, or other sanction, is appropriate. Following the establishment of a *prima facie* case, respondent has the burden

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of presenting and of going forward with any defense to the allegations set forth in the complaint. The Presiding Officer shall decide all controverted matters upon a preponderance of the evidence.

§ 672.18 Filing the transcript.

The hearing shall be transcribed verbatim. After the Presiding Officer closes the record, the reporter shall promptly transmit the original and certified copies to the Hearing Clerk, and one certified copy directly to the Presiding Officer. A certificate of service shall accompany each copy of the transcript. The 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 obtain 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.

§ 672.19 Proposed findings, conclusions, and order.

Unless otherwise ordered by the Presiding Officer, any party may submit proposed findings of fact, conclusions of law, and a proposed order, together with supporting briefs, within twenty (20) days after the parties are notified of the availability of the transcript. The Presiding Officer shall set a time by which reply briefs must be submitted. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and relied-upon authorities.

§ 672.20 Initial decision.

(a) *Filing and contents.* The Presiding Officer shall issue and file with the Hearing Clerk an initial decision as soon as practicable after the period for filing reply briefs, if any, has expired. The initial decision shall contain findings of fact, conclusions regarding all material issues of law or discretion, the reasons for the findings and conclusions, a recommended civil penalty assessment or other sanction, if appropriate, and a proposed final order. Upon

receipt of an initial decision, the Hearing Clerk shall forward a copy to all parties, and shall send the original, along with the record of the proceeding, to the Director.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred, he shall set the dollar amount of the recommended civil penalty in the initial decision in accordance with any criteria set forth in the Act, and must consider any civil penalty guidelines issued by NSF. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended in the complaint, he shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended in the complaint if the respondent has defaulted.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become the final order of the Agency within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Director is filed by a party to the proceedings; or (2) the Director elects, *sua sponte*, to review the initial decision.

(d) *Motion to reopen a hearing.* A motion to reopen a hearing to take further evidence must be made no later than twenty (20) days after service of the initial decision on the parties and shall (1) state the specific grounds upon which relief is sought; (2) state briefly the nature and purpose of the evidence to be adduced; (3) show that such evidence is not cumulative; and (4) 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 Hearing Clerk. Parties shall have ten (10) days following service to respond. The Presiding Officer shall grant or deny such motion as soon as practicable. The conduct of any proceeding which may be required as a result of the granting of any motion to reopen shall be governed by the provisions of the applicable sections of these rules. The filing of a motion to reopen a hearing shall automatically stay the running of all time periods specified under these Rules until such time as

the motion is denied or the reopened hearing is concluded.

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

(a) *Request for interlocutory orders or rulings.* Except as provided in this section, appeals to the Director or, upon delegation, to the General Counsel, shall obtain as a matter of right only from a default order, an accelerated decision or decision to dismiss, or an initial decision rendered after an evidentiary hearing. Appeals from other orders or rulings shall lie only if the Presiding Officer, upon motion of a party, certifies such orders or rulings to the Director on appeal. Requests for such certification shall be filed in writing within six (6) days of notice of the ruling or service of the order, and shall state briefly the grounds to be relied upon on appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may certify any ruling for appeal to the Director when (1) the order or ruling involves an important question of law or policy and there is substantial grounds for difference of opinion; and (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate resolution of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

(c) *Decision.* If the Director or the General Counsel takes no action within thirty (30) days of the certification, the appeal is dismissed. If the Director or the General Counsel decides to hear the interlocutory appeal, he shall make and transmit his findings and conclusions to the Presiding Officer. When the Presiding Officer declines to certify an order or ruling to the Director on interlocutory appeal, it may be reviewed by the Director only upon appeal from the initial decision.

(d) *Stay of proceedings.* The Presiding Officer may stay the proceedings for an interlocutory appeal. Proceedings will not be stayed except in extraordinary circumstances. Where the Presiding Officer grants a stay of more than thirty (30) days, such stay must be separately approved by the Director.

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§ 672.22 Appeal from or review of initial decision.

(a) *Notice of appeal.* Any party may appeal any adverse initial decision of the Presiding Officer by filing a notice of appeal and an accompanying appellate brief with the Hearing Clerk and upon all other parties and amicus curiae within twenty (20) days after the initial decision is served upon the parties. The notice of appeal shall set forth alternative findings of fact, alternative conclusions regarding issues of law or discretion, and a proposed order together with relevant references to the record and the initial decision. The appellant's brief shall contain a statement of the issues presented for review, argument on the issues presented, and a short conclusion stating the precise relief sought, together with appropriate references to the record. Within twenty (20) days of the service of notices of appeal and briefs, any other party or amicus curiae may file with the Hearing Clerk a reply brief responding to argument raised by the appellant, together with references to the relevant portions of the record, initial decision, or opposing brief. Reply briefs shall be limited to the scope of the appeal brief.

(b) *Sua sponte review by the Director.* Whenever the Director determines sua sponte to review an initial decision, the Hearing Clerk shall serve notice of such intention on the parties within forty-five (45) days after the initial decision is served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the service and filing of briefs.

(c) *Scope of appeal or review.* The appeal of the initial decision shall be limited to those issues raised by the parties during the course of the proceeding. If the Director determines that issues raised, but not appealed by the parties, should be argued, he shall give the parties or their representatives written notice of such determination to permit preparation of adequate argument. Nothing herein shall prohibit the Director from remanding the case to the Presiding Officer for further proceedings.

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(d) *Argument.* The Director may, upon request of a party or sua sponte, assign a time and place for oral argument.

§ 672.23 Final order on appeal.

(a) *Contents of the final order.* When an appeal has been taken or the Director issues a notice of intent to conduct review sua sponte, the Director shall issue a final order as soon as practicable after the filing of all appellate briefs or oral argument. The Director shall adopt, modify or set aside the findings and conclusions contained in the decision or order being reviewed and shall set forth in the final order the reasons for his actions. The Director may, in his discretion, increase or decrease the assessed penalty from the amount recommended in the decision or order being reviewed, except that if the order being reviewed is a default order, the Director may not increase the amount of the penalty.

(b) *Payment of a civil penalty.* The respondent shall pay the full amount of the civil penalty assessed in the final order within sixty (60) days after receipt of the final order unless otherwise agreed by the parties. Payment shall be made by forwarding to the Hearing Clerk a cashier's check or certified check in the amount of the penalty assessed in the final order, payable to the Treasurer, United States of America.

(c) Money due and owing the United States by virtue of an unappealed final decision or settlement order may be collected by referral to the Department of Justice for appropriate civil action against respondent.

§ 672.24 Maximum civil monetary penalties for violations.

(a) For violations occurring before August 1, 1998, the maximum civil penalty that may be assessed under §§ 672.20(b) and 672.23(a) is set by the statute at \$5,000 for any violation and \$10,000 for knowing violations.

(b) For violations occurring between August 1, 1998 and August 31, 2002, the maximum civil penalty was adjusted under authority of the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note) as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134) to \$5,500 for any

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violation and \$11,000 for knowing violations.

(c) For violations occurring after August 31, 2002, the maximum civil penalty is adjusted under authority of the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note) as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134) to \$6,500 for any violation and \$11,000 for knowing violations.

[67 FR 55729, Aug. 30, 2002]

PART 673—ANTARCTIC NON-GOVERNMENTAL EXPEDITIONS

Sec.

- 673.1 Purpose of regulations.
- 673.2 Scope.
- 673.3 Definitions.
- 673.4 Environmental protection information.
- 673.5 Emergency response plan.

AUTHORITY: 16 U.S.C. 2401 *et. seq.*

SOURCE: 66 FR 42451, Aug. 13, 2001, unless otherwise noted.

§ 673.1 Purpose of regulations.

The purpose of the regulations in this part is to implement the Antarctic Conservation Act of 1978, Public Law 95-541, as amended by the Antarctic Science, Tourism and Conservation Act of 1996, Public Law 104-227, and Article 15 of the Protocol on Environmental Protection to the Antarctic Treaty done at Madrid on October 4, 1991. Specifically, this part requires that all non-governmental expeditions, for which advance notice by the United States is required under the Antarctic Treaty, who use non-flagged vessels ensure that the vessel owner or operator has an appropriate emergency response plan. This part is also designed to ensure that expedition members are informed of their environmental protection obligations under the Antarctic Conservation Act.

(Approved by the Office of Management and Budget under control number 3145-0180)

§ 673.2 Scope.

The requirements in this part apply to non-governmental expeditions to or within Antarctica for which the United States is required to give advance no-

tice under Paragraph (5) of Article VII of the Antarctic Treaty.

§ 673.3 Definitions.

In this part:

Antarctica means the area south of 60 degrees south latitude.

Expedition means an activity undertaken by one or more non-governmental persons organized within or proceeding from the United States to or within Antarctica for which advance notification is required under Paragraph 5 of Article VII of the Antarctic Treaty.

Person has the meaning given that term in section 1 of title 1, United States Code, and includes any person subject to the jurisdiction of the United States except that the term does not include any department, agency, or other instrumentality of the Federal Government.

§ 673.4 Environmental protection information.

(a) Any person who organizes a non-governmental expedition to Antarctica and who does business in the United States shall notify expedition members of the environmental protection obligations of the Antarctic Conservation Act.

(b) The National Science Foundation's Office of Polar Programs may prepare for publication and distribution explanation of the prohibited acts set forth in the Antarctic Conservation Act, as well as other appropriate educational material for tour operators, their clients, and employees. Such material provided to tour operators for distribution to their passengers and crew shall be disseminated prior to or during travel to the Antarctic.

§ 673.5 Emergency response plan.

Any person organizing a non-governmental expedition to or within Antarctica who is transporting passengers aboard a non-U.S. flagged vessel shall ensure that:

(a) The vessel owner's or operator's shipboard oil pollution emergency plan, prepared and maintained according to Regulation 26 of Annex I of the International Convention for the Prevention of Pollution from Ships, 1973,