AUTHORITY: Sec. 11, Noise Control Act of 1972 (42 U.S.C. 4910) and additional authority as specified.

SOURCE: 43 FR 34132, Aug. 3, 1978, unless otherwise noted.

Subpart A—Rules of Practice Governing Hearings for Orders Issued Under Section 11(d) of the Noise Control Act

§ 209.1 Scope.

These rules of practice govern all proceedings conducted in the issuance of an order under section 11(d) of the Noise Control Act of 1972, 42 U.S.C. 4910.

§ 209.2 Use of number and gender.

In these rules of practice, words in the singular number apply to the plural and words in the masculine gender apply to the feminine and vice versa.

§ 209.3 Definitions.

All terms not defined in this section shall have the meaning given them in the Act.

(a) *Act* means the Noise Control Act of 1972 (42 U.S.C. 4901 *et seq.*).

(b) *Administrative law judge* means an administrative law judge appointed under 5 U.S.C. 3105 (see also 5 CFR part 930, as amended by 37 FR 16787). ''Administrative law judge'' is synonymous with ''hearing examiner'' as used in Title 5 of the United States Code.

(c) *Administrator* means the Administrator of the Environmental Protection Agency or his or her delegate.

(d) *Agency* means the U.S. Environmental Protection Agency.

(e) *Complainant* means the Agency acting through any person authorized by the Administrator to issue a complaint to alleged violators of the Act. The complainant shall not be the judicial officer or the Administrator.

(f) *Hearing clerk* means the hearing clerk of the Environmental Protection Agency.

(g) *Intervener* means a person who files a motion to be made a party under § 209.15 or § 209.16, and whose motion is approved.

(h) *Party* means the Environmental Protection Agency, the respondent(s) and any interveners.

(i) *Person* means any individual, corporation, partnership, or association, and includes any officer, employee, department, agency or instrumentality of the United States, a State, or any political subdivision of a State.

(j) *Respondent* means any person against whom a complaint has been issued under this subpart.

(k) *Environmental Appeals Board* means the Board within the Agency described in § 1.25 of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under this part. An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this part to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall

be interpreted as referring to the Administrator.

[43 FR 34132, Aug. 3, 1978, as amended at 57 FR 5344, Feb. 13, 1992]

§ 209.4 Issuance of complaint.

If the complainant has reason to believe that a person has violated any provision of the Act or the regulations, he or she may institute a proceeding for the issuance of a remedial order by issuing a complaint.

§ 209.5 Complaint.

(a) *Contents.* The complaint shall include (1) specific reference to each provision of the Act or regulations which respondent is alleged to have violated; (2) a brief statement of the factual basis for alleging each violation; (3) the proposed order issued under section 11(d) of the Act to remedy the violation, signed by the Assistant Administrator for Enforcement, with notice that the order shall be effective 20 days after service of the complaint unless respondent requests a hearing under § 209.6; (4) notice of respondent's right to request a hearing on any material fact or issue of law contained in the complaint, or on the appropriateness of the proposed order; and (5) a statement of whether the respondent must submit a remedial plan pursuant to § 209.8.

(b) *Amendment of the complaint.* At any time prior to the filing of an answer, the complainant may amend the complaint as a matter of right. Respondent shall have twenty (20) additional days from the date of service of the amended complaint to file an answer. At any time after the filing of an answer, the complaint may be amended upon motion granted by the administrative law judge.

(c) *Withdrawal of the complaint.* Where, on the basis of new information or evidence, the complainant concludes that no violation of the Act or the regulations has been committed by the respondent or that the issuance of the complaint was otherwise inappropriate, the complainant may withdraw the complaint without prejudice at any stage in the proceeding.

(d) *Service of complaint.* (1) Service of the complaint shall be made on the respondent personally (or on his or her representative), or by certified mail, return receipt requested.

(2) Service upon a domestic or foreign corporation or upon a partnership or another unincorporated association which is subject to suit under a common name shall be made by personal service or certified mail, return receipt requested, directed to an officer or partner, a managing or general agent, or any other agent authorized by appointment or by Federal or State law to receive service of process.

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

§ 209.6 Answer.

(a) *General.* Where respondent (1) contests any material fact alleged in the complaint to constitute a violation of the Act or regulations; or (2) contends that the remedial order proposed in the complaint is inappropriate to the violation; or (3) contends that he or she is entitled to judgment as a matter of law, he or she shall file a written answer with the complainant. Any answer must be filed with the complainant within twenty (20) days after service of the complaint. Initiation of informal conferences with the Agency under § 209.19 does not add to the twenty (20) day period. The time period in which to file an answer may be extended by the Administrator upon motion.

(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. Whenever an allegation is denied, the answer shall state briefly the facts upon which the denial is based. The answer shall also state (1) whether a hearing is requested, (2) the facts respondent intends to place at issue, and (3) the circumstances or arguments which are alleged to constitute the grounds of defense.

(c) *Hearing upon the issues.* A hearing upon the issues raised by the complaint and answer shall be held upon written demand of respondent.

(d) *Failure to plead specifically.* A respondent's failure to plead specifically

to any material factual allegation contained in the complaint shall constitute an admission of such allegation.

(e) *Amendment of the answer.* The respondent may amend the answer upon motion granted by the administrative law judge.

§ 209.7 Effective date of order in complaint.

(a) The order in the complaint is effective and binding on respondent 20 days after service of the complaint, unless respondent requests a hearing pursuant to § 209.6. If the respondent does not request a hearing, the order is then a final order of the Agency.

(b) Respondent may file a motion with the complainant to vacate the final order, reopen the proceedings and request a hearing after the order is effective. This motion must be filed within twenty (20) days after the effective date of the order. The motion shall state the reasons respondent failed to file a timely answer, and provide the information required by § 209.6(b). The Administrator may, in his or her discretion and for good cause shown, grant the motion.

§ 209.8 Submission of a remedial plan.

(a) The Administrator may require the respondent to submit a remedial plan. Notice of this requirement and the due date will be given in the complaint. If the respondent requests a hearing, the remedial plan required by the complaint need not be submitted. The final order may include a requirement that the respondent submit a remedial plan.

(b) A respondent may always submit a remedial plan voluntarily in pursuit of informal settlement.

(Sec. 13, Noise Control Act (42 U.S.C. 4912))

§ 209.9 Contents of a remedial plan.

(a) The Administrator will specify the requirements of the remedial plan. This may include, but is not limited to, the following information:

(1) A detailed description of the products covered by the remedial order, including the category and/or configuration if applicable, and the make, model year and model number, if applicable.

(2) A detailed description of the present location of the products, including a list of those in possession of the products and, if necessary, how the respondent intends to contact the persons in possession and retrieve the products.

(3) Any appropriate remedies the respondent would propose as an alternative to the specific remedies proposed by the Administrator.

(4) A detailed plan for implementing the remedies, both those proposed by the Administrator and those proposed by the respondent.

(5) A detailed account of the costs of implementing each of the proposed plans.

(b) Remedial plans shall be submitted to Director, Noise Enforcement Division (EN–387), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

(Sec. 13, Noise Control Act (42 U.S.C. 4912))

§ 209.10 Approval of plan, implementation.

(a) If the Administrator finds that the remedial plan is designed to remedy the noncompliance effectively, he or she will so notify the respondent in writing. If the remedial plan is not approved, the Administrator will provide the respondent with written notice of the disapproval and the reasons for the disapproval. The Administrator may give the respondent an opportunity to revise the plan, or the Administrator may revise the plan.

(b) The respondent shall commence implementation of the approved plan upon receipt of notice from the Administrator that the remedial plan has been approved, or revised by the Administrator and then approved.

(Sec. 13, Noise Control Act (42 U.S.C. 4912))

§ 209.11 Filing and service.

(a) After an answer containing a written demand for a hearing has been filed, an original and two copies of all documents or papers required or permitted to be filed under these rules of practice shall be filed with the hearing clerk.

(b) When a party files with the hearing clerk any pleadings, any additional issues for consideration at the hearing, or any written testimony, documents, papers, exhibits, or materials, proposed

to be introduced into evidence or papers filed in connection with any appeal, it shall serve copies upon all other parties. A certificate of service shall be provided on or accompany each document or paper filed with the hearing clerk. Documents to be served upon the Director of the Noise Enforcement Division shall be mailed to: Director, Noise Enforcement Division, U.S. Environmental Protection Agency (EN–387), 1200 Pennsylvania Ave., NW., Washington, DC 20460.

(c) Service by mail is complete upon mailing. Filing is completed when the document reaches the hearing clerk. It shall be timely if mailed within the time allowed for filing as determined by the postmark.

§ 209.12 Time.

(a) In computing any period of time prescribed or allowed by these rules of practice, the day of the act or event from which the designated period of time begins to run shall not be included, except as otherwise provided. Saturdays, Sundays, and Federal legal holidays shall be included in computing any period allowed for the filing of any document or paper, except that when a period expires on a Saturday, Sunday, or Federal legal holiday, the period shall be extended to include the next following business day.

(b) A prescribed period of time within which a party is required or permitted to do an act shall be computed from the time of service, except that when service is accomplished by mail, 3 days shall be added.

§ 209.13 Consolidation.

The Administrator or the administrative law judge may consolidate two or more proceedings to be held under this section for resolving one or more issues whenever it appears that such consolidation will expedite or simplify consideration of such issues. Consolidation shall not affect the right of any party to raise any issues that could otherwise have been raised.

§ 209.14 Motions.

(a) All motions, except those made orally during the course of the hearing, shall be in writing, shall state the grounds with particularity, and shall set forth the relief or order sought.

(b) Within 10 days after service of any motion filed under this section or within such other time as may be fixed by the Environmental Appeals Board or the administrative law judge, as appropriate, any party may serve and file an answer to the motion. The movant shall, by leave of the Environmental Appeals Board or the administrative law judge, as appropriate, serve and file reply papers within the time set by the request.

(c) The administrative law judge shall rule upon all motions filed or made subsequent to his or her appointment and prior to the filing of his or her decision or accelerated decision, as appropriate. The Environmental Appeals Board shall rule upon all motions filed before the appointment of the administrative law judge and all motions filed after the filing of the decision of the administrative law judge or accelerated decision. Oral argument of motions will be permitted only if the administrative law judge or the Environmental Appeals Board, as appropriate, deems it necessary.

[43 FR 34132, Aug. 3, 1978, as amended at 57 FR 5344, Feb. 13, 1992]

§ 209.15 Intervention.

(a) Persons desiring to intervene in a hearing to be held under section 11(d) of the act shall file a motion setting forth the facts and reasons why they should be permitted to intervene.

(b) In passing on a motion to intervene, the following factors, among other things, shall be considered by the administrative law judge:

(1) The nature of the movant's interest including the nature and the extent of the property, financial, environmental protection, or other interest of the movant;

(2) The effect the order which may be entered in the proceeding may have on the movant's interest;

(3) The extent to which the movant's interest will be represented by existing parties or may be protected by other means;

(4) The extent to which the movant's participation may reasonably be expected to assist materially in the development of a complete record;

(5) The extent to which one movant's participation may reasonably be expected to delay the proceedings.

(c) A motion to intervene should be filed before the first prehearing conference, the initiation of correspondence under § 209.20, or the setting of the time and place for the hearing, whichever occurs earliest. Motions shall be served on all parties. Any opposition to such motion must be filed within 10 days of service.

(d) All motions to be made an intervener shall be reviewed by the administrative law judge using the criteria set forth in paragraph (b) of this section and considering any opposition to such motion. The administrative law judge may, in granting such motion, limit a movant's participation to certain issues only.

(e) If the administrative law judge grants the motion with respect to any or all issues, he or she shall notify, or direct the hearing clerk to notify, the petitioner and all parties. If the administrative law judge denies the motion he or she shall notify, or direct the hearing clerk to notify, the petitioner and all parties and shall briefly state the reasons why the motion was denied.

(f) All motions to be made an intervener shall include the movant's agreement that the movant and any person he or she represents will be subject to examination and cross-examination, and will also include an agreement to make any supporting and relevant records available at the movant's own expense upon the request of the administrative law judge, on his or her own motion or the motion of any party or other intervener. If the intervener fails to comply with any of these requests, the administrative law judge may, in his or her discretion, terminate his or her status as an intervener.

§ 209.16 Late intervention.

Following the expiration of the time prescribed in § 209.15 for the submission of motions to intervene in a hearing, any person may file a motion with the administrative law judge to intervene in a hearing. Such a motion must contain the information and commitments required by paragraph (b) and (f) of § 209.15, and, in addition, must show that there is good cause for granting the motion and must contain a statement that the movant shall be bound by agreements, arrangements, and other determinations which may have been made in the proceeding.

§ 209.17 Amicus curiae.

Persons not parties to the proceedings who wish to file briefs may do so by leave of the Environmental Appeals Board or the administrative law judge, as appropriate, granted on motion. This motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. An amicus curiae shall be eligible to participate in any briefing following the granting of his or her motion, and shall be served with all briefs, reply briefs, motions and orders relating to issues to be briefed.

[43 FR 34132, Aug. 3, 1978, as amended at 57 FR 5344, Feb. 13, 1992]

§ 209.18 Administrative law judge.

(a) *General.* The administrative law judge shall conduct a fair and impartial hearing in accordance with 5 U.S.C. 554, and shall take all necessary action to avoid delay and maintain order. He or she shall have all power consistent with Agency rule and with the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, necessary to this end, including the following:

(1) To administer oaths and affirmations;

(2) To rule upon offers of proof and receive relevant evidence;

(3) To regulate the course of the hearings and the conduct of the parties and their counsel;

(4) To hold conferences for simplification of the issues or any other proper purpose;

(5) To consider and rule upon all appropriate procedural and other motions, and to issue all necessary orders;

(6) To require the submission of testimony in written form whenever in the opinion of the administrative law judge oral testimony is not necessary for full and true disclosure of the facts.

(7) To require the filing of briefs on any matter on which he or she is required to rule;

(8) To require any party or any witness, during the course of the hearing,

to state his or her position on any relevant issue;

(9) To take depositions or cause depositions to be taken in accordance with § 209.22.

(10) To render judgments upon issues of law during the course of the hearing.

(11) To issue subpenas authorized by law.

(b) *Assignment of administrative law judge.* When an answer which contains a written demand for a hearing is filed, the administrator shall refer the proceeding to the chief administrative law judge, who shall conduct the proceeding, or assign another administrative law judge to conduct the proceeding.

(Sec. 16, Noise Control Act (42 U.S.C. 4915))

§ 209.19 Informal settlement and consent agreement.

(a) *Settlement policy.* The Agency encourages settlement of the proceeding at any time after the issuance of a complaint if settlement is consistent with the provisions and the objectives of the act and the regulations. Whether or not respondent requests a hearing, he or she may confer with complainant concerning the facts stated in the complaint or concerning the appropriateness of the proposed remedial order. The terms of any settlement agreement shall be expressed in a written consent agreement. Conferences with complainant concerning possible settlement shall not affect the 20 day time limit for filing an answer under § 209.6.

(b) *Consent agreement.* A written consent agreement signed by the complainant and respondent shall be prepared by the complainant and forwarded to the Environmental Appeals Board whenever settlement or compromise is proposed. A copy shall be served on all other parties to the proceeding, no later than the date the consent agreement is forwarded to the Environmental Appeals Board. 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 as stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; and (3) consents to the issuance of a given remedial order. The consent agreement shall include (i) the terms of the agreement; (ii) any appropriate conclusions regarding material issues of law, fact and/or discretion as well as reasons therefor; and (iii) the Environmental Appeals Board's proposed final order. The administrative law judge does not have jurisdiction over a consent agreement.

(c) *Final order.* No settlement or consent agreement shall be dispositive of any action pending under section 11(d) of the act without a final order of the Environmental Appeals Board. In preparing a final order, the Environmental Appeals Board may require that any or all of the parties to the settlement or other parties appear before it to answer inquiries relating to the proposed consent agreement. The hearing is terminated without further proceedings upon the filing of the final order with the hearing clerk.

[43 FR 34132, Aug. 3, 1978, as amended at 57 FR 5344, Feb. 13, 1992]

§ 209.20 Conferences.

(a) At the discretion of the administrative law judge, conferences may be held prior to or during any hearing. The administrative law judge shall direct the hearing clerk to notify all parties of the time and location of any such conferences. At the discretion of the administrative law judge, persons other than parties may attend. At a conference the administrative law judge may:

(1) Obtain stipulations and admissions, receive requests and order depositions to be taken, identify disputed issues of fact and law, and require or allow the submission of written testimony from any witness or party.

(2) Set a hearing schedule for as many of the following as are deemed necessary by the administrative law judge:

(i) Oral and written statements;

(ii) Submission of written testimony as required or authorized by the administrative law judge;

(iii) Oral direct and cross-examination of a witness;

(iv) Oral argument, if appropriate;

(3) Identify matters of which official notice may be taken;

(4) Consider limitation of the number of expert and other witnesses;

(5) Consider the procedure to be followed at the hearing; and

(6) Consider any other matter that may expedite the hearing or aid in the disposition of the issue.

(b) The results of any conference including all stipulations shall, if not transcribed, be summarized in writing by the administrative law judge and made part of the record.

(c) The administrative law judge, on motion or sua sponte, may request correspondence from the parties for any of the objectives set forth in this section. Copies of the administrative law judge's request and the parties' correspondence shall be served upon all parties. The administrative law judge shall include such correspondence in the record and a written summary of any stipulation or agreement reached by means of such correspondence as provided in paragraph (b) of this section.

§ 209.21 Primary discovery (exchange of witness lists and documents).

(a) At a prehearing conference or within some reasonable time set by the administrative law judge prior to the hearing, each party shall make available to the other parties the names of the expert and other witnesses the party expects to call, together with a brief summary of their expected testimony and copies of all documents and exhibits which the party expects to introduce into evidence. Thereafter, witnesses, documents, or exhibits may be added and summaries of expected testimony amended upon motion by a party.

(b) The administrative law judge, may, upon motion by a party or other person, and for good cause shown, by order (1) restrict or defer disclosure by a party of the name of a witness or a narrative summary of the expected testimony of a witness, and (2) prescribe other appropriate measures to protect a witness. Any party affected by any such action shall have an adequate opportunity, once he or she learns the name of a witness and obtains the narrative summary of the witness' expected testimony, to prepare for the presentation of his or her case.

§ 209.22 Other discovery.

(a) Further discovery under this section shall be undertaken only upon order of the administrative law judge or upon agreement of the parties, except as provided in § 209.21. The administrative law judge shall order further discovery only after determining:

(1) That such discovery will not delay the proceeding unreasonably;

(2) That the information to be obtained is not obtainable voluntarily; and

(3) That such information is relevant to the subject matter of the hearing.

(b) The administrative law judge shall order depositions upon oral questions only upon a showing of good cause and a finding that:

(1) The information sought cannot be obtained by alternative methods; or

(2) 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.

(c) Any party to the proceeding may make a motion or motions for an order of discovery. The motion shall set forth:

(1) The circumstances which require the discovery;

(2) The nature of the information expected to be discovered; and

(3) The proposed time and place where it will be taken. If the administrative law judge determines the motion should be granted, he or she shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(d) A person's or party's failure to comply with a discovery order may lead to the inference that the information to be discovered is adverse to the person or party who failed to provide it.

§ 209.23 Trade secrets and privileged information.

In the presentation, admission, disposition, and use of evidence, the administrative law judge shall preserve the confidentiality of trade secrets and other privileged commercial and financial information. The confidential or trade secret status of any information shall not, however, preclude its being

introduced into evidence. The administrative law judge may make such orders as may be necessary to consider such evidence in camera. This may include a supplemental initial decision to consider questions of fact and conclusions regarding material issues of law, fact or discretion which arise out of that portion of the evidence which is confidential or which includes trade secrets.

§ 209.24 Default order.

(a) *Default.* Respondent may be found to be in default upon failure to comply with a prehearing or hearing ruling of the Administrator or the administrative law judge. A respondent's default shall constitute an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. The remedial order proposed is binding on respondent without further proceedings upon the issuance by the Environmental Appeals Board of a final order issued upon default.

(b) *Proposed default order.* Where the administrative law judge finds a default has occurred after a request for a hearing has been filed, the administrative law judge may render a proposed default order to be issued against the defaulting party. For the purpose of appeal pursuant to § 209.31 this order shall be deemed to be the initial decision of the administrative law judge.

(c) *Contents of a final order issued upon default.* A final order issued upon default shall include findings of fact, conclusions regarding all material issues of law, fact, or discretion, and the remedial order which is issued. An order issued by the Environmental Appeals Board upon default of respondent shall constitute a final order in accordance with the terms of § 209.33.

[43 FR 34132, Aug. 3, 1978, as amended at 57 FR 5345, Feb. 13, 1992]

§ 209.25 Accelerated decision; dismissal.

(a) The administrative law judge, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the Agency 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 or she may require, or dismiss any party with prejudice, under any of the following conditions:

(1) Failure to state a claim upon which relief can be granted, or direct or collateral estoppel;

(2) No genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of a proceeding; or

(3) Such other reasons as are just, including failure to obey a procedural order of the administrative law judge.

(b) If under this section an accelerated decision is issued as to all the issues and claims joined in the proceedings, the decision shall be treated as the decision of the administrative law judge as provided in § 209.30.

(c) If under this section, judgment is rendered on less than all issues or claims in the proceeding, the administrative law judge shall determine what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The administrative law judge shall thereupon issue an order specifying the facts which appear without substantial controversy, and the issues and claims upon which the hearing will proceed.

§ 209.26 Evidence.

(a) The official transcripts and exhibits, together with all papers and requests filed in the proceeding, shall constitute the record. Evidence may be received at the hearing even though inadmissible under the rules of evidence applicable to judicial proceedings, provided it is relevant, competent and material and not unduly repetitious. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded so far as practicable. The weight to be given evidence shall be determined by its reliability and probative value.

(b) Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in these rules of practice or by the administrative law judge. 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) Rulings of the administrative law judge on the admissibility of evidence, the propriety of examination and cross-examination and other procedural matters shall appear in the record.

(d) Parties shall automatically be presumed to have taken exception to an adverse ruling.

§ 209.27 Interlocutory appeal.

(a) An interlocutory appeal may be taken to the Environmental Appeals Board either (1) with the consent of the administrative law judge where he or she certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense or prejudice to any party or substantial detriment to the public interest, or (2) absent the consent of the administrative law judge, by permission of the Environmental Appeals Board.

(b) Applications for interlocutory appeal of any ruling or order of the administrative law judge may be filed with the administrative law judge within 5 days of the issuance of the ruling or order being appealed. Answers by other parties may be filed within 5 days of the service of such applications.

(c) Applications to file such appeals absent consent of the administrative law judge shall be filed with the Environmental Appeals Board within 5 days of the denial of any appeal by the administrative law judge.

(d) The Environmental Appeals Board will consider the merits of the appeal on the application and answers. No oral argument will be heard nor other briefs filed unless the Environmental Appeals Board directs otherwise.

(e) Except under extraordinary circumstances as determined by the administrative law judge, the taking of an interlocutory appeal will not stay the hearing.

[43 FR 34132, Aug. 3, 1978, as amended at 57 FR 5345, Feb. 13, 1992]

§ 209.28 Record.

(a) Hearings shall be reported and transcribed verbatim, stenographically or otherwise, and the original transcript shall be part of the record and the sole official transcript. Copies of the record shall be filed with the hearing clerk and made available during Agency business hours for public inspection. Any person who desires a copy of the record of the hearing or any part of it shall be entitled to it upon payment of the cost.

(b) The official transcripts and exhibits, together with all papers and requests filed in the proceeding, shall constitute the record.

§ 209.29 Proposed findings, conclusions.

(a) Within 20 days of the filing of the record with the hearing clerk as provided in § 209.28, or within such longer time as may be fixed by the administrative law judge, any party may submit for the consideration of the administrative law judge proposed findings of fact, conclusions of law, and a proposed rule or order, together with briefs in support of it. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

(b) The record shall show the administrative law judge's ruling on the proposed findings and conclusions except when the administrative law judge's order disposing of the proceedings otherwise informs the parties of the action taken by him or her thereon.

§ 209.30 Decision of the administrative law judge.

(a) The administrative law judge shall issue and file with the hearing clerk his or her decision as soon as practicable after the period for filing proposed findings as provided for in § 209.29 has expired.

(b) The administrative law judge's decision shall become the decision of the Environmental Appeals Board (1) when no notice of intention to appeal as described in § 209.31 is filed, 30 days after its issuance, unless in the interim the Environmental Appeals Board shall have taken action to review or stay the effective date of the decision; or (2) when a notice of intention to appeal is filed but the appeal is not perfected as required by § 209.31, 5 days after the period allowed for perfection of an appeal has expired unless within that 5 day period, the Environmental Appeals Board

has taken action to review or stay the effective date of the decision.

(c) The administrative law judge's decision shall include a statement of findings and conclusions, as well as the reasons or basis therefore, upon all the material issues of fact or law presented on the record and an appropriate rule or order. The decision shall be supported by a preponderance of the evidence and based upon a consideration of the whole record.

(d) At any time prior to issuing his or her decision, the administrative law judge may reopen the proceeding for the reception of further evidence.

[43 FR 34132, Aug. 3, 1978, as amended at 57 FR 5345, Feb. 13, 1992]

§ 209.31 Appeal from the decision of the administrative law judge.

(a) Any party to a proceeding may appeal the administrative law judge's decision to the Environmental Appeals Board: Provided, That within 10 days after the administrative law judge's decision is issued, the party files a notice of intention to appeal, and within 30 days of the decision the party files an appeal brief.

(b) When an appeal is taken from the decision of the administrative law judge, any party may file a brief with respect to such appeal. The brief shall be filed within 20 days of the date of the filing of the appellant's brief.

(c) Any brief filed under this section shall contain, in the order indicated:

(1) A subject index of the matter in the brief, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto;

(2) A specification of the issues which will be argued;

(3) The argument presenting clearly the points of fact and law relied upon in support of the position taken on each issue, with specific page references to the record and the legal or other material relied upon; and

(4) A proposed form of rule or order for the Environmental Appeals Board's consideration if different from the rule or order contained in the administrative law judge's decision.

(d) Briefs shall not exceed 40 pages without leave of the Environmental Appeals Board.

(e) The Environmental Appeals Board may allow oral argument in its discretion.

[43 FR 34132, Aug. 3, 1978, as amended at 57 FR 5345, Feb. 13, 1992]

§ 209.32 Review of the administrative law judge's decision in absence of appeal.

(a) If, after the expiration of the period for taking an appeal under § 209.31, no notice of intention to appeal the decision of the administrative law judge has been filed, or if filed, not perfected, the hearing clerk shall so notify the Environmental Appeals Board.

(b) The Environmental Appeals Board, upon receipt of notice from the hearing clerk that no notice of intention to appeal has been filed, or if filed, not perfected pursuant to § 209.31, may, on its own motion, within the time limits specified in § 209.30(b), review the decision of the administrative law judge. Notice of the Environmental Appeals Board's intention to review the decision of the administrative law judge shall be given to all parties and shall set forth the scope of such review and the issues which shall be considered and shall make provision for filing of briefs.

[57 FR 5345, Feb. 13, 1992]

§ 209.33 Decision on appeal or review.

(a) Upon appeal from or review of the administrative law judge's decision, the Environmental Appeals Board shall consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition shall to the extent necessary or desirable exercise all the powers which the Environmental Appeals Board could have exercised if it had presided at the hearing.

(b) The Environmental Appeals Board shall render a decision as expeditiously as possible. The Environmental Appeals Board shall adopt, modify, or set aside the findings, conclusions, and rule or order contained in the decision of the administrative law judge and

shall set forth in its decision a statement of the reasons or bases for its action. The Environmental Appeals Board's decision shall be the final order in the proceeding.

(c) In those cases where the Environmental Appeals Board determines that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Environmental Appeals Board, in its discretion, may withhold final action pending the receipt of such additional information or views, or may remand the case to the administrative law judge.

[57 FR 5345, Feb. 13, 1992]

§ 209.34 Reconsideration.

Within five (5) days after service of the Environmental Appeals Board's decision, any party may file a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. Petitions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Petitions 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's pursuant to § 209.3(k) and in which the Administrator has issued the final order. Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the administrative law judge or the Environmental Appeals Board. Any party desiring to oppose a petition shall file an answer thereto within five (5) days after service of the petition. The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order.

[57 FR 5345, Feb. 13, 1992]

§ 209.35 Conclusion of hearing.

(a) If no appeal has been taken from the administrative law judge's decision before the period for taking an appeal under § 209.31 has expired, and the period for review by the Environmental Appeals Board on its own motion under § 209.30 has expired, and the Environmental Appeals Board does not move to review such decision, the hearing will be deemed to have ended at the expiration of all periods allowed for such appeal and review.

(b) If an appeal of the administrative law judge's decision is taken under § 209.31, or if, in the absence of such appeal, the Environmental Appeals Board moves to review the decision of the administrative law judge under § 209.32, the hearing will be deemed to have ended upon the rendering of a final decision by the Environmental Appeals Board.

[57 FR 5346, Feb. 13, 1992]

§ 209.36 Judicial review.

(a) The Administrator hereby designates the general counsel, Environmental Protection Agency as the officer upon whom copy of any petition for judicial review shall be served. That officer shall be responsible for filing in the court the record on which the order of the Environmental Appeals Board is based.

(b) Before forwarding the record to the court, the Agency shall advise the petitioner of the costs of preparing it and as soon as payment to cover fees is made shall forward the record to the court.

[43 FR 34132, Aug. 3, 1978, as amended at 57 FR 5346, Feb. 13, 1992]

PART 210—PRIOR NOTICE OF CITIZEN SUITS

Sec.

AUTHORITY: Sec. 12, Noise Control Act, (Pub. L. 92–574, 86 Stat. 1234).

SOURCE: 39 FR 36011, Oct. 7, 1974, unless otherwise noted.

§ 210.1 Purpose.

Section 12 of the Noise Control Act authorizes any person to commence a civil action on his own behalf to enforce the Act or to enforce certain requirements promulgated pursuant to the Act. The purpose of this part is to prescribe procedures governing the manner of giving notices as required by