ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 22 and 59

[FRL–5966–7]

RIN 2020–AA13

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is today proposing technical amendments and other refinements to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 CFR part 22, including the addition of new rules for administrative proceedings not governed by section 554 of the Administrative Procedure Act.

DATES: Comments must be submitted on or before April 27, 1998.

ADDRESSES: Comments should be submitted in writing to Enforcement and Compliance Docket and Information Center (2201A), Office of Enforcement and Compliance Assurance, Office of Regulatory Enforcement, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, D.C. 20460 or via electronic mail to crop-comments@epamail.epa.gov. Comments submitted on paper must be submitted in triplicate.

EPA will make available, both in paper form and on the internet, a record of comments received in response to this document. The official docket will be a paper record of all comments received in writing or by electronic mail. This record may be reviewed at room 4033 of the Ariel Rios Federal Building, 1200 Pennsylvania Avenue, N.W., Washington, DC 20044. Persons interested in reviewing the comments must make advance arrangements to do so by calling 202–564–2614. A reasonable fee may be charged by EPA for copying docket materials. The Agency also will publish a copy of the official docket on the Office of Enforcement and Compliance Assurance's internet home page at http:\\www.epa.gov\oeca\r*egstat2.html. The Agency intends that this internet docket should duplicate the official paper record, however, if technological or resource limitations make it infeasible to include one or more comments on the internet docket, the internet docket will identify those comments available only in the official paper docket.

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

SUPPLEMENTARY INFORMATION:

I. Background

The Consolidated Rules of Practice (''CROP'') at 40 CFR part 22 were promulgated in 1980 to establish uniform procedural rules for administrative enforcement proceedings required under various environmental statutes to be held on the record after opportunity for a hearing in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 551 et seq. (''APA''). Aside from the addition of statute-specific amendments to subpart H (see e.g., Rules of Practice Governing the Administrative Assessment of Class II Civil Penalties Under the Clean Water Act, 55 FR 23838 (1990), codified at 40 CFR 2.38), the CROP have not been substantially revised since their initial promulgation. Today's proposal would correct a number of inconsistencies and ambiguities in the procedures which have become apparent through experience with the CROP. In addition, the Agency proposes to update and modernize the procedures to make them more ''user-friendly'' and to aid in streamlining administrative practice.

On July 1, 1991, EPA proposed a separate set of procedures for the administrative assessment of penalties where a hearing on the record under APA section 554 is not required, commonly referred to as ''non-APA'' enforcement actions. See 56 FR 29996. These procedures, to be codified at 40 CFR part 28, were authorized by Congress in various statutes. *Id.* The proposed ''part 28'' procedures were designed to provide a quick and understandable process by which to resolve non-APA enforcement actions, while protecting the basic due process rights of a respondent. *Id.* at 29997 (discussion of constitutional due process requirements as established in *Matthews* v. *Eldridge*, 424 U.S. 319 (1976)). EPA subsequently issued guidance in September, 1991, to the EPA Regional Offices calling for use of the proposed part 28 procedures for Class I penalty actions under section 309(g) of the Clean Water Act (''CWA'') and, several months later, for Class I penalty actions under section 311(b)(6) of the CWA. Although use of these procedures did result in quicker resolution of administrative penalty cases than had occurred before, Agency experience revealed that the majority of EPA Regions were following, with some modification, the CROP procedures for non-APA enforcement actions, in large measure out of familiarity with the CROP. A side-by-side comparison of the proposed part 28 with the CROP reveals many similar sections and procedures.

The proposed part 28 introduced a number of useful concepts to EPA's administrative practice, such as limitations on written legal arguments or statements (§ 28.8), a more clearly described commenter role for certain CWA and Safe Drinking Water Act (''SDWA'') cases, expansion of information exchange and restrictions on formal discovery (§ 28.24), a more structured default procedure (§ 28.21), and simplified and expedited settlement procedures (§ 28.22). Many of these concepts are the basis for today's proposed revisions to the APA procedures of the CROP. *See, e.g.,* proposed § 22.18(a) ''Quick resolution'' provisions. Given the many similarities between the CROP and proposed part 28, as well as the Agency's long-standing goal of enhancing administrative efficiency, the Agency believes that maintaining two stand-alone sets of procedures for its administrative enforcement practice which contain more similarities than differences would be inefficient and confusing. The specific requirements appropriate to non-APA enforcement actions can be presented effectively and efficiently as a short subpart to the CROP. Accordingly, today's proposal includes in subpart I modifications to the basic CROP suitable for non-APA proceedings. EPA expects to withdraw the part 28 proposal upon issuance of these CROP amendments as a final rule.

Similarly, the proposed revisions to the CROP would supersede and replace the anticipated rules governing non-APA hearings on field citations under section 113(d)(3) of the Clean Air Act (''CAA''). On May 3, 1994, EPA published the proposed Field Citation Program to be codified at 40 CFR 59. 59 FR 22776. EPA expects that the part 59 Field Citation Program will be promulgated as a final rule before the completion of this CROP rulemaking. Subpart B of part 59, ''Rules Governing Hearings on Field Citations,'' will govern CAA section 113(d)(3) proceedings until these CROP revisions become final. EPA expects that upon promulgation of the CROP revisions as a final rule, subpart B of part 59 would be repealed and the revised CROP would be used for CAA section 113(d)(3) proceedings.

In addition, in order to implement the SDWA Amendments of 1996, EPA anticipates that it will soon repeal subpart J of 40 CFR part 142, ''Procedures for PWS Administrative Compliance Orders.'' Section 142.208 of that subpart stated that the CROP procedures are to apply to administrative actions enforcing compliance orders issued under section 1414(g) of the SDWA, 42 U.S.C. 300g–3. That instruction is now part of this proposed rulemaking, and EPA intends to use the relevant CROP procedures proposed below as procedural guidance for SDWA section 1414(g)(3)(B) administrative enforcement actions during the interim period before final promulgation of revisions to the CROP.

On December 11, 1996, EPA proposed to modify the procedures for termination of National Pollutant Discharge Elimination System (''NPDES'') permits issued under the CWA and for permits issued under Subtitle C of the Resource Conservation and Recovery Act (''RCRA''). 61 FR 65268. EPA proposed to substitute the procedures contained in the CROP governing revocation, termination and suspension of other EPA permits for the existing procedures in part 124, subpart E (which cover only termination of NPDES and RCRA Subtitle C permits). EPA proposed two changes to the CROP to implement this proposal: (1) EPA proposed to insert the word ''termination'' or ''terminate'' as appropriate wherever the existing CROP refers to ''revocation or suspension'' or ''revoke or suspend'' permits; (2) EPA proposed to add a set of supplemental rules at § 22.44 to cover NPDES or RCRA permit terminations. *See* 60 FR 65280 for a discussion of this proposal. The comment period on this proposal closed on February 10, 1997. For the convenience of the public, today's proposal reflects all the changes to the CROP EPA has previously proposed, with some minor editorial changes. EPA is not, however, soliciting new comments on changes previously proposed, nor will EPA respond to any such comments in the final rule to this proposal. Any comments on the proposal to terminate NPDES or RCRA permits using the CROP procedures should be directed to the docket for that proposal, referenced in the December 11, 1996 document. It should be noted, however, that such comments will be considered late-filed.

II. Proposed Revisions

A. Revisions to Part 22

1. Statement of authority

The ''Authority'' section is reorganized in numeric order, and updated to include additional authorities. To the extent that these additional authorities change the scope of the CROP, they are discussed below in regard to § 22.01(a).

2. Scope of the Rules

Section 22.01(a): The phrase ''Consolidated Rules of Practice'' would be substituted for other phrases such as ''these rules of practice,'' ''these rules,'' and ''this part,'' for consistency here in paragraph (a) and throughout the CROP. The first sentence would also be revised to clarify that these procedures apply only to administrative adjudications. Substantive changes to the scope of the CROP are discussed in detail below.

The scope section will mandate that the Agency shall use the CROP procedures for all administrative adjudicatory proceedings listed therein. Although the Agency does not commit itself to apply these procedures to administrative actions other than those listed in the scope, where it has discretion to do so, the Agency may elect to informally apply these procedures for other adjudications not listed. The Agency has, however, attempted to make the proposed scope a complete list of all the proceedings likely to be commenced subject to the CROP. Note, too, that the CROP only creates a set of procedures for use in the exercise of some of EPA's statutory enforcement authorities, and neither extends nor limits the substantive jurisdiction of the Agency. Many provisions of the CROP reflect policy choices by the Agency to exercise less than the full scope of its statutory and constitutional authority (e.g., extending to 30 days the deadline for all answers (§ 22.15), procedures for issuance of default orders (§ 22.17)). As such, these limitations on the Agency's authority apply only in proceedings under the CROP, and the Agency may modify these requirements in future rulemakings.

Section 22.01(a)(2): The CROP would be expanded to include field citation proceedings under 42 U.S.C. 7413(d)(3), as discussed above. Part 22 currently applies to penalty proceedings under section 7413(d)(1), and the proposed revision would expand the scope to include all of section 7413(d).

Section 22.01(a)(3): A reference to 33 U.S.C. 1415(f) inadvertently omitted from the 1980 CROP is added for clarity and consistency.

Section 22.01(a)(4): This paragraph is revised to clarify which sections of the Solid Waste Disposal Act (SWDA) authorize the various proceedings. The scope is expanded by inclusion of proceedings to suspend or revoke a permit under sections 3005(d) and 3008(h) (42 U.S.C. 6925(d) and 6928(h)) as proposed in the Agency's December 11, 1996, proposal noted above (60 FR 65280). The scope is also expanded to include assessment of administrative civil penalties under 42 U.S.C. 6961 within the CROP. Reference to 42 U.S.C. 6992d is deleted, because the demonstration program for medical wastes and its accompanying regulations (40 CFR part 259) expired on July 22, 1991. The scope is revised to clarify that the CROP applies to the issuance of compliance orders under section 3008(a) or section 9006(a) of the SWDA (42 U.S.C. 6928(a) or 6991e(a)).

Additionally, the paragraph would be revised to specify that the CROP is applicable to both the assessment of civil penalties and the issuance of compliance orders pursuant to section 4005(c)(2) of the SWDA (42 U.S.C. 6945(c)(2)). That section, enacted as part of the 1984 Hazardous and Solid Waste Amendments, authorizes EPA to enforce the Subtitle D prohibition against open dumping in certain circumstances. Although section 4005(c)(2) refers to the enforcement authorities available under section 3008, the proposed revision would clarify that the CROP would apply to these actions.

The procedures governing most SWDA corrective action orders appear at 40 CFR part 24, but under certain circumstances the CROP may apply. A new subparagraph (B) would clarify that the CROP generally does not apply to SDWA section 3008(h) corrective action orders, but only to those that are part of a proceeding commenced under the CROP for claims under section 3008(a), to suspend or revoke authorization to operate under section 3005(e), or for penalties for non-compliance with a section 3008(h) order. A new subparagraph (C) would clarify that the CROP procedures generally do not apply to corrective action orders authorized under SWDA section 9003(h)(4) (42 U.S.C. 6991b(h)(4)), except where the Agency includes such orders in a complaint seeking civil penalties pursuant to section 9006. All other corrective action orders are subject to the part 24 procedures.

Section 22.01(a)(5): A reference would be added to include proceedings to assess civil administrative penalties pursuant to section 207 of the Asbestos

Hazard Emergency Response Act (''AHERA''), codified as Title II of the Toxic Substance Control Act, 15 U.S.C. 2647. The CROP was amended June 5, 1989, to add § 22.47, a supplemental rule governing administrative penalty proceedings under AHERA section 207, however, there was no corresponding amendment to § 22.01(a). 54 FR 24112. The proposed revision would make clear that such proceedings are governed by the CROP.

Section 22.01(a)(6): Section 4301(b) of the Oil Pollution Act of 1990 amended section 311(b)(6) of the CWA to allow administrative penalty proceedings. This proposed rule would expand the scope of the CROP to include proceedings to assess administrative civil penalties under section 311(b)(6). The limitation to Class II proceedings would be dropped from the scope, requiring use of the CROP for non-APA Class I proceedings as well as Class II penalty proceedings, under both sections 309(g) and 311(b)(6) of the CWA. Special provisions regarding the non-APA Class I proceedings would appear in subpart I of the CROP. The proposed revision of § 22.01(a)(6) also reflects the addition of proceedings to terminate a permit issued under section 402(a) of the CWA, as proposed in the December 11, 1996 FR notice discussed above. 60 FR 65,268. Pursuant to that proposed rule, the existing part 124 procedures for terminating permits would be supplanted by the CROP.

Section 22.01(a)(9): A reference would be added to include proceedings for the assessment of civil administrative penalties under 42 U.S.C. 1423(c) and 1447(b) within the scope of the CROP. A further reference would be added regarding the issuance of any order requiring both compliance and the assessment of a civil penalty under 42 U.S.C. 1423(c). These references reflect the amendments to the Safe Drinking Water Act, Public Law 104–182, 110 Stat. 1613 (1996), which affect administrative penalty assessment against public water systems and federal facilities.

Section 22.01(a)(10): A reference would be added to include proceedings for the assessment of civil penalties or the issuance of compliance orders under section 5 of the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. 14304). The Mercury-Containing and Rechargeable Battery Management Act would phase out the use of mercury in batteries and provide for the efficient and cost-effective collection and recycling or proper disposal of batteries regulated under the Act. Section 5 of the Act authorizes administrative enforcement for violations of the Act, except for section 104 of the Act, which is enforceable under the Solid Waste Disposal Act.

Section 22.01 (b): A reference would be added to include the new subpart I, and to provide that subpart H or I provisions will supersede any conflicting provisions in subparts A—G.

Section 22.01(c): This provision would be amended to empower the Environmental Appeals Board the authority to resolve procedural matters not covered in the CROP because it has been designated by the Administrator to perform this function.

3. Definitions

Section 22.03(a): Surplus language would be deleted from the definition of ''Act''. No substantive change is intended.

A definition of ''Business confidentiality claim'' would be added in order to specifically link the treatment of confidential business information (''CBI'') in CROP proceedings to the general provisions for CBI in 40 CFR part 2, subpart B. This amendment will clarify that the same protections that apply to use of CBI in other Agency actions will apply in proceedings under the CROP.

A definition of ''Clerk of the Board'' would be added to identify the Clerk of the Environmental Appeals Board, who should receive service of pleadings and documents in matters pending before the Board.

A definition of ''Commenter'' would be being added for purposes of administrative civil penalty actions under Section 309(g) of the Clean Water Act, Class II administrative civil penalty actions under Section 311(b)(6) of the Clean Water Act, and for actions under Section 1423(c) of the Safe Drinking Water Act, in order to provide commenter procedures required by those Acts.

The definition of ''Complainant'' would be revised to add references to the provisions covering commencement of a proceeding and the content and amendment of a complaint.

The definition of ''Complaint'' would be deleted, as it is fully covered by the operative provisions of the rule at § 22.14.

The definition of ''Consent Agreement'' would be deleted, as it is fully covered by the operative provisions of the rule at § 22.18(b)(2).

The address of the Environmental Appeals Board would be deleted from its definition, as redundant with § 22.30(a).

The definition of ''Final Order'' would be clarified by specifically including Consent Orders issued pursuant to § 22.18.

The definition of ''Hearing Clerk'' would be amended to update the mailing address.

The definition of ''Initial Decision'' would be expanded to include references to the operative sections of the CROP at §§ 22.17(c), 22.20(b) and 22.27, thereby distinguishing initial decisions from other decisions rendered by a Presiding Officer.

The definition of ''permit'' would be expanded to include permits issued under Section 402(a) of the Clean Water Act and Section 3005(d) of the Resource Conservation and Recovery Act, consistent with the December 11, 1996, proposed rule (60 FR 65,268). As used in the CROP, the term ''permit'' would also apply to authority to operate under interim status pursuant to section 3005(e) of the Resource Conservation and Recovery Act.

The definition of ''Presiding Officer'' would be clarified and amended to provide that, until an answer is filed, the Regional Judicial Officer serves as Presiding Officer. This change is one of form only, as § 22.16(c) of the existing Rule allows the Regional Administrator or a delegate to rule on motions until an answer is filed, and in practice this authority is delegated to Regional Judicial Officers. The definition also would be amended to allow Regional Judicial Officers to preside in proceedings under subpart.

The definition of ''Regional Administrator'' would be revised for clarity and to eliminate unnecessary language. EPA would delete from the existing rule the provision defining the term ''Regional Administrator'' to refer to the Environmental Appeals Board in cases commenced at EPA Headquarters. In the interests of clarity, the proposed revisions would specifically refer to the Regional Administrator where the CROP assigns responsibilities to the Regional Administrator, and to the EAB wherever the CROP assigns responsibilities to the EAB. Only one responsibility assigned to the Regional Administrators under the CROP would not also be assigned to the EAB for cases commenced at EPA Headquarters, which is the responsibility of designating Regional Judicial Officers. EPA does not anticipate any need to provide for a Regional Judicial Officer to preside in non-APA proceedings commenced at EPA Headquarters. EPA anticipates that it will use non-APA procedures primarily for cases expected to be routine and raising few, if any, new issues of law. EPA expects to rely on Administrative Law Judges to act as Presiding Officers in all cases initiated

at EPA Headquarters, because current Agency plans do not call for EPA Headquarters to initiate significant numbers of routine cases or cases which raise no significant new issues of law. For the few instances where Headquarters-based Complainants seek to file non-APA cases, such cases could be filed with a Regional Hearing Clerk and adjudicated by the appropriate Regional Judicial Officer.

The definition of ''Regional Hearing Clerk'' would be clarified as it pertains to cases initiated at EPA Headquarters. The Regional Office addresses now appear in Appendix A.

Redundant language would be removed from the definition of ''Regional Judicial Officer''.

4. Roles of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.

Section 22.04(a): The heading would be amended, and the entire section would be revised to clarify the roles of the Environmental Appeals Board, Regional Judicial Officers, and Presiding Officers in administrative enforcement proceedings under the CROP. The proposed changes better describe current practice. Paragraph (a) would be amended to clarify that the Administrator has delegated to the Environmental Appeals Board the authority to rule on appeals, and that in all cases except those in which the Environmental Appeals Board has referred a matter to the Administrator, appeals and motions must be directed to the Environmental Appeals Board to be considered. The word ''direction,'' an uncorrected typographical error in the existing CROP, would be amended to ''discretion.''

Section 22.04(b): The section would be amended to clarify the role and authority of the Regional Judicial Officer, to whom the authority to act in a given proceeding is delegated by the Regional Administrator. This authority includes acting as Presiding Officer in non-APA administrative enforcement cases, acting as Presiding Officer in APA cases prior to the filing of respondent's answer and request for a hearing, and approving settlements of proceedings under the CROP.

EPA proposes to delete the prohibition that Regional Judicial Officers ''shall not be employed by the Region's Enforcement Division or by the Regional Division directly associated with the type of violation at issue in the proceeding'', because Regional reorganizations have made this language obsolete. EPA's Regional Offices currently have a variety of different organizational structures, and these organizational structures may continue to evolve. Accordingly, EPA proposes to substitute a more generally applicable requirement which makes no mention of organizational structures: The Regional Judicial Officer shall not ''have any interest in the outcome of'' any case in which he or she serves as Regional Judicial Officer. EPA interprets this clause broadly, as prohibiting anyone who has any financial interest, personal interest, or career interest in the outcome of the action from serving as Regional Judicial Officer. EPA believes this should provide the Regional Judicial Officers sufficient independence to conduct a fair hearing, because in EPA's experience no Regional Judicial Officer has been subject to improper influence by Agency officials. The limitation placed on the Regional Judicial Officer regarding any ''factually related hearing'' also would be deleted, because the Agency believes it improper to disqualify a Regional Judicial Officer merely because that person has participated in a hearing where similar facts were at issue.

EPA intends that the Regional Judicial Officers should be, and are in fact, fully independent of improper influence. Nevertheless, EPA requests suggestions as how this independence should be described in § 22.04(b). Commenters should be cognizant of the fact that the EPA employees who serve as Regional Judicial Officers will have duties other than acting as Regional Judicial Officer, because workloads do not generally warrant exclusive assignments to that position. One possible alternative to the language proposed would be a mandate that a Regional Judicial Officer ''shall not be directly supervised by any person who directly supervises the prosecution of the case.'' Such a requirement would provide a more definite standard than the standard that is proposed, however it would be at odds with Agency's reinvention efforts to remove layers of management, minimize institutional barriers, promote cross-media training and promote multimedia enforcement.

Section 22.04(c): Surplus language would be deleted. No substantive change is intended by this revision.

Section 22.04(d): Several clarifications are made by deleting surplus and confusing language. The proposed rule would require parties to first request that a Regional Administrator, a member of the Environmental Appeals Board, or the Presiding Officer disqualify himself or herself before requesting that a higher Agency official disqualify that person. Although requests for disqualification are very rare, the proposed rule would reduce unnecessary delay and burdens by requiring that requests for disqualification first be made directly to the person whose disqualification is sought. If the request is denied, then the reviewing official would have more information upon which to base a ruling than if the initial request were made directly to the reviewing official. The proposed rule would also authorize the Environmental Appeals Board, rather than the Administrator, to review requests for disqualification of Regional Administrators and Presiding Officers. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator.

EPA also requests comment on another possible change in the disqualification procedures which is not included in the text of the proposed rule published today. Under the proposed rule, both the interlocutory appeal procedures of § 22.29 and the procedures for appeal of an initial decision at § 22.30 would apply where a Presiding Officer denies a motion for disqualification. EPA is considering a prohibition on interlocutory appeals of motions for disqualification, in order to avoid unnecessary delay. After issuance of an initial decision, the parties would still have the right of appealing any adverse ruling or order of the Presiding Officer, including a refusal to disqualify himself or herself, pursuant to § 22.30. This change would make the CROP consistent with Federal court practice. See 28 U.S.C. 1292 (decisions regarding disqualification not included in the interlocutory review authority of the Courts of Appeals), *U.S.* v. *Gregory,* 656 F.2d 1132, 1136 (5th Cir. 1981) (interlocutory review of disqualification decision not available), *Dubnoff* v. *Goldstein,* 385 F.2d 717, 721 (2d Cir. 1967)(''A determination of a District Judge not to disqualify himself is ordinarily reviewable only on appeal from a final decision on the [underlying cause of action].''). The Agency requests comment on this potential revision of the CROP.

5. Filing, Service, and Form of Pleadings and Documents; Business Confidentiality Claims

Section 22.05: The heading would be revised to include business confidentiality claims.

Section 22.05(a): The paragraph would be revised to clarify that the original and a copy of each pleading or other document intended to be part of the record of the proceeding shall be filed with the Regional Hearing Clerk or Clerk of the Environmental Appeals Board. Providing both an original and a copy makes it easier for the hearing

clerks to maintain both a record file and a public viewing file, in order to assure public access without risk of altering the official record. The paragraph also would be revised to clarify when a pleading or document is ''filed.'' Requirements regarding service, as distinct from filing, are deleted from § 22.05(a)(2) and moved to § 22.05(b); the remaining sentence concerning certificates of service would be renumbered as § 22.05(a)(3). The existing § 22.05(a)(3) would be renumbered § 22.05(a)(2), and surplus language deleted. The Agency solicits comments on whether electronic filing and service should be allowed, and if so, under what conditions.

Section 22.05(b): The paragraph would be amended to consolidate and clarify service requirements, and to require a copy of each pleading or document to be served on the Presiding Officer. In paragraph (b)(1), the provisions regarding service of the complaint are changed to clarify who must be served when serving a natural person, a domestic or foreign corporation, a partnership or unincorporated association, an officer or agency of the United States, a state or local unit of government or a state or local officer, agency, department, corporation or other instrumentality. The proposed rule allows service of the complaint by any reliable commercial delivery service that provides written verification of delivery.

Paragraph (b)(2) would be amended to allow service of all pleadings and documents other than the complaint by any reliable commercial delivery service. The provision regarding mail would be revised to reflect the fact that both certified mail and return receipt requested are varieties of first class mail. The phrase ''pleadings and documents'' is used here and throughout the proposed rule to include all filings by the parties. The heading would be amended to reflect the change.

Section 22.05(c): Paragraph (c)(2) would be changed to require more information on the first page of every pleading and to require tables of contents and tables of authorities for all legal briefs and memoranda greater than twenty pages in length (excluding attachments) to simplify processing and review. Grammatical changes and clarifications are made in paragraphs (c)(3) and (4). In paragraph (c)(5), the provision which allowed Hearing Clerks to determine the adequacy of documents would be deleted, leaving that authority solely with Presiding Officers or the Environmental Appeals Board.

Section 22.05(d): A new paragraph would be added to specify the treatment of information claimed as Confidential Business Information (''CBI'') in documents filed in CROP proceedings, and to link that treatment with the CBI rules of 40 CFR part 2, subpart B. The purpose is to facilitate the use of CBI as evidence while appropriately preserving the confidentiality of the information. Paragraph (d)(1) provides that any business confidentiality claim shall be made in the manner prescribed by 40 CFR 2.203(b). A person who files a document with a Regional Hearing Clerk without making such a claim places that document in the public record, where it is available to the public for inspection and copying pursuant to § 22.09. After a document has been placed in the public record, a subsequent claim of confidentiality will not be effective. This clarifies the obligations of the claimant and makes clear which procedures to follow, as well as the consequences for failure to follow these procedures.

Paragraph (d)(2) describes in more detail how pleadings or documents containing information claimed confidential are to be filed with the Regional Hearing Clerk, and the contents of such documents, in order to assure that such documents are properly filed and the information within such documents protected. The requirement that parties file two versions of pleadings or documents, one containing the information claimed confidential and a second redacted version, does not preclude a party from filing a single document that merely references, without disclosing, confidential information filed in earlier documents.

Paragraph (d)(3) describes the procedures for service of pleadings of documents containing claimed-confidential information on the Presiding Officer, complainant, parties, amici, or representatives thereof authorized to receive confidential information, and makes clear that only a redacted version of any pleading or document may be served on a party, amici, or other representative thereof not authorized to receive the confidential information. Paragraph (d)(4) provides that only the redacted version of a pleading or document with claimed-confidential information will become part of the public record, and further provides that an EPA officer or employee may disclose information claimed confidential only as provided by 40 CFR part 2.

6. Filing and Service of Rulings, Orders and Decisions

Section 22.06: The requirements regarding service of rulings, orders and decisions have been changed to allow the more flexible service of these documents by first class mail or any reliable commercial delivery service. References to the Regional Judicial Officer are deleted as surplusage.

7. Computation and Extension of Time

Section 22.07: In paragraph (a), ''holidays'' would be clarified to mean federal holidays. Paragraph (b) would be revised to require that any motion for an extension of time be filed sufficiently in advance of the due date so as to allow other parties the opportunity to respond and to allow the Presiding Officer or the EAB reasonable opportunity to issue an order. The reference to ''the Regional Administrator'' would be deleted as surplusage. In paragraph (c), the ''mail box'' rule for service would be expanded to encompass the other reliable commercial delivery services authorized in § 22.05(b). Under the proposed revision, as under the existing CROP, it is implicit that personal service is complete upon personal service, without need for a signed receipt.

8. Ex Parte Discussion of Proceeding

Section 22.08: New language would be included to explicitly allow a decision maker who has formally recused himself from all adjudicatory functions to engage in ex parte functions. For purposes of this provision, the Agency would consider the approval of consent agreements and issuance of consent orders to be adjudicatory functions.

9. Examination of Documents Filed

Section 22.09: Extraneous language would be deleted and the reference to waiver of costs for duplication of documents would be clarified.

10. Intervention and Amicus Curiae

Section 22.11: The section heading would be amended to include amicus curiae motions. Paragraph (a)(1) would be amended to more specifically describe the process for intervening, and would make the standard for intervention equivalent to the standard used in the Federal courts, Rule 24(a)(2) of the Federal Rules of Civil Procedure. The final sentence in paragraph (c) of the existing CROP (''The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.'') is intentionally omitted. This would grant the Presiding Officer the discretion to allow an intervenor to become a party as to part, but not all, of a proceeding. An additional five days is given to file a response to a motion to intervene, for consistency with proposed changes to § 22.16. The

changes to paragraph (a) permit the deletion of paragraphs (c) and (d). Paragraph (b) describes the procedures for motion for leave to file an amicus brief, and fifteen days is given to file a response to an amicus brief. EPA requests comment as to the appropriateness of these intervention provisions.

11. Consolidation and Severance

Section 22.12: The phrase ''by motion or sua sponte'' would be deleted as surplusage, and perhaps confusing to persons not trained in the law. No substantive change is intended by this revision. Paragraph (a) would be amended to clarify that proceedings brought pursuant to the non-APA procedures of subpart I may be consolidated with an action brought under the APA procedures. This paragraph prohibits the use of the non-APA procedures for hearing any action which is the result of a consolidation of an APA proceeding and non-APA proceeding. Under these circumstances, only the APA procedures of the CROP (subpart A—H) are appropriate.

The Agency considered, but rejected as unnecessary, expressly prohibiting under § 22.12 the consolidation of actions if such consolidation could result in the total penalty exceeding any applicable cap on penalty amounts. The existing language is sufficient to prevent consolidation in such circumstances because such a result would ''adversely affect the rights of parties engaged in otherwise separate proceedings.''

12. Commencement of a Proceeding

Section 22.13: The heading would be amended, and the section revised, to clarify how an administrative enforcement proceeding is commenced. For cases where pre-commencement negotiations result in settlement of a cause of action, paragraph (b) would provide for the simultaneous commencement and conclusion of a case upon the issuance of a consent order (provided that, in accordance with § 22.18(b)(2), the consent agreement contains that information required in a complaint set forth in § 22.14(a)(1)–(3)). Negotiations with alleged violators prior to the formal filing of a complaint may in some cases lead to more efficient and expeditious resolution of cases. See, e.g., Executive Order No. 12778 on Civil Justice Reform (56 FR 55195, October 25, 1991). Where such negotiations are productive, the filing of a consent agreement and consent order would be sufficient to commence a case, and requiring a separate filing of a complaint would merely waste paper. In cases subject to the Clean Water Act or Safe Drinking Water Act public comment provisions, this streamlined approach would not permitted. The original language of this section would be deleted as duplicative of the statutory authorizations to commence proceedings.

13. Complaint

Section 22.14: EPA proposes to consolidate paragraphs (a) and (b) of the existing CROP into a single paragraph governing the content of all complaints for assessment of civil penalties, for revocation, termination or suspension of permits, and for compliance and corrective action orders. As used here and in §§ 22.17 and 22.27, ''compliance or corrective action order'' includes orders requiring immediate compliance or corrective action, and orders establishing schedules for compliance or corrective action within a specified period of time.

Paragraph (a)(4) would be amended to present in a single paragraph the content requirements for all complaints, whether they seek penalties, compliance or corrective action orders, or permit actions. New language would expressly permit the filing of a complaint without specifying in the complaint the precise penalty sought, as an alternative to pleading a specific penalty. Where complainant elects not to demand a specific penalty in the complaint, complainant is nonetheless obligated to provide a brief explanation of the severity of each violation alleged and a citation to the statutory penalty authority applicable for each violation alleged in the complaint.[1] This notice pleading option would provide the Agency with added flexibility in issuing a complaint under circumstances where only the violator possesses information crucial to the proper determination of the penalty, for example, the economic benefit the violator derived from its noncompliance or the effect of a penalty on its ability to remain in business. Complaints following the notice pleading approach would give respondents in administrative enforcement proceedings at least as much notice of their potential liability as they would receive in most enforcement proceedings filed in the Federal courts. Complementary changes to §§ 22.17(b) and 22.19(a) assure that, where the Agency employs this notice pleading approach, the Agency will specify a penalty demand in its prehearing information exchange and in any motion for default. As is the case in judicial enforcement proceedings, this notice pleading option is fully compatible with the Agency's long-standing practice of working with respondents toward a fair resolution of enforcement actions.

Paragraph 22.14(a)(5) would combine the right-to-hearing provisions presently in § 22.14 (a)(6) and (b)(6), as well as new language to accommodate hearings on the appropriateness of proposed compliance or corrective action orders. The sentence requiring a copy of the CROP to accompany each complaint served would be deleted and placed in a separate § 22.14(b). The requirement of § 22.14(a)(5) in the existing CROP would be moved to § 22.14(a)(4)(i). Paragraph (a)(6) would require the complainant to specify in the complaint whether the non-APA procedures in subpart I shall apply to the proceeding. If a complaint does not contain an explicit statement that subpart I applies, the ensuing proceeding shall be conducted in conformance with section 554 of the APA.

The original paragraph (b) would be merged into the new paragraph (a). The revised paragraph (b) would contain the requirement, currently in § 22.14 (a)(6) and (b)(6), that a copy of the CROP accompany each complaint.

The text originally in paragraph (c) would be deleted, and subsequent provisions renumbered so that the text presently in § 22.14(d) would appear in 22.14(c), with minor changes. The existing provision would be deleted to avoid the possibility of conflict with the notice pleading option proposed under § 22.14(a)(4)(ii). The Agency's proposed deletion of this provision does not signal any general intent to abandon applicable penalty pleading policies. The Agency's penalty authority remains subject to any statutory penalty criteria, regardless of changes to the CROP, so deletion of the existing paragraph (c) should have no substantive effect on the penalties that would be assessed.

Paragraph (d) would contain the provision presently in paragraph (e), with minor revisions. The Agency considered, but is not proposing, language specifically allowing the withdrawal of a complaint without prejudice, because such language is not necessary. The existing language of this section does not establish a specific standard that the Presiding Officer must apply when considering a motion to withdraw a complaint without

[1] For example, a citation to the statutory penalty authority might state the following: ''For the violations alleged herein, in accordance with 15 U.S.C. 2615(a), complainant seeks a penalty of up to $25,000 for each day the violations continue, taking into account the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and other matters as justice may require.''

prejudice, and so, the ''good cause'' standard generally applicable to motions applies. The good cause standard would allow withdrawal of a complaint without prejudice in circumstances where, for example, information obtained after the commencement of the case indicates that the proper penalty should exceed an applicable penalty cap, thereby allowing the Agency to refile the case in a forum that would permit assessment of the proper penalty.

14. Answer

Section 22.15: The requirements for filing and serving copies of an answer are clarified in paragraph (a). Also, the time allowed for the filing of an answer would be changed from 20 days to 30 days. RCRA, the SDWA, and the CWA authorize 30 days to file an answer. The discrepancy between these statutory authorities and § 22.15 has caused confusion, particularly in cases involving alleged violations of more than one statute (multimedia cases), as to which time limitation applies to the overall cause of action. To avoid any potential conflict, for all causes of action, the requirement would be changed to allow answers to be filed within 30 days of service of the complaint. EPA proposes to add to paragraph (b) a new clause requiring that the answer state the basis for opposing any proposed penalty, compliance or corrective action order, or permit revocation, termination or suspension. This requirement would not add significantly to respondents' existing burdens, as it is both consistent with good pleading practice and implicit in the existing rule. Paragraph (c) would be rewritten for clarity. No substantive change is intended.

15. Motions

Section 22.16: Paragraph (a) would be revised to place explicit limits on motion practice and to provide a common understanding that the routine practice shall be the filing of a motion, a response and a reply, without any further briefing. Any further responsive documents concerning the motion would be allowed only by order of the Presiding Officer or EAB. The present CROP is silent as to whether additional briefing or argument is permitted after the filing of a response to a motion. To the extent that such replies are presently allowed, there is no limit on the time for filing a reply, nor any limit to the total number of replies. With an endless series of replies possible, neither the Presiding Officer nor the parties can be sure when a motion is ripe for decision.[2] The proposed amendments are intended to establish more control over motion practice in an effort to simplify the proceeding, and to reduce delays and litigation costs. EPA believes that a motion-response-reply structure is both necessary and sufficient to present the issues fully for the Presiding Officer. The proposed rule specifically provides the movant an opportunity for a reply because responses to motions often raise issues not addressed in the motion itself. The proposed rule then limits the scope of the reply to those issues raised in the response, in order to avoid giving an unfair advantage to the movant. For those instances where this motion-response-reply format may not be appropriate, the Presiding Officer may order an alternative approach.

The proposed rule would amend paragraph (b) to expand the time for filing a response to a motion from 10 days to 15 days. EPA anticipates that this change will improve the quality of the responses, better clarifying the issues and thereby promoting judicial economy. The proposed rule also would allow 10 days for the filing of a reply, reflecting the fact that the movant has already had an opportunity to anticipate possible objections to its motion and that somewhat less time should be needed to address such new issues as might be raised in the response. The clause pertaining to extensions of time would be deleted as redundant with §§ 22.07(b) and 22.04(c).

Paragraph (c) would be revised to clarify who renders decisions at the different stages of a proceeding. The provision concerning oral argument on motions would be deleted from this section and placed in a separate § 22.16(d), and expanded to acknowledge that Presiding Officers, as well as the EAB, have the discretion to order oral argument on motions.

16. Default

Section 22.17: The heading would be changed, and the entire section reorganized, for purposes of clarity. Paragraph (a) would describe how a party may be found in default, and the consequences of such a finding. The provisions in the current paragraph (a) describing when penalty monies come due, or when a permit revocation, termination or suspension becomes effective, would be moved to paragraph (d).

New paragraph (b) addresses content requirements for motions for default. It includes a requirement that where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and must put into the record the legal and factual grounds for the relief requested. This amendment accommodates the changes made in § 22.14, above, and provides for those instances in which the complaint does not contain a specific penalty proposal.

Paragraph (c) would be revised to describe the default order itself. It would provide that a default order shall be an initial decision, and treated in all respects under the CROP as an initial decision. Paragraph (c) would result in one substantive change rules regarding default orders, in regard to the standards for granting relief. Section 22.17(a) of the existing rule appears to require that a default order automatically assess the penalty proposed in the complaint, or automatically revoke or terminate the permit according to the conditions proposed in the complaint. The proposed revision would remove this apparent restriction on the Presiding Officers' discretion so that they may assure that the relief ordered is supported by the administrative record. In order to make it clear that supporting the relief proposed in a default case should be less burdensome on the Agency than it would be if the respondent chose to contest the case, the language of the revised paragraph (c) would require that the Presiding Officer grant the relief requested unless the record clearly demonstrates that the requested relief is inconsistent with the Act. The Agency would still be required to make a prima facie case in regard to the appropriateness of the proposed relief, as well as in regard to liability. The proposed change would not affect determinations of liability in default, which would remain subject to the ''preponderance of the evidence'' standard of § 22.24.

Subsection (d) would describe the respondent's obligations once default has been entered regarding payment of any penalty, revocation, termination or suspension of any permit, and compliance or corrective action requirements. The existing rule does not describe or explain these sanctions, and the Agency believes therefore that these new provisions provide additional clarity and information to a potentially defaulting party, and make much more clear the consequences of default. The existing rule requires payment of the penalty within 60 days after the default order was issued. This conflicts with the

[2] See, e.g., In the Matter of McLaughlin Gormley King, et al., Docket Nos. FIFRA 94–H–10 through 94–H–15, where a motion to dismiss was followed by a response, a reply, a sur-reply, a supplemental reply, and a second sur-reply.

Federal Claims Collection Standards, which require payment within 30 days after the date the order was issued, unless EPA decides an extension is appropriate. See 4 CFR 102.13(g). The proposed rule therefore requires payment within 30 days after the date the default order becomes final.

17. Quick Resolution; Settlement; Alternative Dispute Resolution

Section 22.18: This section would be substantially revised to provide expedited resolution procedures, and to clarify the process and effect of formal settlements. Paragraph (a) would provide a quick resolution process, whereby a respondent can bring the case to a close at any time simply by paying the amount proposed in the complaint. Any respondent wishing to resolve an action without filing an answer need only pay the proposed penalty within 30 days of receipt of the complaint. In cases where an answer has been filed, the respondent may resolve the action by paying the penalty proposed in the complaint. This will provide respondents the option of resolving minor and uncontested violations without engaging an attorney, much in the manner of a parking ticket. EPA anticipates that this quick resolution procedure may be of particular interest to small businesses, and recognizing that small businesses may need additional time to raise cash to pay a penalty, the provision would allow respondents 60 days from receipt of the complaint to pay the penalty without having to file an answer. In order to exercise this option, a respondent would need to file a written statement within 30 days of receiving the complaint wherein respondent promises to pay the penalty in full within 60 days from receipt of the complaint.

The commenter rights provisions of section 309(g) and 311(b)(6) of the Clean Water Act, and section 1423(c) of the Safe Drinking Water Act do not permit resolution of a case until the public has had opportunity to comment on the complaint. Commenters could provide information indicating that the violations are more serious than indicated in the administrative complaint. In order to give meaning to the public comment requirements, and to allow EPA the opportunity to act upon any such comments before resolution of a case, a respondent would not be permitted to take advantage of the quick resolution provision in a commenter-eligible action until ten days after the period for public comment has closed.

Paragraph (b) would clarify the existing settlement process, and is divided into three paragraphs. The first paragraph (b)(1), concerning discussions of settlement, incorporates existing provisions with minor editorial changes, the most significant of which corrects a citation to § 22.16 which should refer to § 22.15. Paragraph (b)(2) would specify that consent agreements be in writing, and that they include all terms and conditions of settlement. The content requirements of a consent agreement are also clarified to include compliance order or corrective action requirements, and an express waiver of the respondent's right to a hearing and appeal of the consent order. This clarification is important, so that respondents enter into settlement agreements with a full understanding that an agreement to settle involves waiving rights to a hearing and rights of appeal. Paragraph (b)(2) also establishes additional content requirements for consent agreements in cases where the complainant proposes to simultaneously commence and conclude a case through filing of a consent agreement and consent order pursuant to § 22.13(b), as a result of successful settlement through negotiations conducted before a complaint is issued. These additional content requirements should assure that the public record clearly identifies the causes of action upon which such cases are based. Paragraph (b)(3) would be revised to expressly provide that an administrative action is settled only when the Regional Judicial Officer or Regional Administrator, or, in cases commenced at EPA Headquarters, the Environmental Appeals Board, approves a consent agreement and issues a consent order. This provision is added to eliminate any uncertainty as to who has authority to conclude a proceeding.

Paragraph (c) would provide that the effect of settlements and full payment of proposed penalties is limited to those facts and violations specifically alleged in the complaint, and reserves the Agency's right to pursue injunctive relief or criminal sanctions. These provisions merely make explicit the existing law of res judicata and claim preclusion, and reflect the Agency's routine practice in settlement of cases. The statutes authorizing administrative proceedings simultaneously define the limits of the Agency's jurisdiction in those proceedings to the assessment of penalties, the issuance of corrective action or compliance orders, or the revocation, termination or suspension of permits. None of the statutes administered by EPA grant to an administrative tribunal the authority to assess criminal sanctions or compel injunctive relief. Because the statutes authorizing administrative proceedings expressly limit the Agency's authority in those proceedings, the settlement of a proceeding commenced under part 22 cannot limit the Agency's right to pursue relief that is beyond the scope of part 22. See generally Restatement (Second) of Judgments § 83 comment g (1982). Accordingly, adding this provision to the CROP does not significantly alter respondents' rights.

Paragraph (d) would recognize use of alternative dispute resolution proceedings. The Agency encourages use of alternative dispute resolution in appropriate circumstances, both as a fair means of resolving enforcement actions and as a method of reducing transaction costs for all parties. The designation of a neutral (who would not be the Presiding Officer) would not divest the Presiding Officer of overall responsibility for the case. The Presiding Officer would retain during dispute resolution proceedings all of the powers and duties assigned under § 22.04(c), including the authority to bring the case to hearing if circumstances so warrant. The Agency has considered including language specifying the impact of dispute resolution proceedings on deadlines, but instead proposes to leave this to the discretion of the Presiding Officer. As needed, the parties may request temporary stays of proceedings and extensions of deadlines.

Other requirements of the CROP (e.g., the consent agreement and consent order provisions of § 22.18(b), the ex parte prohibitions of § 22.08, the public comment provisions of § 22.38) also would continue to apply, notwithstanding any dispute resolution process.

18. Prehearing Information Exchange; Prehearing Conference; Other Discovery

Section 22.19: EPA proposes to substantially restructure and revise this section for ease of use and to make information exchange more timely and efficient. Paragraphs (a) and (b) would be reversed in order from the existing CROP, reflecting the fact that information exchange is more common than, and usually precedes, a prehearing conference. The Agency proposes to expand the scope of the standard prehearing information exchange in order to expedite resolution of cases.

The requirements for prehearing exchange would now appear in paragraph (a). In addition to the information required to be exchanged under § 22.19(b) of the existing CROP, EPA proposes that each party should be required to exchange all information it considers relevant to the assessment of

a penalty. This provision would apply whether or not the complainant identifies a specific penalty in the complaint. In addition, for penalty cases where the complainant has not specified a penalty in the complaint, the proposed rule would require that the complainant shall specify a proposed penalty and state the basis for that proposed penalty. EPA requests comment on whether it is necessary for complainant to specify a proposed penalty in prehearing exchange. As noted above, EPA has proposed to allow notice pleading under § 22.14(a)(4)(ii) in order to allow EPA to issue complaints even where it is unable to obtain information from the violator which is necessary to confidently determine the appropriate penalty. Although EPA anticipates that respondents will provide such information during the course of settlement discussions, it is possible that in some cases the necessary information will not be available until respondent submits its prehearing exchange, or even later. If the complainant is in no better position to propose a penalty at prehearing exchange than it was at the time it filed the complaint, there is little value to such a requirement. EPA requests comment on the utility of this requirement, and on the merits of allowing complainant to postpone for an additional 30 days, or indefinitely, the making of a specific penalty demand.

EPA's proposal would change the rules regarding the exchange of witness lists and documents in order to facilitate supplementing and amending prehearing exchange prior to hearing. In so doing, the proposed rule would make more clear the distinction between the filing of prehearing exchange and the admission of information into evidence. In order to prevent undue burden and delay caused by last minute supplements or amendments of the prehearing information exchange, the Agency considered proposing restrictions on amendments to prehearing exchange within 30 days of the hearing date. The Agency instead proposes that all barriers to amending prehearing exchange should be dropped in the interest of full and complete exchange of information between the parties (*see* § 22.19(f)), and proposes under § 22.22(a) to tighten the standards for admitting into evidence information that was not timely exchanged.

The Agency requests comment on the merits of requiring by rule that the parties simultaneously perform their prehearing information exchange 90 or 120 days after the filing of the answer. Making prehearing exchange automatic, rather than dependent on assignment of an ALJ and on the ALJ's issuance of an prehearing exchange order, could expedite administrative practice and move cases to a more rapid resolution. Although an early deadline could prompt the parties to focus intently on settlement at the earliest stages of a proceeding, it could also lead to wasted resources if parties were compelled to submit voluminous prehearing exchanges despite imminent settlements.

The Agency has considered, but is not proposing, amendments concerning the timing of prehearing exchange. The Agency has considered the merits of requiring that complainant file its prehearing exchange before respondent, relative to the merits of requiring that prehearing exchange be made simultaneously by both parties. Allowing respondent to submit its prehearing exchange several weeks after receiving complaint's prehearing exchange might allow respondent to focus its prehearing exchange more narrowly on what it perceives to be the weakest points of the complainant's case, thereby conserving respondent's resources and clarifying the key issues in dispute. In contrast, the traditional, simultaneous prehearing exchange gives both parties equal incentive to settle before incurring the expense and effort of preparing the exchange. Staggering the prehearing exchange creates a disparate incentive, such that the party designated to make the later exchange may adopt a ''wait-and-see'' attitude, preferring to review the papers of the party designated to submit first before accepting a settlement offer it knows to be in its best interest or before even engaging in serious settlement discussions. In this manner, sequential prehearing exchange can delay or even impede settlement, and causes the lead party to incur unnecessary expenditures of resources. EPA believes that the disadvantages of sequential prehearing exchange outweigh the anticipated benefits in the great majority of cases.

The disadvantages of a sequential prehearing exchange do not, however, compel the conclusion that prehearing exchange must necessarily be simultaneous in every case. There may be instances where the circumstances suggest that a case might be more expeditiously resolved if prehearing exchange were structured in some other manner. Accordingly, the Agency does not propose to make either simultaneous or sequential prehearing exchange the mandatory and exclusive option, but instead would continue to allow the Presiding Officer some discretion regarding the timing of the prehearing exchange required under this rule.

Paragraph (b) would describe the purpose of any prehearing conference which may be held, and is substantially similar to paragraph (a) of the existing CROP. The revisions would no longer compel the Presiding Officer to require the parties to ''appear at a conference before him,'' but instead would make the nature of the conference more flexible.

In paragraph (c), the phrase ''upon motion or sua sponte'' would be deleted as surplusage, and as potentially confusing. In paragraph (d), additional surplus language would be deleted. No substantive changes are intended. Paragraph (e) from the existing CROP would be deleted as surplusage, as § 22.04(c) (5), (8) and (10) give the Presiding Officer ample authority in these matters.

Under the proposed revisions, as well as the existing CROP, § 22.19 is designed to streamline exchanges of information by the parties and to discourage dilatory tactics and unnecessary and time-consuming motion practice. In contrast to the Federal Rules of Civil Procedure, a formal prehearing exchange of information is the primary vehicle of information exchange under the CROP. This prehearing exchange may be supplemented in certain cases by additional discovery pursuant to paragraph (e). In order to expedite the administrative hearings process, this other discovery is limited in comparison to the extensive and time-consuming discovery typical in the Federal courts.

The proposed revisions to paragraph (e) would revise the process for seeking ''other discovery''. The proposed rule would require that the party seeking discovery must file a motion which ''shall specify the method of discovery sought, provide the proposed discovery instruments and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted).'' By ''proposed discovery instruments,'' the Agency refers to the specific documents which would effectuate discovery if the Presiding Officer were to order the requested discovery (e.g., notices of deposition, depositions upon written questions, written interrogatories, requests for production of documents and things and entry upon land for inspection and other purposes, requests for admission).

The proposed revisions would also refine the substantive standards for issuance of a discovery order. First, discovery motions would only be

authorized after completion of the prehearing information exchange mandated under paragraph (a), so that ''other discovery'' supplements, rather than supplants, prehearing exchange. Second, the prohibition against discovery which would unreasonably delay the proceeding would be expanded to prohibit discovery which would unreasonably burden the other party. The Agency believes that unnecessarily burdensome discovery is inappropriate even if such discovery would not delay a proceeding. Third, the proposed rule would clarify the existing requirement that discovery seeks ''information [that] has significant probative value'', by the addition of the clause ''on a disputed issue of material fact relevant to liability or the relief sought.'' This revision is intended to clarify, rather than change, the existing requirement. See, *e.g., Chautauqua Hardware Corp.*, II EPCRA–90–0223, *Order on Interlocutory Review slip op.* at 12 (June 24, 1991) (''The phrase ''probative value'' denotes the tendency of a piece of information to prove a fact that is of consequence in the case.'')

The Agency proposes to clarify the requirement in the existing rule that prohibits discovery where ''[t]he information to be obtained is not otherwise obtainable''. The phrase ''not otherwise obtainable'' has been the source of much litigation, and the Agency proposes to substitute instead a requirement that discovery is permissible so long as it ''[s]eeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily''. This substitution should not substantively change the discovery standard, but instead make explicit the two most reasonable interpretations of ''not otherwise obtainable''. One reasonable interpretation of the ''not otherwise obtainable'' requirement is that parties should not resort to discovery until more collegial methods of obtaining information have been exhausted. The proposed change would effectively require a party to request voluntary disclosure of the information sought before seeking a discovery order. Another reasonable interpretation of ''not otherwise obtainable'' is that a party should not be burdened by discovery seeking information which is readily obtained through other sources (e.g., texts available in libraries or from the publishers, reports or materials available from other government agencies). If the rule did not encompass this interpretation of ''not otherwise obtainable'', it would unreasonably burden litigants by permitting discovery of all information that could be obtained through a party, or by completely prohibiting discovery of information that could be obtained from third parties. Instead, EPA proposes to limit discovery to ''information that is most reasonably obtained from the non-moving party''. Although this requirement would not eliminate litigation, it provides a more meaningful context than ''not otherwise obtainable'' for determining whether other discovery should be allowed.

Paragraph (e)(2) of the proposed revision would expressly prohibit discovery of a party's settlement positions and information regarding their development, specifically including penalty calculations for purposes of settlement based on Agency settlement policies. This would make explicit a limitation that already exists under the current rule, as § 22.19(f)(1)(iii) limits discovery to information that has ''significant probative value'', and existing § 22.22 prevents the introduction of evidence which would be inadmissible under Federal Rule of Evidence 408. Penalty proposals developed for settlement are offers of compromise which normally would be inadmissible under Federal Rule of Evidence 408 because they generally lack significant probative value, and in addition, because their admission would discourage settlement. In its administrative enforcement programs under the CWA and SDWA, the Agency utilizes the same settlement policies that it uses in judicial enforcement proceedings to determine the penalty amount the Agency would accept in settlement of a case. This has caused some confusion for respondents who are more familiar with the Agency's other administrative enforcement programs, which rely on penalty pleading policies, rather than settlement policies. The proposed rule would clarify that penalty calculations derived from a settlement policy, as opposed to calculations of proposed penalties from a penalty pleading policy, are not subject to discovery. This change would eliminate the potential for litigation on matters reserved for settlement discussions.

The existing CROP provides that the Presiding Officer may order depositions upon oral questions only where additional conditions, over and above those applicable to discovery in general, are met. Paragraph (e)(3) of the revised CROP would maintain this higher standard, and clarify that these requirements are in addition to those of paragraph (e)(1).

Additional conditions also apply to the issuance of a subpoena relative to other discovery, specifically, ''an additional showing of the grounds and necessity therefor.'' The standards for issuing subpoenas do not appear in § 22.19 of the existing CROP, but instead, are repeated in six separate Supplemental rules. Paragraph (e)(4) of the proposed CROP consolidates this material, allowing elimination of several supplemental rules. This change does not expand or limit the authority of the Presiding Officer, nor does it authorize issuance of subpoenas except where authorized by the Act giving rise to the cause of action.

Paragraph (e)(5) further clarifies that Freedom of Information Act (''FOIA'') requests, requests for admissions or stipulations, inspections, statutorily provided information collection requests, and administrative subpoenas issued by an authorized Agency official other than the Presiding Officer do not constitute discovery and are not restricted by the CROP. This revision does not change the CROP, because these activities have never been subject to a Presiding Officer's control. This provision should reduce uncertainty, and consequent litigation, by clarifying that these independent methods of information collection are wholly outside the Presiding Officer's authority.

Paragraph (f) would impose on each party a duty to supplement or correct prior exchanges of information when the party learns that a prior exchange is deficient. As with the subsections already described above, this subsection is intended to reinforce the practice of full and complete voluntary information exchange in order to expedite proceedings and avoid unnecessary and costly motion practice. This subsection addresses situations where a party learns that a prior response is incorrect, inaccurate or outdated. It is not intended to impose a duty on any party to continually check the accuracy of prior responses, but does prohibit knowing concealment by a party. This provision would eliminate any procedural barriers to amending prehearing exchange, however, EPA also proposes at § 22.22(a) that information that is not exchanged in a timely manner shall not be admitted into evidence. Moreover, failure to comply with a prehearing exchange order would still constitute grounds for issuance of a default order, notwithstanding these changes.

Paragraph (g) clarifies that a failure of a party to provide information within its control pursuant to an order of the Presiding Officer may lead to an inference that the information sought

would be adverse to the non-exchanging party, to exclusion of the information from evidence, or to issuance of a default order. In the existing CROP, a version of this requirement applied to information provided through other discovery, but its applicability to information provided through prehearing exchange was unclear. The proposed rule expressly applies this requirement to all information exchanges, and expressly authorizes the additional sanction that information might be excluded from evidence.

19. Accelerated Decision; Decision to Dismiss

Section 22.20: Several editorial changes are made to this section. No substantive change is intended.

20. Assignment of Presiding Officer; Scheduling the Hearing

Section 22.21: Paragraph (a) would be revised to make it clear that the Chief Administrative Law Judge presides from the time an answer is filed until he or she assigns another ALJ. This would assure that there is a Presiding Officer at every stage of a proceeding.

21. Evidence

Section 22.22(a): EPA proposes splitting this subsection into two paragraphs. Paragraph (a)(1) would addresses the admission of evidence into the record. It restates the existing standard, with only a minor editorial revision, and adds a new standard for exclusion of evidence which is not provided to opposing parties in a timely manner. It provides that the Presiding Officer shall not admit into evidence any document, exhibit, witness name or summary of expected testimony that has not been provided to all parties at least fifteen days before the hearing date, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

Paragraph (a)(2) would address treatment of confidential business information (CBI), in conformance with the Agency's general confidentiality requirements. The 40 CFR part 2, subpart B provisions regarding treatment of CBI are cross referenced and other provisions are added to clarify how and when CBI may be used as evidence in a CROP proceeding. A significant substantive change would authorize the Presiding Officer to consider CBI evidence outside the presence of a party if necessary to preserve the confidentiality of the business information. While EPA expects that the Presiding Officers will seldom need to exercise this authority, experience has demonstrated the need for it. In *In the Matter of Baker Performance,* TSCA–91–H–08, a respondent charged with manufacture of chemical substances not listed in the TSCA inventory of existing chemical substances argued that the chemicals in question were identical to chemicals already listed on the confidential TSCA inventory by competitors. This posed a dilemma for EPA, forcing EPA to choose between revealing to the respondent its competitors' trade secrets in order to prove the violation, or else foregoing full enforcement. EPA chose in that case to accept settlement on relatively unfavorable terms rather than reveal the CBI. EPA believes that allowing the independent Administrative Law Judges the discretion to review confidential evidence outside the presence of a party in similar cases would strike an appropriate balance between the right of confrontation and the statutory mandates to protect confidential business information. Other changes have been made for clarity.

Section 22.22(c): For clarity, EPA proposes that the term ''written testimony'' be substituted for ''verified statements''. As they are described in the existing paragraph (c), verified statements are in fact testimony, and differ from live testimony only to the extent that they are presented in written form. No substantive change is intended.

22. Objections and Offers of Proof

Section 22.23(b): Surplus language would be omitted in the interest of clarity. No substantive change is intended.

23. Burden of Presentation; Burden of Persuasion; Preponderance of The Evidence Standard

Section 22.24: EPA proposes to split this section into two subsections, one addressing burden of presentation and burden of persuasion, and another addressing the preponderance of the evidence standard. Paragraph (a) would revise the existing language to adopt a consistent terminology throughout its discussion of burden of presentation and burden of persuasion, and to encompass compliance orders and corrective action orders. The proposed rule would clarify that respondent bears the burden of persuasion in regard to affirmative defenses only, although it bears the burden of presentation regarding all defenses. These revisions are consistent with settled law and would not change respondents' burdens relative to the existing CROP. Paragraph (b) would consist of language from the existing CROP, without any change. The title of the section would be amended to aid readers in locating the preponderance of the evidence standard established in paragraph (b).

24. Filing the Transcript

Section 22.25: EPA proposes to add a provision disallowing motions to conform the transcript of a proceeding to the actual testimony unless filed within 20 days after notice of the availability of the transcript, in the interests of finality.

25. Initial Decision

Section 22.27: Paragraph (a) would be amended to encompass compliance orders, corrective action orders, and permit revocations, terminations and suspensions. It would further require that a copy of the initial decision be served on the Assistant Administrator for Enforcement and Compliance Assurance. Other changes are editorial, and are not intended to make substantive changes in the CROP.

Paragraph (b) would be amended to require that the Presiding Officer base the recommended penalty upon evidence in the record and in accordance with any penalty criteria set forth in the Act. A requirement that the Presiding Officer explain how the penalty corresponds to any penalty criteria set forth in the Act would be substituted for the existing requirement that the Presiding Officer explain the reasons for recommending a penalty other than the penalty proposed in the complaint. These changes will clarify the essential neutrality of the Presiding Officer, but will not result in any substantive or other procedural changes to CROP proceedings.

Paragraph (c) would be amended to clarify the circumstances under which an initial decision may become a final order of the Agency. It further clarifies that the respondent must appeal an initial decision to the EAB as a prerequisite to judicial review. This addition makes clear the point at which administrative remedies are exhausted for the purpose of appeal to Federal courts. The purpose of this latter amendment is to prevent a party from seeking judicial review prior to seeking review from EPA's administrative appellate body, the Environmental Appeals Board. This addition to the CROP is proposed to conform to the holding in *Darby* v. *Cisneros,* 509 U.S. 137 (1993). In *Darby* the Supreme Court held that in cases where the Administrative Procedure Act applies, an appeal to ''superior agency

authority'' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. Courts are not free otherwise to impose an exhaustion requirement where the agency action has already become ''final'' under section 10(c) of the APA, 5 U.S.C. 704.

The new language is an express requirement that the administrative appeals process be exhausted before a party may seek judicial review of a final agency action. Section 22.27(c) makes it clear that the initial decision of the Presiding Officer would not be operative pending review by the Environmental Appeals Board. While this holding in *Darby* applies to cases governed by section 704 of the APA, exhaustion of administrative remedies is also required in cases where APA section 10(c) is not applicable. EPA's position with regard to exhaustion of administrative remedies in CROP cases is consistent with its position on exhaustion of administrative remedies generally. See, 40 CFR 66.81 and *Bethlehem Steel Corp.* v. *EPA*, 669 F.2d 903 (1982) interpreting 40 CFR 66.81. These changes do not alter respondents' rights and do not create any right of appeal in § 22.27. Appeal is only permitted pursuant to the provisions of § 22.30.

26. Motion to Reopen a Hearing

Section 22.28: Paragraph (a) would be amended to clarify the purposes for reopening a hearing. No substantive change is intended. EPA would amend paragraph (b) to expand from 10 to 15 days the time allotted for responding to a motion to reopen a hearing, for consistency with changes to § 22.16. Other changes are made for clarity.

27. Appeal From or Review of Interlocutory Orders or Rulings

Section 22.29: EPA proposes that paragraphs (a), (b) and (c) be revised to clarify the nature of interlocutory appeals, and to allow ten days from service, rather than six days from notice, to request interlocutory review. The change in the filing deadline will give parties additional time, and it will measure that time from a date easily ascertained by all. No other substantive change is intended. Paragraph (d) would be deleted as surplusage, as the Presiding Officer's authority to stay a proceeding is inherent in § 22.04(c) and the limitations of § 22.29(d) are unnecessary.

28. Appeal From or Review of Initial Decision

Section 22.30: The procedure for filing appeals would be clarified, including, but not limited to, provisions addressing service and filing, and describing the contents of any appeal brief. Under the existing CROP, a party which is not fully satisfied by an initial decision, but who would be willing to let the decision stand as is, may feel obliged to file an appeal merely to assure that its own issues are preserved in the event that the other party appeals the initial decision on other grounds. The proposal includes a new provision whereby a party who initially declined to appeal, but who receives a notice of appeal from another party, is granted an additional 20 days to raise other issues on appeal. This change would eliminate the need for protective filings by parties who are largely content with an initial decision. Other substantive changes include extending the time to file an appeal from 20 to 30 days, and a provision expressly limiting the scope of appeals to issues raised during the course of the proceeding or by the initial decision. A new paragraph (e) specifies that the general requirements for motions at § 22.16 apply to motions made in appeals to the EAB. A new paragraph (f) would consist of language presently in § 22.31(a) concerning decisions on appeals. Moving this language into § 22.30 makes the structure of § 22.30 comparable to § 22.29. Paragraph (f) describes the scope of review by the EAB and its authority to increase or decrease a penalty, or to modify any compliance order, corrective action order, or any permit revocation, termination and suspension. The proposed revision would allow the EAB to increase the amount of a penalty assessed in a default order, but would not allow the EAB to increase the default penalty to an amount greater than that proposed in the complaint or in a motion for default, whichever is less. This change would avoid an unintended implication of the present rule, which could be interpreted as precluding the EAB from reviewing the amount of a penalty in a default order which assessed less than the penalty complainant sought.

29. Final Order

Section 22.31: Section 22.31 of the existing CROP applies to final orders on appeal only; provisions regarding other types of final orders are scattered throughout the CROP. For clarity and consistency, requirements and provisions applicable to all final orders would be consolidated in revised § 22.31. Those provisions now in § 22.31 which apply only to final orders on appeal would be moved to § 22.30, as noted above. Paragraph (a) would make clear that a final order constitutes final Agency action. It would provide that the final order resolves respondent's liability for a civil penalty, compliance or corrective action order, or the status of a permit or authority to operate, only for the violations and facts alleged in the complaint, and that it shall not affect the government's right to injunctive relief or criminal sanctions. It explicitly states that a final order will not affect a respondent's obligation to comply with all applicable provisions of the Act and regulations promulgated thereunder. These provisions do not alter respondents' rights, but merely make explicit the existing law of res judicata and claim preclusion. The Agency's routine practice is to make provisions such as these standard elements of settlement agreements. Including these provisions in the CROP would provide a clear limit to the scope of final orders, regardless of whether the final orders are consent orders, final decisions on appeal, or unappealed initial decisions.

A new paragraph (b) would clarify that final orders are effective upon issuance, except that unappealed initial decisions which become final orders pursuant to § 22.27(c) become effective at the same time they become final orders, i.e., 45 days after service of the initial decision. This clause pertains to the effective date of the order itself; the final order may establish compliance schedules, schedules for payment of penalties, dates of termination of permits, etc., notwithstanding this clause. Paragraphs (c) and (d) establish penalty payment schedules and effective dates for other relief, respectively, which shall apply unless the final order specifies otherwise. The existing rule requires payment of the penalty within 60 days after the order was received. This conflicts with the Federal Claims Collection Standards, which require payment within 30 days after the date the order was issued, unless EPA decides an extension is appropriate. See 4 CFR 102.13(g). The proposed rule therefore requires payment within 30 days after the effective date of the final order. Paragraph (c) also would require payment of penalties directly to U.S. Treasury lockboxes, rather than to the Hearing Clerks, and would make applicable to all proceedings a provision currently in § 22.39(d) regarding assessment of interest on overdue penalties. This Subsection would

specify that the collection of interest on overdue payments shall be in accordance with the Debt Collection Act, 31 U.S.C. 3717, which is applicable whether or not it is referenced in part 22. The Agency requests comment on whether the CROP should address payment of penalties by electronic transfer of funds, and if so, what procedures would be appropriate.

A new paragraph (e) would make explicit that although a respondent may choose to conclude an administrative proceeding by settlement or by allowing an initial decision to become final without appeal to the Environmental Appeals Board, each of these options falls short of exhausting the opportunities available within the CROP for administrative review. This revision would not substantively change the requirements of exhaustion of remedies, nor would it alter respondents' rights. This subsection would simply assure that respondents have notice that appeal of the final order to the Federal courts is not available where a respondent settles a case pursuant to § 22.18 or fails to exercise its right to appeal an initial decision to the Environmental Appeals Board pursuant to § 22.30.

Paragraph (f) would provide that a final order of the Environmental Appeals Board issued to a department, agency, or instrumentality of the United States pursuant to § 22.30 shall become effective (and ''final'' as that term is used in 42 U.S.C. 6961(b)(2)) thirty days after its service upon the parties, in order that the head of the affected department, agency, or instrumentality may request a conference with the Administrator. If the department, agency, or instrumentality requests a conference with the Administrator, then the Administrator's ensuing decision would become the final order. Essentially the same provision appeared in § 22.37(g), the Solid Waste Disposal Act supplemental rule. It is moved into § 22.31 in order that the same procedure also would be applicable to penalty actions brought against federal facilities under other statutes such as the Safe Drinking Water Act (42 U.S.C. 300j-6) and the Clean Air Act (42 U.S.C. 7413(d), 7524(c) and 7545(d)(1)). In making the language of § 22.37(g) apply to proceedings commenced under other statutes, reference to the Federal Facility Compliance Act would be deleted. The Agency still intends that a final order issued in a case brought under the Solid Waste Disposal Act shall constitute a final order for purposes of the Federal Facility Compliance Act. This opportunity to confer with the Administrator is available only after the Environmental Appeals Board has issued a final order on appeal, and only if requested in writing within 30 days. A motion for reconsideration by the Environmental Appeals Board is not necessary, however, such a motion does not toll the thirty-day limit unless specifically so ordered by the Environmental Appeals Board.

30. Supplemental Rules of Practice Applicable to Proceedings Authorized Under Specific Statutes

Section 22.33: The provisions discussing subpoenas have been deleted from this supplemental rule, as well as from §§ 22.34, 22.37, 22.39, 22.40, and 22.43, allowing the elimination of this and several other supplemental rules. The procedures for subpoenas are now consolidated in § 22.19, as discussed above. The Presiding Officer's authority to issue a subpoena remains dependant on the statute giving rise to the cause of action. Owing to the fact that the subpoena provisions were the only substantive elements of this supplemental rule, the entire supplemental rule applying to TSCA proceedings would be deleted.

Section 22.34: This section would be amended to include, in addition to proceedings for civil penalty assessment under Title II of the CAA, proceedings governing the assessment of a civil penalty under section 113(d) of the CAA. The latter proceedings are presently covered by § 22.43, which mostly mirrors § 22.34. The one substantive difference, the § 22.43(b)(2) provision allowing 30 days for filing an answer, is no longer necessary as a consequence of proposed changes to § 22.15. Paragraph (a) of this supplemental rule and each of the other supplemental rules also would be amended to eliminate the implication that the supplemental rules are not part of the Consolidated Rules of Practice. The term ''final order'' would be substituted for the phrase ''administrative penalty order'' in paragraph (b), for consistency and to encompass field citations as well as administrative penalty orders issued pursuant to section 113(d)(1) of the CAA.

A new paragraph (c) would apply to default orders for failure to answer a field citation. Section 59.5(d) of the Field Citation Rule provides that when a respondent fails to file a timely answer to a field citation (and fails to offer to pay the penalty under the quick resolution procedure at § 22.18(a)(2)), the Presiding Officer shall issue a default order assessing the penalty proposed in the complaint. This provision initially was proposed in the May 3, 1994, **Federal Register** (59 FR 22776), and EPA does not seek additional comment on it at this time.

Section 22.35: In the supplemental rules governing proceedings under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA proposes to amend the venue provision of paragraph (b) to address the situation where a respondent's place of residence is outside the U.S. FIFRA regulates the domestic conduct of foreign-based pesticide registrants, manufacturers, producers, distributors, applicators, etc. Accordingly, for a person who claims a place of residence outside the U.S., EPA interprets the phrase ''place of residence'', as used in 7 U.S.C. 136l(a)(3), to mean either the person's primary place of business within the U.S., or the primary place of business of the person's U.S. agent. Paragraph (c) would be deleted for consistency with changes to § 22.27(b).

Section 22.36: The supplemental rule regarding the Marine Protection, Research and Sanctuaries Act would be deleted as surplusage in light of changes made elsewhere in the CROP to accommodate permit revocation, termination and suspension proceedings, particularly in § 22.13.

Section 22.37: The scope of this supplemental rule would be expanded to include section 3005(d) of the SWDA, which authorizes termination of permits, and section 9006, which authorizes the issuance of administrative compliance orders to address violations of Underground Storage Tank (''UST'') requirements. The notice requirements presently in paragraphs (b), (c) and (d) would be deleted as surplusage. On December 2, 1980 (45 FR 79808), EPA suspended these subsections until further notice, in response to amendments to the SWDA which eliminated the pre-complaint notice requirements from the Act. Today, EPA proposes to delete the requirements entirely. The proposed revision of § 22.15, allowing 30 days for filing an answer, would make paragraph (e) surplusage as well. A new paragraph (b) would specify that a complaint may contain a compliance order issued under section 3008(a) or section 9006(a), or a corrective action order issued under section 3008(h) or section 9003(h)(4) of the SWDA. This provision is included to make clear that in these circumstances, the complaint is an ''order'' as that term is used in the aforementioned sections of the SWDA. Any such order would automatically become a final order unless, no later than thirty (30) days after the order is served, the respondent requests a hearing pursuant to § 22.15. The provision concerning the Federal

Facilities Compliance Act contained in paragraph (g) would be moved to § 22.31(f), in order that it may be applicable to actions commenced pursuant to other statutes as well as the SWDA.

Section 22.38: In paragraph (a), the scope of this supplemental rule would be expanded to include civil penalties authorized by section 311(b)(6) of the Clean Water Act. Paragraph (b) would be amended to provide a more explicit process for implementing the statutory requirement regarding state consultation. The public notice and comment provisions would be removed from paragraphs (c), (d) and (f) and placed in a separate supplemental rule, § 22.45, which would also apply to proceedings under section 300h–2(c) of the Safe Drinking Water Act. The proposed text of § 22.45 would provide much more detailed and comprehensive process than is currently provided under § 22.38(c), (d) and (f). The applicability of § 22.45 would be noted in § 22.38(a) in order to provide additional notice that both supplemental rules apply. The provision presently in paragraph (e) would be renumbered as (c), and expanded to include proceedings under section 311(b)(6) of the Clean Water Act, consistent with changes to paragraph (a). A new paragraph (d) would require that in proceedings pursuant to section 311(b)(6) of the Clean Water Act penalties be paid into the Oil Spill Liability Trust Fund.

Section 22.39: Most of the changes to this supplemental rule are consistent with changes to other supplemental rules already discussed. In addition, language proposed to be added to the main text of the CROP at § 22.31 would be deleted from § 22.39(d) (which would be renumbered as (c)).

Section 22.40: The supplemental rule regarding the Emergency Planning and Community Right-To-Know Act would be deleted in its entirety. The subpoena provisions would be deleted from this and other supplemental rules as discussed above. In addition, the provisions regarding judicial review in paragraph (c) and collection of penalties in paragraph (d) can also be deleted as surplusage. No substantive change is intended by the deletion of this supplemental rule.

Section 22.41: The only changes to the supplemental rule regarding the Asbestos Hazard Emergency Response Act are consistent with changes to other supplemental rules already discussed. No substantive change is intended by these editorial revisions.

Section 22.42: Paragraphs (b) through (e) of the Safe Drinking Water Act supplemental rule would be deleted as surplusage. No substantive change is intended by these deletions. A new paragraph (b) would allow respondents in certain non-APA proceedings the right to choose that the hearing be conducted in accordance with section 554 of the APA, as required under section 1414(g)(3)(B) of the Safe Drinking Water Act. This provision would enable respondent to make subpart I inapplicable, notwithstanding the Agency's having commenced the proceeding under subpart I, by requesting in its answer a hearing on the record in accordance with 5 U.S.C. 554. EPA proposes that a respondent's failure to exercise this right in its answer shall constitute a waiver of that right. This limitation is necessary in order to avoid the delays, disruptions, and duplications of effort which would result if a case were reassigned from a Regional Judicial Officer to an ALJ after the proceeding was well underway.

Section 22.43: The provisions of the existing § 22.43 would be incorporated into § 22.34, as discussed above. A new supplemental rule applicable to proceedings against a federal facility pursuant to the Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104–182 would be codified as § 22.43. Paragraph (b) describes the effective date of any penalty order issued under section 1447(b) of the Act. Paragraph (c) describes the public notice requirements for issuance of a final penalty order.

Section 22.44: This section presents a new supplemental rule for termination of NPDES permits issued under the Clean Water Act and for permits issued under Subtitle C of the Resource Conservation and Recovery Act. This new supplemental rule has already been proposed (60 FR 65,268), and EPA does not seek additional comment at this time.

Sections 22.45: The Agency proposes to add a new supplemental rule governing public notice and comment in proceedings under section 309(g) of the Clean Water Act and section 300h–2(c) of the Safe Drinking Water Act. The detailed procedures proposed for public notice and comment are sufficiently extensive that the Agency proposes to codify them once, in a single supplemental rule applicable to these two types of proceedings, rather than repeating the same requirements in two separate rules. This supplemental rule would complement § 22.38, such that both would apply to proceedings under section 309(g) of the Clean Water Act. These public commenter rights are separate from, and in addition to, the intervention and amicus curie provisions at § 22.11.

The substance of the proposed § 22.45 replaces and expands on the procedures presently in § 22.38 (c), (d) and (f), in order to clarify commenter provisions and to fully satisfy the statutory requirements. Section 22.45(b) would require the complainant to provide public notice and an opportunity to comment on a complaint or on a proposed consent agreement where the parties agree to settle without the filing of a complaint pursuant to § 22.13(b). This provision would require the Agency to accommodate commenters in situations where the agency proposes to settle an action without the filing of a complaint. Paragraph (b)(2) sets out the type and content of the required public notice, so that the notice will provide any potential commenter with sufficient information to make an initial determination as to whether or not he wishes to comment.

Paragraph (c) expands procedures for participation by a commenter. These procedures provide a meaningful opportunity for commenters to present evidence, as required by statute, and at the same time limit the opportunity commenters might have to delay issuance of a final order through dilatory or frivolous submissions. Paragraph (c)(1) sets out the requirements for commenter participation in a proceeding. It describes both the obligations of the commenter and those of the Presiding Officer in this context. It establishes express limits on the scope of commenter participation, and gives the Presiding Officer broad discretion to further control the extent of commenter participation. Paragraph (c)(2) sets out limitations on commenter cross-examination of witnesses, and prohibits the commenter from either participating in, or being subject to, any discovery or prehearing information exchange. Paragraph (c)(3) assures that cases are not settled before the end of a required comment period.

Paragraph (c)(4) describes the procedures governing a commenter's petition to set aside a consent order where no hearing on the merits was held. The Agency believes that this language establishes appropriate limits on such requests, while at the same time meeting the requirements of the respective statutes and avoiding inappropriate tainting of the administrative record. Paragraph (c)(4)(i) requires the complainant to provide all commenters and the Regional Administrator with a copy of the proposed consent order. The Presiding Officer and Hearing Clerk do not receive a copy of the proposed order at this juncture, in order to protect the

administrative record and assure that the Presiding Officer, who may have to adjudicate the case if settlement efforts fail, is not privy to the parties' settlement positions. Paragraph (c)(4)(ii) requires that, within 30 days of receipt of the proposed order, the commenter must provide to the Regional Administrator and the parties (but not to the Presiding Officer or Hearing Clerk) any petition to set aside the consent order. Paragraph (c)(4)(iii) then permits the complainant to withdraw the proposed order within 15 days of receipt of a petition, in order to consider the matters raised. If the complainant does not withdraw the proposed order within 15 days, the Regional Administrator shall appoint a Petition Officer to review the petition and make a determination as to the issues raised. A copy of the Regional Administrator's order of appointment shall be sent to the Presiding Officer and the parties. These procedures are designed, once again, to avoid tainting the Presiding Officer or administrative record with materials relevant to settlement negotiations only. Paragraph (c)(4)(iv) gives the complainant 30 days in which to file with the Petition Officer (*not* the Presiding Officer) the complainant's response to the petition. Copies of the response are provided to the parties and commenter(s), but not to the Presiding Officer and Hearing Clerk. Paragraph (c)(4)(v) describes the Petition Officer's duties upon receipt of complainant's response. Note here that the Petition Officer's written findings will be filed with the Hearing Clerk and Presiding Officer. Paragraph (c)(4)(vi) describes the Presiding Officer's duties where the Petition Officer rules that a hearing is required and the petition for hearing is granted. Paragraph (c)(4)(vii) describes the Petition Officer's duties where the Officer determines that a hearing is not required. Paragraph (c)(4)(viii) and (ix) describe the procedures for issuance of the consent order, for appeal of such order in the appropriate U.S. District Court, and when the order becomes final after denial of appellate review.

Sections 22.46 through 22.49: Reserved.

31. Supplemental Rules for Administrative Proceedings not Governed by Section 554 of the Administrative Procedure Act

Sections 22.50 through 22.53 comprise subpart I, which presents modifications to the main text of the CROP to facilitate use of the CROP in administrative adjudications where a hearing on the record is not required. Such adjudications are commonly referred to as ''non-APA'' proceedings in reference to the Administrative Procedure Act, of which sections 554, 556 and 557 apply only to ''adjudication[s] required by statute to be determined on the record after opportunity for an agency hearing''. 5 U.S.C. 554(a)(1). A key feature of these non-APA procedures is that the Presiding Officer need not be an Administrative Law Judge, as required in proceedings subject to APA 554, 556 and 557. Other differences include greater limitations on discovery and a prohibition on interlocutory appeals, however, it is only the absence of an Administrative Law Judge which puts the subpart I procedures outside the requirements of APA 554, 555, and 556. Owing to the retention of most of subparts A through G, the subpart I procedures provide nearly the same level of procedural protection for respondent's interests as would be available in a hearing fully conforming to the requirements of subparts A through G.

The subpart I procedures would retain the extensive prehearing exchange mandated in § 22.19(a) (requiring exchange of witness lists, summaries of expected testimony, copies of documents or exhibits, and evidence relevant to the amount of the penalty). Although courts have confirmed that there is no constitutional due process right to discovery in administrative adjudications (see e.g., Silverman v. CFTC, 549 F.2d 28 (7th Cir. 1977); NLRB v. Valley Mold Co., 530 F.2d 693 (6th Cir. 1976) cert. den. 429 US 824), the prehearing exchange under § 22.19(a) provides substantial discovery well in advance of a hearing.

The procedures provided through subpart I are adequate to assure a fair hearing, notwithstanding the absence of an ALJ, additional prehearing discovery and interlocutory review. The differences between the APA and non-APA provisions of the CROP are unlikely to affect the outcome of an administrative enforcement proceeding, and unlikely to impair the accuracy of the Agency's decisionmaking. Providing an ALJ for every case, including those lacking significant legal or factual dispute, would draw limited resources away from more complex and more significant cases. Allowing interlocutory appeals and additional discovery, such as interrogatories, depositions, requests for documents, would add significant delay to administrative enforcement and could cause extraordinary resource burdens. The absence of these additional procedural protections in non-APA proceedings poses only minor risk of impairing the regulated community's interest in fair and accurate adjudications, yet making them generally available would put substantial fiscal and administrative burdens on the government. Accordingly, EPA is not obliged to provide these additional procedural protections in non-APA proceedings in order to satisfy the requirements of the due process clause. *Matthews* v. *Eldridge,* 424 U.S. 319, 344–45 (1976); also see *Chemical Waste Management, Inc.* v. *U.S. E.P.A.*, 873 F.2d 1477 (D.C. Cir. 1989).

Although the Agency has not yet through rulemaking established formal procedures for the assessment of civil penalties through non-APA proceedings, the Agency has been conducting such proceedings under the proposed part 28 procedures and program-specific guidance. Where it is not inconsistent with other regulations, EPA intends that the procedures for non-APA proceedings proposed herein should be used in non-APA penalty proceedings pending promulgation of a final rule. Accordingly, non-APA penalty cases filed after the publication of this proposed rule should follow the procedures herein. Cases that have already commenced pursuant to the proposed part 28 procedures shall continue to be governed by the proposed part 28 procedures, however, complaints withdrawn in accordance with § 28.18(a)(1) may be refiled under the proposed CROP. In addition, a proceeding commenced under the proposed part 28 may be converted into a proceeding under the proposed CROP provided that no evidentiary hearing has been held and that all parties and the Presiding Officer agree to the change.

Section 22.50: Section 22.50 defines the scope of subpart I. Paragraph (a) indicates that the initial decision to bring a proceeding pursuant to subpart I is made by the Agency and requires that the Agency indicate such decision in the complaint. The Agency may in any case decline to apply subpart I and instead give the respondent the greater process of law afforded by a proceeding conforming to section 554 of the APA. Paragraph (a) acknowledges that the Agency may not apply subpart I where a statute requires a hearing in accordance with section 554 of the Administrative Procedure Act. Examples where Congress has authorized EPA to administratively assess penalties through proceedings that are not subject to the requirements of section 554 in certain circumstances include: CWA sections 309(g)(2)(A) and 311(b)(6)(A) & (B)(i) (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(A) & (B)(i)); section 109(a) of the Comprehensive

Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. 9609(a)); section 325(b)(1), (c), and (d) of the Emergency Planning and Community Right-To-Know Act (EPCRA) (42 U.S.C. 11045(b)(1), (c), and (d)); SDWA section 1414(g)(3)(B) (42 U.S.C. 300g–3(g)(3)(B)); and CAA section 113(d)(3) (42 U.S.C. 7413(d)(3)); and issuance of a penalty-only order or a penalty/compliance order under SDWA section 1423(c) (42 U.S.C. 300h-2(c)). At this time, EPA does not intend to alter its present practice of providing the full APA process in CERCLA and EPCRA cases, although if circumstances warrant, the Agency may in the future exercise its authority to assess CERCLA and EPCRA penalties through non-APA proceedings. EPA welcomes comment concerning the types of CERCLA and EPCRA penalty cases for which non-APA procedures would be appropriate.

Paragraph (b) describes how the subpart works in conjunction with the preceding sections of the CROP, and also identifies those sections of the CROP which are inapplicable to a non-APA proceeding brought under subpart I.

Section 22.51: The term ''Presiding Officer'' would be defined for the purposes of a proceeding under this subpart to mean a Regional Judicial Officer, and provides that the Regional Judicial Officer shall rule on all motions, notwithstanding the provisions of § 22.16(c) which provide that post-answer motions be ruled on by the Administrative Law Judge.

Section 22.52: This section defines the parameters of information exchange for purposes of non-APA proceedings. The Agency's goal is to encourage complete and voluntary information exchange by the parties and limit unnecessary motion practice. Parties would be subject to the prehearing information exchange authorized in § 22.19(a), but most additional discovery would be prohibited under this subpart. The proposed § 22.52 would also require the respondent to provide in its prehearing exchange information in regard to any economic benefit it may have enjoyed as a result of the alleged non-compliance or a failure to act. Requiring this information up-front will help to clarify penalty issues early on, and avoid excessive and time-consuming motion practice.

The proposed § 22.52 would prohibit most additional discovery that would otherwise be allowed under § 22.19(e). Although it would prohibit most discovery, the complainant would be entitled to discovery of information concerning respondent's economic benefit of noncompliance and of financial records probative of respondent's ability to pay a penalty. Under several statutes, this information must be made part of the administrative record supporting a penalty determination, but it generally is not available to the Agency except through discovery of the respondent. Accordingly, discovery of this information must be permitted in order to prevent respondents from avoiding enforcement by simply withholding information.

Section 22.53: This section prohibits interlocutory appeals in proceedings under this subpart. The Agency sees little value in allowing interlocutory appeals in these relatively informal enforcement actions, particularly since parties to a proceeding under subpart I retain full appeal rights once an initial decision is issued. The Agency is particularly concerned that permitting interlocutory appeals would slow resolution of non-APA enforcement actions considerably.

32. Appendices

Appendix A: The Appendix would be amended to reflect the current addresses of EPA Regional Offices and EPA Headquarters.

Appendix B: This new appendix would be added to provide the addresses of EPA Regional and Headquarters lockboxes. These are the addresses to which, generally, the payments of civil penalties would be sent. The Agency requests comment on whether, and if so, how the CROP should address the electronic transfer of funds in addition to, or in lieu of, payment by check.

B. Revisions to Part 59

EPA anticipates that its May 3, 1994, proposed part 59 rule on field citations (59 FR 22776) will become final while these proposed revisions to the CROP are pending. Upon final promulgation of these revisions to the CROP, subpart B of part 59 would be superseded and deleted from the CFR.

III. Invitation of Public Comment

EPA invites comments on all aspects of the revisions proposed to part 22 and part 59. For the convenience of the reader only, EPA is publishing in its entirety part 22 as it would be revised. EPA is not proposing to readopt those portions of part 22 which would remain unchanged. This Notice of Proposed Rulemaking is limited to those changes from the existing regulations described in this Notice.

Information on the time period for submission of comments and directions for their submission may be found in the **DATES** and **ADDRESSES** sections of this document.

IV. Administrative Requirements

A. The Regulatory Flexibility Act

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

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

B. Executive Order 12866

Under Executive Order 12866, (58 FR 51,735 (October 4, 1993)) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

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

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

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

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

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

C. Paperwork Reduction Act

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

D. Unfunded Mandates Reform Act

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

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

List of Subjects

40 CFR Part 22

Environmental protection, Administrative practice and procedure.

40 CFR Part 59

Environmental protection, Administrative practice and procedure, Air pollution control, Labeling, Penalties, Reporting and recordkeeping requirements.

Dated: February 6, 1998.

Carol M. Browner,

Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR parts 22 and 59 as follows:

1. Part 22 is revised to read as follows:

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

Subpart A—General

Sec.

Subpart B—Parties and Appearances

Subpart C—Prehearing Procedures

Subpart D—Hearing Procedures

Subpart E—Initial Decision and Motion to Reopen a Hearing

Subpart F—Appeals and Administrative Review

Subpart G—Final Order

Subpart H—Supplemental Rules

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

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

Subpart A—General

§ 22.01 Scope of this part.

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

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

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

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

(4)(i) The issuance of a compliance order pursuant to section 3008(a), section 4005(c)(2), section 6001(b), or section 9006(a), suspension or revocation of a permit pursuant to section 3005(d) or section 3008(a), or the suspension or revocation of authority to operate as an interim status facility pursuant to section 3008(h) of the Solid Waste Disposal Act (''SWDA'') (42 U.S.C. 6925(d) & (e), 6928(a) & (h), 6945(c)(2), 6961(b), and 6991e(a)); or the assessment of any administrative civil penalty under sections 3008, 4005(c)(2), 6001(b), and 9006 of the SWDA (42 U.S.C. 6928, 6945(c)(2), 6961(b), and 6991e), except as provided in 40 CFR parts 24 and 124.

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

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

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

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

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

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

(6) The assessment of any administrative civil penalty under sections 309(g) and 311(b)(6), or the termination of any permit issued pursuant to section 402(a) of the Clean Water Act (33 U.S.C. 1319(g), 1321(b)(6) and 1342(a));

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

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

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

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

(b) The supplemental rules set forth in subparts H and I of this part establish special procedures for proceedings identified in paragraph (a) of this section where the Act allows or requires procedures different from the procedures in subparts A through G of this part. The procedures in any applicable subpart H or I of this part supplemental rule supersede any conflicting provisions of subparts A through G of this part.

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

§ 22.02 Use of number and gender.

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

§ 22.03 Definitions.

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

Act means the particular statute authorizing the proceeding at issue.

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

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

Agency means the United States Environmental Protection Agency.

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

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

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

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

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

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

Consolidated Rules of Practice means the regulations in this part.

Environmental Appeals Board means the Board within the Agency described in § 1.25 of this chapter.

Final Order means:

(1) An order issued by the Environmental Appeals Board or the Administrator after an appeal of an initial decision, accelerated decision,

decision to dismiss, or default order, disposing of the matter in controversy between the parties,

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

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

Hearing means a hearing on the record open to the public and conducted under these Consolidated Rules of Practice.

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

Initial Decision means the decision issued by the Presiding Officer pursuant to §§ 22.17(c), 22.20(b) or 22.27 resolving all outstanding issues in the proceeding based upon the record of the proceedings out of which it arises.

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

Permit means a permit issued under section 102 of the Marine Protection, Research and Sanctuaries Act, section 402(a) of the Clean Water Act, or section 3005(d) of the Resource Conservation and Recovery Act, or authority to operate granted pursuant to section 3005(e) of the Resource Conservation and Recovery Act.

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

Presiding Officer means an individual who presides in an administrative adjudication until an initial decision becomes final or is appealed. The Presiding Officer shall be an Administrative Law Judge, except where §§ 22.04(b), 22.16(c) or 22.51 allow a Regional Judicial Officer to serve as Presiding Officer.

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

Regional Hearing Clerk means an individual duly authorized to serve as hearing clerk for a given region. Correspondence may be addressed to the Regional Hearing Clerk, U.S. Environmental Protection Agency (address of Regional Office—see Appendix A). For a case initiated at EPA Headquarters, the term Regional Hearing Clerk means the Hearing Clerk.

Regional Judicial Officer means a person designated by the Regional Administrator under § 22.04(b).

Respondent means any person proceeded against in the complaint.

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

§ 22.04 Roles of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.

(a) *Environmental Appeals Board.* The Environmental Appeals Board: rules on appeals from the decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice; acts as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters; and approves settlement of proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters. The Environmental Appeals Board may refer any case or motion to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and references to the Environmental Appeals Board in these Consolidated Rules of Practice shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate § 22.08. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or where the Environmental Appeals Board has referred a matter to the Administrator.

(b) *Regional Judicial Officer.* Each Regional Administrator shall designate one or more Regional Judicial Officers to act as Presiding Officer in proceedings under subpart I of these Consolidated Rules of Practice, and to act as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice to which subpart I does not apply. The Regional Administrator may also delegate to one or more Regional Judicial Officers the authority to approve settlement of proceedings pursuant to § 22.18(b)(3). These delegations will not prevent a Regional Judicial Officer from referring any motion or case to the Regional Administrator. A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or another Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with, nor have any interest in the outcome of, any case in which he serves as a Regional Judicial Officer.

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

The Presiding Officer may:

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

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

(3) Administer oaths and affirmations and take affidavits;

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

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

(6) Admit or exclude evidence;

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

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

(9) Issue subpoenas authorized by the Act; and

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

(d) *Disqualification, withdrawal and reassignment.* (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Presiding Officer may not perform functions provided for in these Consolidated Rules of Practice regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion to the Regional Administrator request that the Regional Judicial Officer be disqualified from the proceeding. Any party may at any time by motion to the Administrator, Regional Administrator,

a member of the Environmental Appeals Board, or the Presiding Officer request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional Administrator or Presiding Officer is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Presiding Officer may at any time withdraw from any proceeding in which they deem themselves disqualified or unable to act for any reason.

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

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

§ 22.05 Filing, service, and form of pleadings and documents; business confidentiality claims.

(a) *Filing of pleadings and documents.* (1) The original and one copy of each pleading or document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer, or filed with the Clerk of the Board when the proceeding is before the Environmental Appeals Board. A pleading or document is filed when it is received by the appropriate Clerk.

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

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

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

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

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

(B) Where respondent is an officer or agency of the United States complainant shall serve the officer or agency, or as otherwise permitted by law. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii)(A) of this section.

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

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

(2) *Service of pleadings and documents other than the complaint, rulings, orders, and decisions.* All pleadings and documents other than the complaint, rulings, orders, and decisions shall be served personally, by first class mail (including certified mail or return receipt requested), or by any reliable commercial delivery service.

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

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

(3) The original of any pleading or other document (other than exhibits) shall be signed by the party filing or by its attorney or other representative. The signature constitutes a representation by the signer that he has read the 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 first pleading or document filed by any person shall contain the person's name, address, and telephone number, and those of its attorney or representative, if any. Any changes in this information shall be communicated promptly to the Regional 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 its right to notice and service in a proceeding under these Consolidated Rules of Practice.

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

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

be available to the public for inspection and copying.

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

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

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

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

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

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

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

§ 22.07 Computation and extension of time.

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

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

(c) *Service by mail or commercial delivery service.* Service of the complaint is complete when the return receipt is signed. Service of all other pleadings and documents is complete upon mailing or when placed in the custody of a reliable commercial delivery service. Where a pleading or document is served by first class mail or commercial delivery service, five (5) days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive pleading or document.

§ 22.08 Ex parte discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Regional Judicial Officer, 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 prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, the Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication. The requirements of this section shall not apply to any Administrator, Regional Administrator, member of the Environmental Appeals Board, Regional Judicial Officer, or Presiding Officer who has formally recused himself from all adjudicatory functions in a proceeding.

§ 22.09 Examination of documents filed.

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

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

Subpart B—Parties and Appearances

§ 22.10 Appearances.

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

§ 22.11 Intervention and amicus curiae.

(a) *Intervention.* Any person desiring to become a party to a proceeding may move for leave to intervene. A motion for leave to intervene that is filed after the exchange of information pursuant to § 22.19(a) shall not be granted unless the movant shows good cause for its failure to file before such exchange of information. Any party to the proceeding may file a response to a motion to intervene within fifteen (15) days after service of the motion for leave to intervene. The Presiding Officer shall grant leave to intervene in all or part of the proceeding if: the movant claims an interest relating to the cause of action; a final order may as a practical matter impair the movant's ability to protect that interest; and the movant's interest is not adequately represented by existing parties. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding unless otherwise ordered

by the Presiding Officer or the Environmental Appeals Board for good cause.

(b) *Amicus Curiae.* Any person who is not a party to a proceeding may move for leave to file an amicus brief. 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 Environmental Appeals Board shall issue an order setting the time for filing such brief. Any party to the proceeding may file a response to an amicus curiae brief within fifteen (15) days after service of the amicus curiae brief.

§ 22.12 Consolidation and severance.

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

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

Subpart C—Prehearing Procedures

§ 22.13 Commencement of a proceeding.

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

(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding not subject to the public notice and comment provisions of § 22.45 may be simultaneously commenced and concluded by the issuance of a consent agreement and consent order pursuant to § 22.18(b)(2) and (3).

§ 22.14 Content and amendment of the complaint.

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

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

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

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

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

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

(ii) Where a specific penalty demand is not made, a brief explanation of the severity of each violation alleged and a citation to the statutory penalty authority applicable for each violation alleged in the complaint;

(iii) A request for revocation, termination or suspension of all or part of a permit, and a statement of the terms and conditions of such revocation, termination or suspension; or

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

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

(6) Notice if subpart I of this part applies to such hearing.

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

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

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

§ 22.15 Answer to the complaint.

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

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

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

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

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

§ 22.16 Motions.

(a) *General.* All motions, except those made orally on the record during a hearing, shall: be in writing; state the grounds therefor, with particularity; set forth the relief sought; and be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon. Motions shall be served as provided by § 22.05(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response; any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate.

(b) *Response to motions.* A party's response to any written motion must be filed within fifteen (15) days after service of such motion. The movant's reply to any written response must be filed within ten (10) days after service of such response and shall be limited to issues raised in the response. The Presiding Officer or the Environmental

Appeals Board may set a shorter or longer time for response or reply, or make other orders concerning the disposition of motions. The response or reply shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Any party who fails to respond within the designated period waives any objection to the granting of the motion.

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

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

§ 22.17 Default.

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

(b) *Motion for default.* A motion for default shall set forth the grounds for finding a party in default. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested. The motion shall include as attachments any affidavit, certificate, other evidence or legal memoranda relied upon in support of the motion.

(c) *Default order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party unless the record shows good cause why a default order should not be issued. This order shall constitute the initial decision under these Consolidated Rules of Practice, except that the relief proposed in the complaint or the motion for default shall be ordered unless the record clearly demonstrates that the requested relief is inconsistent with the Act. For good cause shown, the Presiding Officer may set aside a default order.

(d) *Payment of Penalty; Effective Date of Compliance or Corrective Action Orders, Revocation or Suspension of Permits.* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings thirty (30) days after the default order becomes final under § 22.27(c). Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under § 22.27(c). If the default order revokes or suspends a permit, the conditions of the revocation or suspension shall become effective without further proceedings on the date that the default order becomes final under § 22.27(c).

§ 22.18 Quick resolution; settlement; alternative dispute resolution.

(a) *Quick resolution.* (1) Any respondent who receives a complaint containing a specific proposed penalty may resolve the action at any time by paying the proposed penalty in full into the appropriate lockbox (see Appendix B of this part) and by filing with the Regional Hearing Clerk a copy of the check. If the respondent pays the proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed. Paragraph (a) of this secttion shall not apply to any complaint which seeks a compliance or corrective action order, or to revoke, terminate or suspend a permit. In an action subject to the public comment provisions of § 22.45, this quick resolution is not available until ten (10) days after the close of the comment period.

(2) Any respondent who wishes to resolve an action by paying the proposed penalty instead of filing an answer, but who needs additional time to pay the penalty, may file a written statement with the Regional Hearing Clerk within thirty (30) days after receiving the complaint stating that the respondent agrees to pay the proposed penalty in accordance with paragraph (a)(1) of this section. The written statement need not contain any response to, or admission of, the allegations in the complaint. Within sixty days (60) days after receiving the complaint, the respondent shall pay the full amount of the proposed penalty. Failure to make such payment within 60 days of receipt of the complaint may subject the respondent to default pursuant to § 22.17.

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

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

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

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

(c) *Scope of resolution or settlement.* Full payment of the penalty proposed in

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

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

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

(3) The parties may choose any person to act as a neutral, or may move for the appointment of a neutral. If the Presiding Officer concurs with a motion for the appointment of a neutral, the Presiding Officer shall forward the motion to the Chief Administrative Law Judge who shall designate a qualified neutral.

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

(a) *Prehearing information exchange.* Unless otherwise ordered by the Presiding Officer, each party shall provide to all parties: the names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called; and copies of all documents and exhibits which it intends to introduce into evidence at the hearing. If the proceeding is for the assessment of a penalty, complainant shall specify a proposed penalty if it has not done so in the complaint and state the basis for that penalty, and respondent shall provide all factual information it considers relevant to the assessment of a penalty (except evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence). Documents and exhibits shall be marked for identification as ordered by the Presiding Officer. Documents or exhibits that have not been included and testimony that has not been summarized in prehearing information exchange may not be admitted into evidence except as provided in § 22.22(a).

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

(1) Settlement of the case;

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

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

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

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

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

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

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer. The Presiding Officer shall 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) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, DC, unless the Presiding Officer determines that there is good cause to hold it at another location or by telephone.

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

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

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

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

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

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

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

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

(4) The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, in accordance with paragraph (e)(1) of this section and upon an additional showing of the grounds and necessity therefor. Subpoenas shall be served in accordance with § 22.05(b)(1). Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Any fees shall be paid by the party at whose request the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

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

(f) *Supplementing prior exchanges.* A party who has made an information exchange under paragraph (a) of this section, or who has responded to a request for information or a discovery order pursuant to paragraph (e) of this section, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete,

inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

(g) Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may:

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

(2) Exclude the information from evidence; or

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

§ 22.20 Accelerated decision; decision to dismiss.

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

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

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

Subpart D—Hearing Procedures

§ 22.21 Assignment of Presiding Officer; scheduling the hearing.

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

(b) *Notice of hearing.* If the respondent requests a hearing in his answer, or one is ordered by the Presiding Officer under § 22.15(c), the Presiding Officer shall serve upon the parties a notice of hearing 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.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

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

§ 22.22 Evidence.

(a) *General.* (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible. If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19(a) or (f) to all parties at least fifteen (15) days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

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

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

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

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

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

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

§ 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic

and is not waived by further participation in the hearing.

(b) *Offers of proof.* Whenever 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 documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

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

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

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

§ 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript ordered to be kept confidential by the Presiding Officer. Any party may file a motion to conform the transcript to the actual testimony within twenty (20) days after the parties are notified of the availability of the transcript.

§ 22.26 Proposed findings, conclusions, and order.

Within twenty (20) days after the parties are notified of the availability of the transcript, or within such longer time as may be fixed by the Presiding Officer, any party may submit for the consideration of the Presiding Officer, proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. 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 authorities relied on.

Subpart E—Initial Decision and Motion to Reopen a Hearing

§ 22.27 Initial Decision.

(a) *Filing and contents.* After the period for filing reply briefs under § 22.26 has expired, the Presiding Officer shall issue an initial decision. The initial decision shall contain findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, and a recommended civil penalty assessment, compliance order, corrective action order, or permit revocation and suspension, if appropriate. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward the record of the proceeding to the Hearing Clerk and shall forward copies of the initial decision to the Environmental Appeals Board and the Assistant Administrator for the Office of Enforcement and Compliance Assurance.

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

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: a party moves to reopen the hearing; a party appeals the initial decision to the Environmental Appeals Board; a party moves to set aside a default order; or the Environmental Appeals Board elects to review the initial decision on its own initiative. An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board's issuance of a final order.

§ 22.28 Motion to reopen a hearing.

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

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

Subpart F—Appeals and Administrative Review

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

(a) *Request for interlocutory appeal.* Appeals from orders or rulings other than an initial decision shall be allowed only at the discretion of the Environmental Appeals Board. A party seeking interlocutory appeal of such orders or rulings to the Environmental Appeals Board shall file a motion within ten (10) days of service of the

order or ruling, requesting that the Presiding Officer forward the order or ruling to Environmental Appeals Board for review, and stating briefly the grounds for the appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may recommend any order or ruling for review by the Environmental Appeals Board when: (1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and (2) either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding; or review after the final order is issued will be inadequate or ineffective.

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

§ 22.30 Appeal from or review of initial decision.

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

(2) Within twenty (20) days of service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or amicus curiae may file and serve with the Environmental Appeals Board an original and one copy of a response brief responding to argument raised by the appellant, together with reference to the relevant portions of the record, initial decision, or opposing brief. Appellee shall simultaneously serve one copy of the response brief upon each party and amicus curiae. Response briefs shall be limited to the scope of the appeal brief. Further briefs may be filed only with the permission of the Environmental Appeals Board.

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

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

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

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

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

Subpart G—Final Order

§ 22.31 Final order.

(a) *Effect of final order.* A final order constitutes the final Agency action in a proceeding. The final order shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. The final order shall resolve respondent's liability for a civil penalty, compliance or corrective action order, or the status of a permit or authority to operate, only for the violations and facts alleged in the complaint. The final order does not waive, extinguish or otherwise affect respondent's obligation to comply with all applicable provisions of the Act and regulations promulgated thereunder.

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

(c) *Payment of a civil penalty.* The respondent shall pay the full amount of any civil penalty assessed in the final order within thirty (30) days after the effective date of the final order unless otherwise ordered. Payment shall be made by forwarding to the appropriate lockbox (see Appendix B of this part) a cashier's check or certified check in the amount of the penalty assessed in the final order, payable to the order of the ''Treasurer, United States of America'', or in a case pursuant to § 22.1(a)(7), ''EPA, Hazardous Substances Superfund,'' in the amount assessed, and noting the case title and docket

number. Respondent shall serve copies of the check on the Regional Hearing Clerk and on complainant. Collection of interest on overdue payments shall be in accordance with the Debt Collection Act, 31 U.S.C. 3717.

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

(e) *Exhaustion of remedies.* Respondent may appeal a final order as provided under the Act, except that:

(1) Where a respondent fails to appeal an initial decision to the Environmental Appeals Board pursuant to § 22.30 and that initial decision becomes a final order pursuant to § 22.27(c), respondent waives its rights to judicial review; and

(2) A respondent which elects to resolve a proceeding pursuant to § 22.18 waives its rights to judicial review.

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

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

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Motions must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to § 22.04(a) and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless so ordered by the Environmental Appeals Board.

Subpart H—Supplemental Rules

§ 22.33 [Reserved]

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.01 through 22.32, in administrative proceedings to assess a civil penalty conducted under sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d), and 7547(d)). Where inconsistencies exist between this section and §§ 22.01 through 22.32, this section shall apply.

(b) *Issuance of notice.* Prior to the issuance of a final order assessing a civil penalty, the person to whom the order is to be issued shall be given written notice of the proposed issuance of the order. Such notice shall be provided by the issuance of a complaint pursuant to § 22.13.

(c) *Default on field citation.* When a respondent fails to file a timely answer to a field citation issued pursuant to 40 CFR part 59 [1] and fails to submit a timely statement under § 22.18(a)(2) of these Consolidated Rules of Practice, the Presiding Officer shall issue a default order assessing the penalty proposed in the complaint.

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.01 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136*l*(a)). Where inconsistencies exist between this section and §§ 22.01 through 22.32, this section shall apply.

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

§ 22.36 [Reserved].

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.01 through 22.32, in administrative proceedings under sections 3005(d) and (e), 3008, 9003 and 9006 of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and (e), 6928, 6991b and 6991e) (''SWDA''). Where inconsistencies exist between this section and §§ 22.01 through 22.32, this section shall apply.

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

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.01 through 22.32 and § 22.45, in administrative proceedings for the assessment of any civil penalty under section 309(g) or section 311(b)(6) of the Clean Water Act (''CWA'')(33 U.S.C. 1319(g) and 1321(b)(6)). Where inconsistencies exist between this section and §§ 22.01 through 22.32, this section shall apply.

(b) *Consultation with states.* For proceedings pursuant to section 309(g), the complainant shall, within thirty days after issuing a complaint, provide the State agency with the most direct authority over the matters at issue in the case an opportunity to consult with the complainant.

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

(d) Notwithstanding § 22.31(b), respondent shall make payment of a civil penalty assessed pursuant to section 311(b)(6) of the Clean Water Act, 33 U.S.C. 1321(b)(6), by sending to the address provided by the complainant a cashier's check or certified check in the amount of the penalty assessed in the final order payable to the ''Oil Spill Liability Trust Fund''.

[1] This proposed rule on field citation program published in the **Federal Register** on May 3, 1994 at 59 FR 22776.

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.10 through 22.32, in administrative proceedings for the assessment of any civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609). Where inconsistencies exist between this section and §§ 22.01 through 22.32, this section shall apply.

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

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

§ 22.40 [Reserved]

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.01 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 207 of the Toxic Substances Control Act (''TSCA'') (15 U.S.C. 2647). Where inconsistencies exist between this section and §§ 22.01 through 22.32, this section shall apply.

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

§ 22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued under part B of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.01 through 22.32, in administrative proceedings to assess a civil penalty under section 1414(g)(3)(B) of the Safe Drinking Water Act. Where inconsistencies exist between this section and §§ 22.01 through 22.32, this section shall apply.

(b) *Choice of forum.* The respondent in a proceeding subject to subpart I of this part of these Consolidated Rules of Practice has a right to elect a hearing on the record in accordance with 5 U.S.C. 554. To exercise this right, the respondent in its answer must request a hearing on the record in accordance with 5 U.S.C. 554. Upon such request, the Regional Hearing Clerk shall recaption the pleadings and documents in the record as necessary.

§ 22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.01 through 22.32, in administrative proceedings to assess a civil penalty against a federal agency under section 1447(b) of the Safe Drinking Water Act. Where inconsistencies exist between this section and §§ 22.01 through 22.32, this section shall apply.

(b) *Effective date of final penalty order.* Any penalty order issued pursuant to this section and section 1447(b) of the Safe Drinking Water Act shall become effective thirty days after issuance.

(c) *Public notice of final penalty order.* Upon the issuance of a final penalty order under this section, the Administrator shall provide public notice of the order by publication, and by providing notice to any person who requests such notice. The notice shall include:

(1) The docket number of the order;

(2) The address and phone number of the Regional Hearing Clerk from whom a copy of the order may be obtained;

(3) The location of the facility where violations were found;

(4) A description of the violations;

(5) The penalty that was assessed; and

(6) A notice that any interested person may within thirty days of the date the order becomes final, obtain judicial review of the penalty order pursuant to section 1447(b) of the Safe Drinking Water Act and the notice requirements of 40 CFR part 135.

§ 22.44 Supplemental rules governing the termination of permits under section 402(a) of the Clean Water Act or under section 3005(d) of the Resource Conservation and Recovery Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.10 through 22.32, in administrative proceedings for the termination of permits under section 402(a) of the Clean Water Act or under section 3005(d) of the Resource Conservation and Recovery Act. Where inconsistencies exist between this section and §§ 22.01 through 22.32, this section shall apply.

(b) In any proceeding to terminate a permit for cause under 40 CFR 122.64 or 270.42 during the term of the permit:

(1) The complaint shall, in addition to the requirements of § 22.14, contain any additional information specified in 40 CFR 124.8;

(2) The Director (as defined in 40 CFR 124.2) shall provide public notice of the complaint in accordance with 40 CFR 124.10, and allow for public comment in accordance with 40 CFR 124.11; and

(3) The Presiding Officer shall admit into evidence the contents of the Administrative Record described in 40 CFR 124.9, and any public comments received.

§ 22.45 Supplemental rules governing public notice and comment in proceedings under section 309(g) of the Clean Water Act and section 300h–2(c) of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.01 through 22.32, in administrative proceedings for the assessment of any civil penalty under section 309(g) of the Clean Water Act (33 U.S.C. 1319(g)), and under section 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300h–2(c)). Where inconsistencies exist between this section and §§ 22.01 through 22.32, this section shall apply.

(b) *Public notice—General.* Complainant shall provide the public with notice of any complaint filed seeking the assessment of a civil penalty. Such notice shall be provided within 30 days following proof of service of the complaint on the respondent. Where the parties agree to settlement of an action without the filing of a complaint pursuant to § 22.13(b), complainant shall provide the public with notice of the proposed consent agreement at least 30 days before it will be finalized.

(2) *Type and Content of Public Notice.* The Complainant shall provide public notice of the complaint (or the proposed consent agreement if § 22.13(b) is applicable) by a method reasonably calculated to provide notice, and shall also provide notice to any person who

requests such notice. The notice shall include:

(i) The docket number of the complaint;

(ii) The name and address of the complainant and respondent, and the address of the Regional Hearing Clerk from whom information on the action may be obtained and to whom appropriate comments may be directed;

(iii) The location of the site or facility from which the violations are alleged, and any applicable permit number;

(iv) A description of the violation alleged and the relief sought;

(v) A notice that persons may submit comments on the complaint to the Regional Hearing Clerk, and the deadline for such submissions.

(c) *Comment by a person who is not a party.* The following provisions apply in regard to comment by a person not a party to a proceeding:

(1) *Participation in Proceeding.* (i) Any person wishing to participate in the proceedings must notify the Regional Hearing Clerk within 30 days of public notice. The person must provide his name, complete mailing address, and state that he wishes to participate in the action.

(ii) The Presiding Officer shall provide notice of any hearing on the merits to any person who has met the requirements of paragraph (c)(1)(i) of this section at least 20 days prior to the scheduled hearing.

(iii) Commenters may present written comments for the record at any time prior to the close of the record.

(iv) Commenters wishing to present evidence at a hearing on the merits shall notify, in writing, the Presiding Officer and the parties of their intent at least 10 days prior to the scheduled hearing. This notice must include a copy of any document to be introduced, a description of the evidence to be presented, and the identity of any witness (and qualifications if an expert), and the subject matter of the testimony.

(v) In any hearing on the merits, a commenter may present evidence, including direct testimony subject to cross examination by the parties.

(vi) The Presiding Officer shall have the discretion to establish the extent of commenter participation in any other scheduled activity.

(2) *Limitations.* A commenter may not cross-examine any witness in any hearing and shall not be subject to or participate in any discovery or prehearing exchange.

(3) *Quick Resolution and Settlement.* No proceeding subject to the public notice and comment provisions of paragraphs (b) and (c) of this section may be resolved or settled until ten (10) days after the close of the comment period provided in paragraph (d)(1) of this section.

(4) *Petition to Set Aside a Consent Order.*

(i) Complainant shall provide to each commenter, by certified mail, return receipt requested, but not to the Regional Hearing Clerk or Presiding Officer, a copy of the proposed consent order.

(ii) Within 30 days of receipt of the proposed consent order a commenter may present to the Regional Administrator (or, for cases commenced at EPA Headquarters, the Environmental Appeals Board), and to the parties, a petition to set aside the consent order and an objection to resolution of the action without a hearing on the basis that material evidence was not considered. Copies of the petition shall not be sent to the Regional Hearing Clerk or the Presiding Officer. The adequacy of the amount of the penalty to be paid in resolution of the action is not, by itself, grounds for a petition for a hearing.

(iii) Within 15 days of receipt of a petition, the complainant may, with notice to the Regional Administrator or Environmental Appeals Board and to the commenter, withdraw the proposed consent order to consider the matters raised in the petition. If the complainant does not give notice of withdrawal within 15 days of receipt of the petition, the Regional Administrator or EAB shall assign a Petition Officer to consider and rule on the petition. The Petition Officer shall be another Presiding Officer, not otherwise involved in the case. Notice of this assignment shall be sent to the parties, and to the Presiding Officer.

(iv) Within 30 days of assignment of the Petition Officer, the complainant shall present to the Petition Officer a copy of the complaint and a written response to the petition. A copy of the response shall be provided to the parties and to the commenter, but not to the Regional Hearing Clerk or Presiding Officer.

(v) The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:

(A) The extent to which the petition states an issue relevant and material to the issuance of the consent order;

(B) Whether complainant adequately considered and responded to the petition; and

(C) Whether a resolution of the action by the parties is appropriate without a hearing.

(vi) Upon a finding by the Petition Officer that a hearing is appropriate, the Presiding Officer shall order that the proposed consent order be set aside and shall establish a schedule for a hearing.

(vii) Upon a finding by the Petition Officer that a resolution of the action without a hearing is appropriate, the Petition Officer shall deny the petition and:

(A) File with the Regional Hearing Clerk;

(B) Send copies to the parties and the commenter; and

(C) Publish, as required by law, an order denying the petition and stating the reasons for such denial.

(viii) Upon a finding by the Petition Officer that a resolution of the action without a hearing is appropriate, the Regional Administrator may issue the consent order, which shall become final 30 days after both the order denying the petition and a properly signed consent order are filed with the Regional Hearing Clerk, unless further petition for review is filed by a notice of appeal in the appropriate United States District Court, with coincident notice by certified mail to the Administrator and the Attorney General. Written notice of appeal also shall be filed with the Regional Hearing Clerk, and sent to the Presiding Officer and the parties.

(ix) If judicial review of the consent order is denied, the consent order shall become final 30 days after such denial has been filed with the Regional Hearing Clerk.

§§ 22.46—22.49 [Reserved].

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

§ 22.50 Scope of this subpart.

(a) *Scope.* This subpart applies to any adjudicatory proceedings where the complainant designates in the complaint that subpart I shall apply, except that the procedures of this subpart shall not apply in any case where the Act makes the proceeding subject to section 554 of the Administrative Procedure Act, 5 U.S.C. 554.

(b) *Relationship to other provisions.* Sections 22011 through 22.45 apply to proceedings under this subpart, except for the following provisions which do not apply: §§ 22.11, 22.16(c), 22.21(a), and 22.29. The provisions of this subpart shall supersede any conflicting provisions of subparts A through G of this part. The provisions of subpart H of this part shall supersede any conflicting provisions of this subpart or of subparts A through G of this part.

§ 22.51 Presiding Officer.

The Presiding Officer shall be a Regional Judicial Officer. The Presiding Officer shall rule on all motions until an initial decision has become final or has been appealed.

§ 22.52 Information exchange and discovery.

Respondent's information exchange pursuant to § 22.19(a) shall include information on any economic benefit resulting from any activity or failure to act which is alleged in the administrative complaint to be a violation of applicable law, including its gross revenues, delayed or avoided costs. Discovery under § 22.19(e) shall not be authorized, except for discovery of information concerning respondent's economic benefit from alleged violations and information concerning respondent's ability to pay a penalty.

§ 22.53 Interlocutory orders or rulings.

Interlocutory review as set forth in § 22.29 is prohibited.

Appendix A to Part 22—Addresses of EPA Regional Offices and Headquarters

Environmental Protection Agency, *Region I*—John F. Kennedy Federal Building, One Congress Street, Boston, MA 02203.
Environmental Protection Agency, *Region II*—290 Broadway, New York, NY 10007–1866.
Environmental Protection Agency, *Region III*—841 Chestnut Building, Philadelphia, PA, 19107.
Environmental Protection Agency, *Region IV*—Atlanta Federal Center, 100 Alabama Street, S.W., Atlanta, GA 30365.
Environmental Protection Agency, *Region V*—77 West Jackson Boulevard, Chicago, IL 60604-3590.
Environmental Protection Agency, *Region VI*—First Interstate Bank Tower and Fountain Place, 1445 Ross Avenue, 12th Floor, Suite 1200, Dallas, TX 75202–2733.
Environmental Protection Agency, *Region VII*—726 Minnesota Avenue, Kansas City, KS, 66101.
Environmental Protection Agency, *Region VIII*—999 18th Street, Suite 500, Denver, CO 80202-2466.
Environmental Protection Agency, *Region IX*—75 Hawthorne Street, San Francisco, CA 94105.
Environmental Protection Agency, *Region X*—1200 6th Avenue, Seattle, WA 98101.
Environmental Protection Agency, *Headquarters*, 401 M Street, S.W., Washington, D.C. 20460.

Appendix B to Part 22—Addresses of Regional and Headquarters Lockboxes

Superfund (all Regions)—(Mellon Bank) EPA—Superfund, PO Box 371003, Pittsburgh, PA 15251–7003
Region I—(Mellon Bank) EPA Region I Hearing Clerk, PO Box 360197, Pittsburgh, PA 15251-6197
Region II—(Mellon Bank) EPA Region II Hearing Clerk, PO Box 360188, Pittsburgh, PA 15251–6188
Region III—(Mellon Bank) EPA Region III Hearing Clerk, PO Box 360515, Pittsburgh, PA 15251–6515
Region IV—(The Citizens and Southern National Bank) EPA Region IV Hearing Clerk, PO Box 100142, Atlanta, GA 30384
Region V—(The First National Bank of Chicago) EPA Region V Hearing Clerk, PO Box 70753, Chicago, Il 60673
Region VI—(Mellon Bank) EPA Region VI Hearing Clerk, PO Box 360582, Pittsburgh, PA 15251–6582
Region VII—(Mellon Bank) EPA Region VII Hearing Clerk, PO Box 360748, Pittsburgh, PA 15251–6748
Region VIII—(Mellon Bank) EPA Region VIII Hearing Clerk, PO Box 360859, Pittsburgh, PA 15251–6859
Region IX—(Mellon Bank) EPA Region IX Hearing Clerk, PO Box 360863, Pittsburgh, PA 15251–6863
Region X—(Mellon Bank) EPA Region X Hearing Clerk, PO Box 360903, Pittsburgh, PA 15251–6903
Headquarters—(Mellon Bank) EPA Headquarters Hearing Clerk, PO Box 360277, Pittsburgh, PA 15251–6277.

PART 59—[AMENDED]

1. The authority citation for Part 59 continues to read as follows:

Authority: 42 U.S.C. 7413(d)(3).

2. Part 59 proposed on May 3, 1994 at (59 FR 22776) is amended by removing subpart B.

[FR Doc. 98–4520 Filed 2–24–98; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300619; FRL–5772–7]

RIN 2070–AB78

Prometryn; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to establish tolerances for residues of prometryn in or on carrots under its own initiative to harmonize tolerances with Canada under the Federal Food, Drug and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1966 (Pub. L. 104–170).

DATES: Comments, identified by the document control number [OPP–300619], must be received on or before March 27, 1998.

ADDRESSES: By mail, submit written comments to: Public Response and Program Resources Branch, Field Operations Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, M St., SW, Washington, DC 20460. In person, bring comments to: Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202.

Comments and data may also be submitted electronically to: opp-docket@epamail.epa.gov. Follow the instructions under Unit V. of this document.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part or all of that information as ''Confidential Business Information'' (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 119 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: James A. Tompkins, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 308-5697, e-mail: tompkins.james@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA is proposing under its own initiative that 40 CFR 180.222 be amended by establishing tolerances for residues of the herbicide prometryn, 2,4-bis(isopropylamino)-6-methylthio-s-triazine in or on carrots at 0.1 parts per million (ppm) without a U.S. registration under the Federal Insecticide Fungicide Act (FIFRA), as amended for carrots imported from Canada.

I. Risk Assessment and Statutory Findings

New section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes