

*provided* that the designated representative of any source or unit as appropriate subject to such order shall advise the Administrator within 30 days of issuance of the order that the order will result in such excess emissions.

[58 FR 3757, Jan. 11, 1993, as amended at 60 FR 17131, Apr. 4, 1995; 62 FR 55487, Oct. 24, 1997; 70 FR 25337, May 12, 2005]

## PART 78—APPEAL PROCEDURES

### Sec.

- 78.1 Purpose and scope.
- 78.2 General.
- 78.3 Petition for administrative review and request for evidentiary hearing.
- 78.4 Filings.
- 78.5 Limitation on filing or presenting new evidence and raising new issues.
- 78.6 Action on petition for administrative review.
- 78.7 [Reserved]
- 78.8 Consolidation and severance of appeals proceedings.
- 78.9 Notice of the filing of petition for administrative review.
- 78.10 *Ex parte* communications during pendency of a hearing.
- 78.11 Intervenors.
- 78.12 Standard of review.
- 78.13 Scheduling orders and pre-hearing conferences.
- 78.14 Evidentiary hearing procedure.
- 78.15 Motions in evidentiary hearings.
- 78.16 Record of appeal proceeding.
- 78.17 Proposed findings and conclusions and supporting brief.
- 78.18 Proposed decision.
- 78.19 Interlocutory appeal.
- 78.20 Appeal of decision of Administrator or proposed decision to the Environmental Appeals Board.

AUTHORITY: 42 U.S.C. 7401–7671q.

SOURCE: 58 FR 3760, Jan. 11, 1993, unless otherwise noted.

### § 78.1 Purpose and scope.

(a)(1)(i) This part shall govern appeals of any final decision of the Administrator under:

(A) Part 72, 73, 74, 75, 76, or 77 of this chapter;

(B) Subparts A through J of part 97 of this chapter;

(C) Subparts AA through II, AAA through III, or AAAA through IIII of part 96 of this chapter; subparts AA through II, AAA through III, or AAAA through IIII of part 97 of this chapter; or State regulations approved under

§ 51.123(o)(1) or (2) or (aa)(1) or (2) or § 51.124(o)(1) or (2) of this chapter;

(D) Subpart AAAAA, BBBBB, CCCCC, DDDDD, EEEEE, FFFFF, or GGGGG of part 97 of this chapter or State regulations approved under § 52.38(a)(4) or (5) or (b)(4), (5), (8), (9), (11), or (12) or § 52.39(e), (f), (h), or (i) of this chapter; or

(E) Subpart RR of part 98 of this chapter.

(ii) Notwithstanding paragraph (a)(1)(i) of this section, matters listed in § 78.3(d) and preliminary, procedural, or intermediate decisions, such as draft Acid Rain permits, may not be appealed.

(iii) All references in paragraph (b) of this section and in § 78.3 to subparts AA through II of part 96 of this chapter, subparts AAA through III of part 96 of this chapter, and subparts AAAA through IIII of part 96 of this chapter shall be read to include the comparable provisions in State regulations approved under § 51.123(o)(1) or (2) of this chapter, § 51.124(o)(1) or (2) of this chapter, and § 51.123(aa)(1) or (2) of this chapter, respectively.

(iv) All references in paragraph (b) of this section and in § 78.3 to subpart AAAAA of part 97 of this chapter, subpart BBBBB of part 97 of this chapter, subpart CCCCC of part 97 of this chapter, subpart DDDDD of part 97 of this chapter, subpart EEEEE of part 97 of this chapter, and subpart GGGGG of part 97 of this chapter shall be read to include the comparable provisions in State regulations approved under § 52.38(a)(4) or (5) of this chapter, § 52.38(b)(4) or (5) of this chapter, § 52.39(e) or (f) of this chapter, § 52.39(h) or (i) of this chapter, § 52.38(b)(8) or (9) of this chapter, and § 52.38(b)(11) or (12) of this chapter, respectively.

(2) Filing an appeal, and exhausting administrative remedies, under this part shall be a prerequisite to seeking judicial review. For purposes of judicial review, final agency action occurs only when a decision appealable under this part is issued and the procedures under this part for appealing the decision are exhausted.

(b) The decisions of the Administrator that may be appealed include but are not limited to:

(1) Under part 72 of this chapter,

## Environmental Protection Agency

## § 78.1

(i) The determination of incompleteness of an Acid Rain permit application;

(ii) The issuance or denial of an Acid Rain permit and approval or disapproval of a compliance option by the Administrator;

(iii) The approval or disapproval of an early ranking application for Phase I extension under § 72.42 of this chapter;

(iv) The final determination of whether a technology is a qualified repowering technology under § 72.44 of this chapter;

(v) [Reserved]

(vi) The approval or disapproval of a permit revision;

(vii) The decision on the deduction or return of allowances under §§ 72.41, 72.42, 72.43, 72.44, 72.91(b), and 72.92 (a) and (c) of this chapter; and

(viii) The failure to issue an Acid Rain permit in accordance with the deadline under § 72.74(b) of this chapter.

(2) Under part 73 of this chapter,

(i) The correction of an error in an Allowance Tracking System account;

(ii) The decision on the allocation of allowances from the Conservation and Renewal Energy Reserve;

(iii) The decision on the allocation of allowances under regulations implementing sections 404(e), 405(g)(4), 405(i)(2), and 410(h) of the Act;

(iv) The decision on the allocation of allowances under subpart F of part 73 of this chapter;

(v) The decision on the sale or return of allowances and transfer of proceeds under subpart E of part 73 of this chapter; and

(vi) The decision on the deduction of allowances under § 73.35(b) of this chapter.

(3) Under part 74 of this chapter,

(i) The determination of incompleteness of an opt-in permit application;

(ii) The issuance or denial of an opt-in permit and approval or disapproval of the transfer of allowances for the replacement of thermal energy;

(iii) The approval or disapproval of a permit revision to an opt-in permit; and

(iv) The decision on the deduction or return of allowances under subpart E of part 74 of this chapter.

(4) Under part 75 of this chapter,

(i) The decision on a petition for approval of an alternative monitoring system;

(ii) The approval or disapproval of a monitoring system certification or recertification;

(iii) The finalization of annual emissions data, including retroactive adjustment based on audit;

(iv) The determination of the percentage of emissions reduction achieved by qualifying Phase I technology; and

(v) The determination on the acceptability of parametric missing data procedures for a unit equipped with add-on controls for sulfur dioxide and nitrogen oxides in accordance with part 75 of this chapter.

(5) Under part 77 of this chapter, the determination of incompleteness of an offset plan and the approval or disapproval of an offset plan under § 77.4 of this chapter and the deduction of allowances under § 77.5(c) of this chapter.

(6) Under subparts A through J of part 97 of this chapter,

(i) The adjustment of the information in a compliance certification or other submission and the deduction or transfer of NO<sub>x</sub> allowances based on the information, as adjusted, under § 97.31 of this chapter;

(ii) The decision on the allocation of NO<sub>x</sub> allowances to a NO<sub>x</sub> Budget unit under § 97.41(b), (c), (d), or (e) of this chapter;

(iii) The decision on the allocation of NO<sub>x</sub> allowances to a NO<sub>x</sub> Budget unit from the compliance supplement pool under § 97.43 of this chapter;

(iv) The decision on the deduction of NO<sub>x</sub> allowances under § 97.54 of this chapter;

(v) The decision on the transfer of NO<sub>x</sub> allowances under § 97.61 of this chapter;

(vi) The decision on a petition for approval of an alternative monitoring system;

(vii) The approval or disapproval of a monitoring system certification or recertification under § 97.71 of this chapter;

(viii) The finalization of control period emissions data, including retroactive adjustment based on audit;

(ix) The approval or disapproval of a petition under § 97.75 of this chapter;

(x) The determination of the sufficiency of the monitoring plan for a NO<sub>x</sub> Budget opt-in unit;

(xi) The decision on a request for withdrawal of a NO<sub>x</sub> Budget opt-in unit from the NO<sub>x</sub> Budget Trading Program under § 97.86 of this chapter;

(xii) The decision on the deduction of NO<sub>x</sub> allowances under § 97.87 of this chapter; and

(xiii) The decision on the allocation of NO<sub>x</sub> allowances to a NO<sub>x</sub> Budget opt-in unit under § 97.88 of this chapter.

(7) Under subparts AA through II of part 96 of this chapter,

(i) The decision on the allocation of CAIR NO<sub>x</sub> allowances under § 96.141(b)(2) or (c)(2) of this chapter.

(ii) The decision on the deduction of CAIR NO<sub>x</sub> allowances, and the adjustment of the information in a submission and the decision on the deduction or transfer of CAIR NO<sub>x</sub> allowances based on the information as adjusted, under § 96.154 of this chapter;

(iii) The correction of an error in a CAIR NO<sub>x</sub> Allowance Tracking System account under § 96.156 of this chapter;

(iv) The decision on the transfer of CAIR NO<sub>x</sub> allowances under § 96.161 of this chapter;

(v) The finalization of control period emissions data, including retroactive adjustment based on audit;

(vi) The approval or disapproval of a petition under § 96.175 of this chapter.

(8) Under subparts AAA through III of part 96 of this chapter,

(i) The decision on the deduction of CAIR SO<sub>2</sub> allowances, and the adjustment of the information in a submission and the decision on the deduction or transfer of CAIR SO<sub>2</sub> allowances based on the information as adjusted, under § 96.254 of this chapter;

(ii) The correction of an error in a CAIR SO<sub>2</sub> Allowance Tracking System account under § 96.256 of this chapter;

(iii) The decision on the transfer of CAIR SO<sub>2</sub> allowances under § 96.261 of this chapter;

(iv) The finalization of control period emissions data, including retroactive adjustment based on audit;

(v) The approval or disapproval of a petition under § 96.275 of this chapter.

(9) Under subparts AAAA through IIII of part 96 of this chapter,

(i) The decision on the allocation of CAIR NO<sub>x</sub> Ozone Season allowances under § 96.341(b)(2) or (c)(2) of this chapter.

(ii) The decision on the deduction of CAIR NO<sub>x</sub> Ozone Season allowances, and the adjustment of the information in a submission and the decision on the deduction or transfer of CAIR NO<sub>x</sub> Ozone Season allowances based on the information as adjusted, under § 96.354 of this chapter;

(iii) The correction of an error in a CAIR NO<sub>x</sub> Ozone Season Allowance Tracking System account under § 96.356 of this chapter;

(iv) The decision on the transfer of CAIR NO<sub>x</sub> Ozone Season allowances under § 96.361 of this chapter;

(v) The finalization of control period emissions data, including retroactive adjustment based on audit;

(vi) The approval or disapproval of a petition under § 96.375 of this chapter.

(10) Under subparts AA through II of part 97 of this chapter,

(i) The decision on the allocation of CAIR NO<sub>x</sub> allowances under subpart EE of part 97 of this chapter.

(ii) The decision on the deduction of CAIR NO<sub>x</sub> allowances, and the adjustment of the information in a submission and the decision on the deduction or transfer of CAIR NO<sub>x</sub> allowances based on the information as adjusted, under § 97.154 of this chapter;

(iii) The correction of an error in a CAIR NO<sub>x</sub> Allowance Tracking System account under § 97.156 of this chapter;

(iv) The decision on the transfer of CAIR NO<sub>x</sub> allowances under § 97.161 of this chapter;

(v) The finalization of control period emissions data, including retroactive adjustment based on audit;

(vi) The approval or disapproval of a petition under § 97.175 of this chapter.

(11) Under subparts AAA through III of part 97 of this chapter,

(i) The decision on the deduction of CAIR SO<sub>2</sub> allowances, and the adjustment of the information in a submission and the decision on the deduction or transfer of CAIR SO<sub>2</sub> allowances based on the information as adjusted, under § 97.254 of this chapter;

(ii) The correction of an error in a CAIR SO<sub>2</sub> Allowance Tracking System account under § 97.256 of this chapter;

(iii) The decision on the transfer of CAIR SO<sub>2</sub> allowances under § 97.261 of this chapter;

(iv) The finalization of control period emissions data, including retroactive adjustment based on audit;

(v) The approval or disapproval of a petition under § 97.275 of this chapter.

(12) Under subparts AAAA through IIII of part 97 of this chapter,

(i) The decision on the allocation of CAIR NO<sub>x</sub> Ozone Season allowances under subpart EEEE of part 97 of this chapter.

(ii) The decision on the deduction of CAIR NO<sub>x</sub> Ozone Season allowances, and the adjustment of the information in a submission and the decision on the deduction or transfer of CAIR NO<sub>x</sub> Ozone Season allowances based on the information as adjusted, under § 97.354 of this chapter;

(iii) The correction of an error in a CAIR NO<sub>x</sub> Ozone Season Allowance Tracking System account under § 97.356 of this chapter;

(iv) The decision on the transfer of CAIR NO<sub>x</sub> Ozone Season allowances under § 97.361 of this chapter;

(v) The finalization of control period emissions data, including retroactive adjustment based on audit;

(vi) The approval or disapproval of a petition under § 97.375 of this chapter.

(13) Under subpart AAAAA of part 97 of this chapter,

(i) The decision on the allocation of CSAPR NO<sub>x</sub> Annual allowances under § 97.411(a)(2) or (c) or § 97.412 of this chapter.

(ii) The decision on the transfer of CSAPR NO<sub>x</sub> Annual allowances under § 97.423 of this chapter.

(iii) The decision on the deduction of CSAPR NO<sub>x</sub> Annual allowances under § 97.424 or § 97.425 of this chapter.

(iv) The correction of an error in an Allowance Management System account under § 97.427 of this chapter.

(v) The adjustment of information in a submission and the decision on the deduction and transfer of CSAPR NO<sub>x</sub> Annual allowances based on the information as adjusted under § 97.428 of this chapter.

(vi) The finalization of control period emissions data, including retroactive adjustment based on audit.

(vii) The approval or disapproval of a petition under § 97.435 of this chapter.

(14) Under subpart BBBBB of part 97 of this chapter,

(i) The decision on the allocation of CSAPR NO<sub>x</sub> Ozone Season Group 1 allowances under § 97.511(a)(2) or (c) or § 97.512 of this chapter.

(ii) The decision on the transfer of CSAPR NO<sub>x</sub> Ozone Season Group 1 allowances under § 97.523 of this chapter.

(iii) The decision on the deduction of CSAPR NO<sub>x</sub> Ozone Season Group 1 allowances under § 97.524 or § 97.525 of this chapter.

(iv) The correction of an error in an Allowance Management System account under § 97.527 of this chapter.

(v) The adjustment of information in a submission and the decision on the deduction and transfer of CSAPR NO<sub>x</sub> Ozone Season Group 1 allowances based on the information as adjusted under § 97.528 of this chapter.

(vi) The finalization of control period emissions data, including retroactive adjustment based on audit.

(vii) The approval or disapproval of a petition under § 97.535 of this chapter.

(viii) The decision on the deduction of CSAPR NO<sub>x</sub> Ozone Season Group 1 allowances from an Allowance Management System account and the allocation to such account or another account of CSAPR NO<sub>x</sub> Ozone Season Group 2 allowances or CSAPR NO<sub>x</sub> Ozone Season Group 3 allowances under § 97.526(d) of this chapter.

(15) Under subpart CCCCC of part 97 of this chapter,

(i) The decision on the allocation of CSAPR SO<sub>2</sub> Group 1 allowances under § 97.611(a)(2) or (c) or § 97.612 of this chapter.

(ii) The decision on the transfer of CSAPR SO<sub>2</sub> Group 1 allowances under § 97.623 of this chapter.

(iii) The decision on the deduction of CSAPR SO<sub>2</sub> Group 1 allowances under § 97.624 or § 97.625 of this chapter.

(iv) The correction of an error in an Allowance Management System account under § 97.627 of this chapter.

(v) The adjustment of information in a submission and the decision on the deduction and transfer of CSAPR SO<sub>2</sub> Group 1 allowances based on the information as adjusted under § 97.628 of this chapter.

(vi) The finalization of control period emissions data, including retroactive adjustment based on audit.

(vii) The approval or disapproval of a petition under § 97.635 of this chapter.

(16) Under subpart DDDDD of part 97 of this chapter,

(i) The decision on the allocation of CSAPR SO<sub>2</sub> Group 2 allowances under § 97.711(a)(2) or (c) or § 97.712 of this chapter.

(ii) The decision on the transfer of CSAPR SO<sub>2</sub> Group 2 allowances under § 97.723 of this chapter.

(iii) The decision on the deduction of CSAPR SO<sub>2</sub> Group 2 allowances under § 97.724 or § 97.725 of this chapter.

(iv) The correction of an error in an Allowance Management System account under § 97.727 of this chapter.

(v) The adjustment of information in a submission and the decision on the deduction and transfer of CSAPR SO<sub>2</sub> Group 2 allowances based on the information as adjusted under § 97.728 of this chapter.

(vi) The finalization of control period emissions data, including retroactive adjustment based on audit.

(vii) The approval or disapproval of a petition under § 97.735 of this chapter.

(17) Under subpart EEEEE of part 97 of this chapter,

(i) The decision on the allocation of CSAPR NO<sub>x</sub> Ozone Season Group 2 allowances under § 97.811(a)(2) or (c) or § 97.812 of this chapter.

(ii) The decision on the transfer of CSAPR NO<sub>x</sub> Ozone Season Group 2 allowances under § 97.823 of this chapter.

(iii) The decision on the deduction of CSAPR NO<sub>x</sub> Ozone Season Group 2 allowances under § 97.824 or § 97.825 of this chapter.

(iv) The correction of an error in an Allowance Management System account under § 97.827 of this chapter.

(v) The adjustment of information in a submission and the decision on the deduction and transfer of CSAPR NO<sub>x</sub> Ozone Season Group 2 allowances based on the information as adjusted under § 97.828 of this chapter.

(vi) The finalization of control period emissions data, including retroactive adjustment based on audit.

(vii) The approval or disapproval of a petition under § 97.835 of this chapter.

(viii) The decision on the deduction of CSAPR NO<sub>x</sub> Ozone Season Group 2 allowances from an Allowance Management System account and the allocation to such account or another account of CSAPR NO<sub>x</sub> Ozone Season Group 3 allowances under § 97.826(d) of this chapter.

(ix) The decision on the recall of allocations of CSAPR NO<sub>x</sub> Ozone Season Group 2 allowances and the deduction of such allowances from an Allowance Management System account under § 97.811(d) of this chapter.

(18) Under subpart FFFFF of part 97 of this chapter,

(i) The decision on the allocation of Texas SO<sub>2</sub> Trading Program allowances under § 97.911(a)(2) or (c) or § 97.912 of this chapter.

(ii) The decision on the transfer of Texas SO<sub>2</sub> Trading Program allowances under § 97.923 of this chapter.

(iii) The decision on the deduction of Texas SO<sub>2</sub> Trading Program allowances under § 97.924 or § 97.925 of this chapter.

(iv) The correction of an error in an Allowance Management System account under § 97.927 of this chapter.

(v) The adjustment of information in a submission and the decision on the deduction and transfer of Texas SO<sub>2</sub> Trading Program allowances based on the information as adjusted under § 97.928 of this chapter.

(vi) The finalization of control period emissions data, including retroactive adjustment based on audit.

(vii) The approval or disapproval of a petition under § 97.935 of this chapter.

(19) Under subpart GGGGG of part 97 of this chapter,

(i) The decision on the allocation of CSAPR NO<sub>x</sub> Ozone Season Group 3 allowances under § 97.1011(a)(2) or (3) or (c) or § 97.1012 of this chapter.

(ii) The decision on the transfer of CSAPR NO<sub>x</sub> Ozone Season Group 3 allowances under § 97.1023 of this chapter.

(iii) The decision on the deduction of CSAPR NO<sub>x</sub> Ozone Season Group 3 allowances under § 97.1024 or § 97.1025 of this chapter.

(iv) The correction of an error in an Allowance Management System account under § 97.1027 of this chapter.

(v) The adjustment of information in a submission and the decision on the deduction and transfer of CSAPR NO<sub>x</sub>

## Environmental Protection Agency

## § 78.2

Ozone Season Group 3 allowances based on the information as adjusted under § 97.1028 of this chapter.

(vi) The finalization of control period emissions data, including retroactive adjustment based on audit.

(vii) The approval or disapproval of a petition under § 97.1035 of this chapter.

(20) Under subpart RR of part 98 of this chapter,

(i) The decision on eligibility for a research and development exemption under § 98.440(d) of this chapter.

(ii) The approval or disapproval of a request for discontinuation of reporting under § 98.441(b) of this chapter.

(iii) The approval or disapproval of a geologic sequestration monitoring, reporting, and verification (MRV) plan under § 98.448(c) or (d) of this chapter.

(c) In order to appeal a decision under paragraph (a) of this section, a person shall file a petition for administrative review with the Environmental Appeals Board under § 78.3. The Environmental Appeals Board will, consistent with § 78.6, either:

(1) Issue an order deciding the appeal; or

(2) Where there is a disputed issue of fact material to the contested portions of the decision, refer the proceeding to the Chief Administrative Law Judge, who will designate an Administrative Law Judge to conduct an evidentiary hearing to decide the disputed issue of fact. If the proposed decision is contested or the Environmental Appeals Board decides to review the proposed decision, the Environmental Appeals Board will issue an order deciding the appeal.

(d) Questions arising at any stage of a proceeding that are not addressed in this part will be resolved at the discretion of the Environmental Appeals Board or the Presiding Officer.

[58 FR 3760, Jan. 11, 1993, as amended at 60 FR 17132, Apr. 4, 1995; 62 FR 55488, Oct. 24, 1997; 66 FR 12978, Mar. 1, 2001; 69 FR 21644, Apr. 21, 2004; 70 FR 25338, May 12, 2005; 71 FR 25379, Apr. 28, 2006; 72 FR 59205, Oct. 19, 2007; 75 FR 75078, Dec. 1, 2010; 76 FR 48378, Aug. 8, 2011; 81 FR 74602, Oct. 26, 2016; 86 FR 23178, Apr. 30, 2021]

EFFECTIVE DATE NOTE: At 88 FR 36897, June 5, 2023, § 78.1 was amended as follows:

a. In paragraphs (b)(13)(i), (b)(14)(i), (b)(15)(i), (b)(16)(i), and (b)(17)(i), removing

“decision on the” and adding in its place “calculation of an”;

b. In paragraph (b)(17)(viii), adding “or (e)” after “§ 97.826(d)”;

c. In paragraph (b)(17)(ix), adding “or (e)” after “§ 97.811(d)”;

d. In paragraph (b)(18)(i), removing “decision on the” and adding in its place “calculation of an”; and

e. Revising paragraph (b)(19). These amendments became effective Aug. 4, 2023. For the convenience of the user, the revised text is set forth as follows:

### § 78.1 Purpose and scope.

\* \* \* \* \*

(b) \* \* \*

(19) Under subpart GG GGG of part 97 of this chapter:

(i) The calculation of a dynamic trading budget under § 97.1010(a)(4) of this chapter.

(ii) The calculation of an allocation of CSAPR NO<sub>x</sub> Ozone Season Group 3 allowances under § 97.1011 or § 97.1012 of this chapter.

(iii) The decision on the transfer of CSAPR NO<sub>x</sub> Ozone Season Group 3 allowances under § 97.1023 of this chapter.

(iv) The decision on the deduction of CSAPR NO<sub>x</sub> Ozone Season Group 3 allowances under § 97.1024, § 97.1025, or § 97.1026(d) of this chapter.

(v) The correction of an error in an Allowance Management System account under § 97.1027 of this chapter.

(vi) The adjustment of information in a submission and the decision on the deduction and transfer of CSAPR NO<sub>x</sub> Ozone Season Group 3 allowances based on the information as adjusted under § 97.1028 of this chapter.

(vii) The finalization of control period emissions data, including retroactive adjustment based on audit.

(viii) The approval or disapproval of a petition under § 97.1035 of this chapter.

\* \* \* \* \*

### § 78.2 General.

(a) *Definitions.* (1) The terms used in this part with regard to a decision of the Administrator that is appealed under this part shall have the meanings as set forth in the regulations under which the Administrator made such decision and as set forth in paragraph (a)(2) of this section and § 72.2 of this chapter.

(2) *Interested person* means, with regard to a decision of the Administrator:

(i) Any person who submitted comments, or testified at a public hearing,

### § 78.3

### 40 CFR Ch. I (7–1–23 Edition)

pursuant to an opportunity for comment provided by the Administrator as part of the process of making such decision;

(ii) Any person who submitted objections pursuant to an opportunity for objections provided by the Administrator as part of the process of making such decision; or

(iii) Any person who submitted, to the Administrator and in a format prescribed by the Administrator, his or her name, service address, telephone number, and facsimile number and identified such decision in order to be placed on a list of persons interested in such decision;

(iv) Provided that the Administrator may update the list of interested persons from time to time by requesting additional written indication of continued interest from the persons listed and may delete from the list the name of any person failing to respond as requested.

(b) *Availability of information.* The availability to the public of information provided to, or otherwise obtained by, the Administrator under this part shall be governed by part 2 of this chapter.

(c) *Computation of time.* (1) In computing any period of time prescribed or allowed under this part, except as otherwise provided, the day of the event from which the period begins to run shall not be included, and Saturdays, Sundays, and federal holidays shall be included. When the period ends on a Saturday, Sunday, or federal holiday, the stated period shall be extended to include the next business day.

(2) Where a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time prescribed or allowed under this part for the filing of a responsive document or for otherwise responding.

[76 FR 48379, Aug. 8, 2011, as amended at 86 FR 23179, Apr. 30, 2021]

#### **§ 78.3 Petition for administrative review and request for evidentiary hearing.**

(a)(1) The following persons may petition for administrative review of a decision of the Administrator that is made under parts 72, 73, 74, 75, 76, and

77 of this chapter and that is appealable under § 78.1(a):

(i) The designated representative for a unit or source covered by the decision or the authorized account representative for any Allowance Tracking System account covered by the decision; or

(ii) Any interested person with regard to the decision.

(2) The following persons may petition for administrative review of a decision of the Administrator that is made under subparts A through J of part 97 of this chapter and that is appealable under § 78.1(a):

(i) The NO<sub>x</sub> authorized account representative for a unit or source covered by the decision or any NO<sub>x</sub> Allowance Tracking System account covered by the decision; or

(ii) Any interested person with regard to the decision.

(3) The following persons may petition for administrative review of a decision of the Administrator that is made under subparts AA through II, AAA through III, or AAAA through IIII of part 96 of this chapter or subparts AA through II, AAA through III, or AAAA through IIII of part 97 of this chapter and that is appealable under § 78.1(a):

(i) The CAIR designated representative for a unit or source covered by the decision or the CAIR authorized account representative for any CAIR NO<sub>x</sub> Allowance Tracking System account, CAIR SO<sub>2</sub> Allowance Tracking System account, or CAIR NO<sub>x</sub> Ozone Season Allowance Tracking System account covered by the decision; or

(ii) Any interested person with regard to the decision.

(4) The following persons may petition for administrative review of a decision of the Administrator that is made under subpart AAAAA, BBBBB, CCCCC, DDDDD, EEEEE, FFFFF, or GGGGG of part 97 of this chapter and that is appealable under § 78.1(a):

(i) The designated representative for a unit or source covered by the decision or the authorized account representative for any Allowance Management System account covered by the decision; or

(ii) Any interested person with regard to the decision.

## Environmental Protection Agency

## § 78.3

(5) The following persons may petition for administrative review of a decision of the Administrator that is made under subpart RR of part 98 of this chapter and that is appealable under § 78.1(a):

(i) The designated representative for a facility covered by the decision; or

(ii) Any interested person with regard to the decision.

(b)(1) Within 30 days following issuance of a decision under § 78.1 by the Administrator, any person under paragraph (a) of this section may file a petition with the Environmental Appeals Board for administrative review of the decision. If no petition for administrative review of a decision under § 78.1 is filed within such period, the decision shall become final agency action and shall not meet the prerequisite for judicial review under § 78.1(a)(2).

(2) The petition may include a request for an evidentiary hearing to resolve any disputed issue of material fact concerning the decision.

(3) At the same time that the petition for administrative review is filed, the petitioner shall:

(i) Serve a copy of the petition on the Administrator and the following person (unless such person is the petitioner):

(A) The designated representative or authorized account representative, for a petition under paragraph (a)(1) of this section;

(B) The NO<sub>x</sub> authorized account representative, for a petition under paragraph (a)(2) of this section;

(C) The CAIR designated representative or CAIR authorized account representative, for a petition under paragraph (a)(3) of this section;

(D) The designated representative or authorized account representative, for a petition under paragraph (a)(4) of this section; or

(E) The designated representative, for a petition under paragraph (a)(5) of this section; and

(ii) Mail a notice of the petition to the air pollution control agencies of affected States and any interested person.

(c) The petition for administrative review under this part shall state with specificity:

(1) Each material factual and legal issue alleged to be in dispute and any

such factual issue for which an evidentiary hearing is sought;

(2) A clear and concise statement of the nature and scope of the interest of the petitioner;

(3) A clear and concise brief in support of the petition, explaining why the factual or legal issues are material and, if an evidentiary hearing is requested, why direct and cross-examination of witnesses is necessary to resolve such factual issues;

(4) If an evidentiary hearing is requested, the time estimated to be necessary for an evidentiary hearing;

(5) If an evidentiary hearing is requested, a certified statement that, in the event of an evidentiary hearing, and without cost or expense to any other party, any of the following persons shall be available to appear and testify:

(i) The petitioner; and

(ii) Any officer, director, employee, consultant, or agent of the petitioner;

(6) Specific references to the contested portions of the decision; and

(7) Any revised or alternative action of the Administrator sought by the petitioner as necessary to implement the requirements, purposes, or policies of, as appropriate:

(i) Parts 72, 73, 74, 75, 76, and 77 of this chapter;

(ii) Subparts A through J of part 97 of this chapter;

(iii) Subparts AA through II, AAA through III, or AAAA through IIII of part 96 of this chapter or subparts AA through II, AAA through III, or AAAA through IIII of part 97 of this chapter;

(iv) Subpart AAAAA, BBBBB, CCCCC, DDDDD, EEEEE, FFFFF, or GGGGG of part 97 of this chapter; or

(v) Subpart RR of part 98 of this chapter.

(d) In no event shall a petition for administrative review be filed, or review be available under this part, with regard to:

(1) Actions of the Administrator under sections 112(r), 113, 114, 120, 301, and 303 of the Act;

(2) The reliance by the Administrator on:



## § 78.4

## 40 CFR Ch. I (7–1–23 Edition)

(i) A certificate of representation submitted by a designated representative or an application for a general account submitted by an authorized account representative under parts 72, 73, 74, 75, 76, and 77 of this chapter;

(ii) An account certificate of representation or an application for a general account submitted by a NO<sub>x</sub> authorized account representative under subparts A through J of part 97 of this chapter;

(iii) A certificate of representation submitted by a CAIR designated representative or an application for a general account submitted by a CAIR authorized account representative under subparts AA through II, AAA through III, or AAAA through IIII of part 96 of this chapter or subparts AA through II, AAA through III, or AAAA through IIII of part 97 of this chapter;

(iv) A certificate of representation submitted by a designated representative or an application for a general account submitted by an authorized account representative under subpart AAAAA, BBBBB, CCCCC, DDDDD, EEEEE, FFFFF, or GGGGG of part 97 of this chapter; or

(v) A certificate of representation submitted by a designated representative under part 98 of this chapter;

(3) Any provision or requirement of part 72, 73, 74, 75, 76, or 77 of this chapter, including the standard requirements under § 72.9 of this chapter and any emission monitoring or reporting requirements;

(4) Any provision or requirement of subparts A through J of part 97 of this chapter, including the standard requirements under § 97.6 of this chapter and any emission monitoring or reporting requirements;

(5) Any provision or requirement of subparts AA through II, AAA through III, or AAAA through IIII of part 96 of this chapter or subparts AA through II, AAA through III, or AAAA through IIII of part 97 of this chapter, including the standard requirements under § 96.106, § 96.206, or § 96.306 of this chapter or § 97.106, § 97.206, or § 97.306 of this chapter, respectively, and any emission monitoring or reporting requirements;

(6) Any provision or requirement of subpart AAAAA, BBBBB, CCCCC, DDDDD, EEEEE, FFFFF, or GGGGG of

part 97 of this chapter, including the standard requirements under § 97.406, § 97.506, § 97.606, § 97.706, § 97.806, § 97.906, or § 97.1006 of this chapter, respectively, and any emission monitoring or reporting requirements; or

(7) Any provision or requirement of subpart RR of part 98 of this chapter.

[58 FR 3760, Jan. 11, 1993, as amended at 60 FR 17132, Apr. 4, 1995; 62 FR 55488, Oct. 24, 1997; 69 FR 21645, Apr. 21, 2004; 70 FR 25338, May 12, 2005; 71 FR 25379, Apr. 28, 2006; 75 FR 75078, Dec. 1, 2010; 76 FR 48379, Aug. 8, 2011; 81 FR 74603, Oct. 26, 2016; 86 FR 23179, Apr. 30, 2021]

### § 78.4 Filings.

(a)(1) All original filings made under this part shall be signed by the person making the filing or by an attorney or authorized representative, in accordance with the following requirements:

(i)(A) Any filings on behalf of owners and operators of an affected unit or affected source under parts 72, 73, 74, 75, 76, and 77 of this chapter shall be signed by the designated representative.

(B) Any filings on behalf of persons with an ownership interest with respect to allowances in a general account under parts 72, 73, 74, 75, 76, and 77 of this chapter shall be signed by the authorized account representative.

(ii)(A) Any filings on behalf of owners and operators of a NO<sub>x</sub> Budget unit or NO<sub>x</sub> Budget source shall be signed by the NO<sub>x</sub> authorized account representative.

(B) Any filings on behalf of persons with an ownership interest with respect to NO<sub>x</sub> allowances in a general account shall be signed by the NO<sub>x</sub> authorized account representative.

(iii)(A) Any filings on behalf of owners and operators of a CAIR NO<sub>x</sub> unit or CAIR NO<sub>x</sub> source, CAIR SO<sub>2</sub> unit or CAIR SO<sub>2</sub> source, or CAIR NO<sub>x</sub> Ozone Season unit or CAIR NO<sub>x</sub> Ozone Season source shall be signed by the CAIR designated representative.

(B) Any filings on behalf of persons with an ownership interest with respect to CAIR NO<sub>x</sub> allowances, CAIR SO<sub>2</sub> allowances, or CAIR NO<sub>x</sub> Ozone Season allowances in a general account shall be signed by the CAIR authorized account representative.

(iv)(A) Any filings on behalf of owners and operators of a CSAPR NO<sub>x</sub> Annual unit or CSAPR NO<sub>x</sub> Annual source, CSAPR NO<sub>x</sub> Ozone Season Group 1 unit or CSAPR NO<sub>x</sub> Ozone Season Group 1 source, CSAPR NO<sub>x</sub> Ozone Season Group 2 unit or CSAPR NO<sub>x</sub> Ozone Season Group 2 source, CSAPR NO<sub>x</sub> Ozone Season Group 3 unit or CSAPR NO<sub>x</sub> Ozone Season Group 3 source, CSAPR SO<sub>2</sub> Group 1 unit or CSAPR SO<sub>2</sub> Group 1 source, CSAPR SO<sub>2</sub> Group 2 unit or CSAPR SO<sub>2</sub> Group 2 source, or Texas SO<sub>2</sub> Trading Program unit or Texas SO<sub>2</sub> Trading Program source shall be signed by the designated representative.

(B) Any filings on behalf of persons with an ownership interest with respect to CSAPR NO<sub>x</sub> Annual allowances, CSAPR NO<sub>x</sub> Ozone Season Group 1 allowances, CSAPR NO<sub>x</sub> Ozone Season Group 2 allowances, CSAPR NO<sub>x</sub> Ozone Season Group 3 allowances, CSAPR SO<sub>2</sub> Group 1 allowances, CSAPR SO<sub>2</sub> Group 2 allowances, or Texas SO<sub>2</sub> Trading Program allowances in a general account shall be signed by the authorized account representative.

(v) Any filings on behalf of owners and operators of a facility covered by subpart RR of part 98 of this chapter shall be signed by the designated representative.

(2) The name, address, e-mail address (if any), telephone number, and facsimile number (if any) of the person making the filing shall be provided with the filing.

(b)(1) All data and information referred to, or in any way relied upon, in any filings made under this part shall be included in full and may not be incorporated by reference, unless the data or information is contained in the administrative record for the decision being appealed.

(2) Notwithstanding paragraph (b)(1) of this section, State or Federal statutes, regulations, and judicial decisions published in a national reporter system, officially issued EPA documents of general applicability, and any other publicly and generally available reference material may be incorporated by reference. Any person incorporating such materials by reference shall provide copies of the materials as in-

structed by the Environmental Appeals Board or the Presiding Officer.

(3) If any part of any filing is in a foreign language, it shall be accompanied by an English translation verified by the person making the translation, under oath, to be complete and accurate, together with the name, address, and a brief statement of the qualifications of the person making the translation. Translations filed of material originally produced in a foreign language shall be accompanied by copies of the original material.

(4) Where relevant data or information is contained in a document also containing irrelevant matter, either the irrelevant matter shall be deleted or an index to the relevant portions of the document shall be included in the document.

(c)(1) Failure to comply with the requirements of this section or any other requirement in this part may result in the noncomplying portions of the filing being excluded from consideration. If the Environmental Appeals Board or the Presiding Officer determines on motion by any party or *sua sponte* that a filing fails to meet any requirement of this part, the Environmental Appeals Board or Presiding Officer may return the filing, together with a reference to the applicable requirements on which the determination is based. A person whose filing has been rejected has 7 days (or other reasonable period established by the Environmental Appeals Board or Presiding Officer), from the date the returned filing is mailed, to correct the filing in conformance with this part and refile it.

(2) The making of a filing shall not mean or imply that the filing, in fact, meets all applicable requirements, that the filing contains reasonable grounds for the action requested, or that the action requested is in accordance with law.

(d) An original and two copies of any written filing under this part shall be filed with the Environmental Appeals Board unless a proceeding is pending before a Presiding Officer, in which case they shall be filed with the Hearing Clerk (except as provided under § 78.19(d)).

(e)(1) The party making any filing in a proceeding under this part shall also

## § 78.5

serve a copy of the filing on each party to the proceeding, or, with regard to a petition for administrative review, on the persons specified in § 78.3(b)(3).

(2) Every filing made under this part shall be accompanied by a certificate of service citing the date, place, time, and manner of service and the names of the persons served.

(f) The Hearing Clerk will maintain and furnish, to any person upon request, the official service list containing the name, service address, telephone, and facsimile numbers of each party to a proceeding under this part and his or her attorney or duly authorized representative.

(g) Affidavits filed under this part shall be made on personal knowledge and belief, set forth only those facts that are admissible into evidence under § 78.5, and show affirmatively that the affiant is competent to testify to the matters stated therein.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997; 62 FR 66279, Dec. 18, 1997; 69 FR 21645, Apr. 21, 2004; 70 FR 25339, May 12, 2005; 75 FR 75078, Dec. 1, 2010; 76 FR 48379, Aug. 8, 2011; 81 FR 74603, Oct. 26, 2016; 86 FR 23180, Apr. 30, 2021]

## § 78.5 Limitation on filing or presenting new evidence and raising new issues.

(a) Where there was an opportunity for submission of public comments or objections prior to the decision that is subject to appeal, no evidence shall be filed or presented, and no issues raised, in a proceeding under this part that were not filed, presented, or raised during the period for submission of public comments or objections, absent a showing of good cause explaining the party's failure to do so during the period for submission of public comments or objections. Good cause shall include any instance where the party seeking to file or present new evidence or raise a new issue shows that the evidence could not have reasonably been ascertained, filed, or presented or the issue could not have reasonably been ascertained or raised, or that the materiality of the new evidence or issue could not have reasonably been anticipated, prior to the close of the period for submission of public comments or objections.

## 40 CFR Ch. I (7–1–23 Edition)

(b) If an evidentiary hearing is granted, no evidence shall be filed or presented on questions of law or policy or on matters not subject to challenge in the evidentiary hearing.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997; 70 FR 25339, May 12, 2005; 76 FR 48379, Aug. 8, 2011; 86 FR 23180, Apr. 30, 2021]

## § 78.6 Action on petition for administrative review.

(a) If no evidentiary hearing concerning the petition for review is requested or is to be held, the Environmental Appeals Board will issue an order under § 78.20(c).

(b)(1) The Environmental Appeals Board may grant a request for an evidentiary hearing, or schedule an evidentiary hearing *sua sponte*, if the Environmental Appeals Board finds that there are disputed issues of fact material to contested portions of the decision and determines, in its discretion, that an opportunity for direct- and cross-examination of witnesses may be necessary in order to resolve these factual issues.

(2) To the extent the Environmental Appeals Board grants a request for an evidentiary hearing, in whole or in part:

(i) It will identify the portions of the decision that have been contested and the disputed factual issues that have been raised by the petitioner with regard to which the evidentiary hearing has been granted; and

(ii) It will refer the disputed factual issues to the Chief Administrative Law Judge for decision and, in its discretion, may also refer all or a portion of the remaining legal, policy, or factual issues to the Chief Administrative Law Judge for decision.

(3)(i) After issues are referred to the Chief Administrative Law Judge, he or she will designate an Administrative Law Judge as Presiding Officer to conduct the evidentiary hearing.

(ii) Notwithstanding paragraph (b)(3)(i) of this section, if all parties waive in writing their right to have an Administrative Law Judge designated as the Presiding Officer, the Administrator may designate a lawyer permanently or temporarily employed by EPA and without any prior connection

## Environmental Protection Agency

## § 78.11

with the proceeding to serve as Presiding Officer.

[58 FR 3760, Jan. 11, 1993, as amended at 86 FR 23180, Apr. 30, 2021]

### § 78.7 [Reserved]

### § 78.8 Consolidation and severance of appeals proceedings.

(a) The Environmental Appeals Board or Presiding Officer has the discretion to consolidate, in whole or in part, two or more proceedings under this part whenever it appears that a joint proceeding on any or all of the matters at issue in the proceedings will be in the interest of justice, will expedite or simplify consideration of the issues, and will not prejudice any party. Consolidation of proceedings under this paragraph (a) will not affect the right of any party to raise issues that might have been raised had there been no consolidation.

(b) The Environmental Appeals Board or Presiding Officer has the discretion to sever issues or parties from a proceeding under this part whenever it appears that separate proceedings will be in the interest of justice, will expedite or simplify consideration of the issues, and will not prejudice any party.

### § 78.9 Notice of the filing of petition for administrative review.

The Administrator will publish in the FEDERAL REGISTER a notice stating that a petition for administrative review of a decision of the Administrator has been filed and specifying any request in the petition for an evidentiary hearing.

### § 78.10 *Ex parte* communications during pendency of a hearing.

(a)(1) No party or interested person outside EPA, representative of a party or interested person, or member of the EPA trial staff shall make, or knowingly cause to be made, to any member of the decisional body an *ex parte* communication on the merits of a proceeding under this part.

(2) No member of the decisional body shall make, or knowingly cause to be made, to any party or interested person outside EPA, representative of a party or interested person, or member of the EPA trial staff, an *ex parte* com-

munication on the merits of any proceeding under this part.

(3) A member of the decisional body who receives, makes, or knowingly causes to be made an *ex parte* communication prohibited by paragraph (a)(1) or (2) of this section shall file with the Environmental Appeals Board (or, if the proceeding is pending before an Administrative Law Judge, with the Hearing Clerk) for inclusion in the record of the proceeding under this part any such written *ex parte* communications and memoranda stating the substance of any such oral *ex parte* communication.

(b) Whenever any member of the decisional body receives an *ex parte* communication made, or knowingly caused to be made, by a party or representative of a party to a proceeding under this part, the person presiding over the proceedings then in progress may, to the extent consistent with justice, require the party to show good cause why its claim or interest in the proceedings should not be dismissed, denied, disregarded, or otherwise adversely affected on account of these *ex parte* communications.

(c) The prohibitions of paragraph (a) of this section shall begin to apply upon publication by the Administrator of the notice of the filing of a petition under § 78.9. These prohibitions terminate on the date of final agency action.

[58 FR 3760, Jan. 11, 1993, as amended at 86 FR 23180, Apr. 30, 2021]

### § 78.11 Intervenor.

(a) Within 30 days (or other shorter, reasonable period established by the Administrator when giving notice) after notice is given under § 78.9 that the petition for administrative review has been filed, any person listed in § 78.3(a) may file a motion for leave to intervene in the proceeding. A motion for leave to intervene under this section shall set forth the grounds for the proposed intervention and may respond to the petition for administrative review. Late motions to intervene may be granted only for good cause shown.

(b) The Environmental Appeals Board or Presiding Officer will grant a motion to intervene only upon an express finding that:

## § 78.12

(1) The motion to intervene raises matters relevant to the factual or legal issues to be reviewed;

(2) The intervenor consented to be bound by all stipulations previously entered into by the existing parties, and all orders previously issued, in the proceeding; and

(3) The intervention will promote the interests of justice and will not cause undue delay or prejudice to the rights of the existing parties.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997; 86 FR 23180, Apr. 30, 2021]

### § 78.12 Standard of review.

(a) On appeal of a decision of the Administrator prior to which there was an opportunity for submission of public comments or objections:

(1) Except as provided under paragraph (a)(2) of this section, the petitioner shall have the burden of going forward and of persuasion to show that a finding of fact or conclusion of law underlying the decision is clearly erroneous or that an exercise of discretion or policy determination underlying the decision is arbitrary and capricious or otherwise warrants review; and

(2) The owners and operators of the source or unit involved shall have the burden of persuasion that an Acid Rain permit, NO<sub>x</sub> Budget permit, CAIR permit, or other federally enforceable permit was properly issued or should be issued.

(b) On appeal of a decision of the Administrator not covered by paragraph (a) of this section, the Administrator shall have the burden of going forward to show the rational basis for the decision. The petitioner shall have the burden of persuasion to show that a finding of fact or conclusion of law underlying the decision is clearly erroneous or that an exercise of discretion or policy determination underlying the decision is arbitrary and capricious or otherwise warrants review.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997; 66 FR 12978, Mar. 1, 2001; 69 FR 21645, Apr. 21, 2004; 70 FR 25339, May 12, 2005; 76 FR 48379, Aug. 8, 2011; 86 FR 23180, Apr. 30, 2021]

## 40 CFR Ch. I (7–1–23 Edition)

### § 78.13 Scheduling orders and pre-hearing conferences.

(a) If a request for an evidentiary hearing is granted, the Presiding Officer will issue an order scheduling the following:

(1) The filing by each party of a narrative statement of position on each factual issue in controversy.

(2) The identification of any witness that a party expects to call and of any written testimony, documents, papers, exhibits, or other materials that a party expects to introduce into evidence. At the request of the Presiding Officer, the party shall include a brief narrative summary of any witness' expected testimony and of any such materials.

(3) The filing of written testimony, in accordance with § 78.14(b), and other evidence in support of a narrative statement.

(4) The filing of any motions by any party, including motions for the production of documentation, data, or other information material to the disputed facts to be addressed at the hearing.

(b) The Presiding Officer may, on motion or *sua sponte*, schedule one or more pre-hearing conferences on the record to address any of the following:

(1) Simplification, clarification, amplification, or limitation of the issues.

(2) Admissions and stipulations of facts and determinations of the genuineness of documents.

(3) Objections to the introduction into evidence at the hearing of any written testimony or other submissions proposed by a party; *provided* that at any time before the end of the hearing, any party may make, and the Presiding Officer may consider and rule upon, a motion to strike testimony or other evidence (other than evidence included in the administrative record (if any) under § 72.63 of this chapter) on the grounds of relevance, competency, or materiality.

(4) Taking official notice of any matters.

(5) Grouping of parties with substantially similar interests to eliminate redundant evidence, motions, objections, and briefs.

(6) Such other matters that may expedite the hearing or aid in the disposition of matters in dispute.

(c) The Presiding Officer will issue an order (which may be in the form of a transcript) reciting the actions taken at any pre-hearing conferences, setting the schedule for any hearing, and stating any areas of factual and legal agreement and disagreement and the methods and procedures to be used in developing any evidence.

[58 FR 3760, Jan. 11, 1993, as amended at 70 FR 25339, May 12, 2005; 86 FR 23180, Apr. 30, 2021]

**§ 78.14 Evidentiary hearing procedure.**

(a) If a request for an evidentiary hearing is granted, the Presiding Officer will conduct a fair and impartial hearing on the record, take action to avoid unnecessary delay in the disposition of the proceedings, and maintain order. For these purposes, the Presiding Officer may:

(1) Administer oaths and affirmations.

(2) Regulate the course of the hearings and prehearing conferences and govern the conduct of participants.

(3) Examine witnesses.

(4) Identify and refer issues for interlocutory decision under § 78.19.

(5) Rule on, admit, exclude, or limit evidence.

(6) Establish the time for filing motions, testimony and other written evidence, and briefs and making other filings.

(7) Rule on motions and other pending procedural matters, including but not limited to motions for summary disposition in accordance with § 78.15.

(8) Order that the hearing be conducted in stages whenever the number of parties is large or the issues are numerous and complex.

(9) Allow direct and cross-examination of witnesses only to the extent the Presiding Officer determines that such direct and cross-examination may be necessary to resolve disputed issues of material fact; *provided* that no direct or cross-examination shall be allowed on questions of law or policy or regarding matters that are not subject to challenge in the evidentiary hearing.

(10) Limit public access to the hearing where necessary to protect con-

fidential business information. The Presiding Officer will provide written notice of the hearing to the parties, and where the hearing will be open to the public, notice in the FEDERAL REGISTER no later than 15 days (or other shorter, reasonable period established by the Presiding Officer) prior to commencement of the hearings.

(11) Take any other action not inconsistent with the provisions of this part for the maintenance of order at the hearing and for the expeditious, fair and impartial conduct of the proceeding.

(b) All direct and rebuttal testimony at an evidentiary hearing shall be filed in written form, unless, upon motion and good cause shown, the Presiding Officer, in his or her discretion, determines that oral presentation of such evidence on any particular factual issue will materially assist in the efficient resolution of the issue.

(c)(1) The Presiding Officer will admit all evidence that is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Evidence relating to settlement that would be excluded in the Federal courts under the Federal Rules of Evidence shall not be admissible.

(2) Whenever any evidence or testimony is excluded by the Presiding Officer as inadmissible, all such evidence will remain a part of the record as an offer of proof. The party seeking the admission of oral testimony may make an offer of proof by means of a brief statement on the record describing the testimony excluded.

(3) When two or more parties have substantially similar interests and positions, the Presiding Officer may limit the number of attorneys or authorized representatives who will be permitted to examine witnesses and to make and argue motions and objections on behalf of those parties.

(4) Rulings of the Presiding Officer on the admissibility of evidence or testimony, the propriety of direct and cross-examination, and other procedural matters will appear in the record of the hearing and control further proceedings unless reversed by the Presiding Officer or as a result of an interlocutory appeal taken under § 78.19.

## § 78.15

(5) All objections shall be made promptly or be deemed waived; *provided* that parties shall be presumed to have taken exception to an adverse ruling. No objection shall be deemed waived by further participation in the hearing.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997; 86 FR 23180, Apr. 30, 2021]

## § 78.15 Motions in evidentiary hearings.

(a) Any party may make a motion to the Presiding Officer on any matter relating to the evidentiary hearing in accordance with the scheduling orders issued under § 78.13. All motions shall be in writing and served as provided in § 78.4, except those made on the record during an oral hearing before the Presiding Officer.

(b) Any party may make a motion for a summary disposition in its favor on any factual issue on the basis that there is no genuine issue of material fact. When a motion for summary disposition is made and supported, any party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or by other materials subject to consideration by the Presiding Officer, that there is a genuine issue of material fact.

(c) Within 10 days (or other shorter, reasonable period established by the Presiding Officer) after a motion made on the record or service of any written motion, any party may file a response to the motion.

(d) The Presiding Officer may schedule an oral argument and call for the filing of briefs on any motion. The Presiding Officer will rule on the motion within a reasonable time after the date that responses to the motion may be filed under paragraph (c) of this section and that any oral argument or filing of briefs is completed.

(e) If all factual issues are decided by summary disposition prior to the hearing, no hearing will be held and the Presiding Officer will issue a proposed decision under § 78.18. If a summary disposition is denied or if partial summary disposition is granted, the hear-

## 40 CFR Ch. I (7–1–23 Edition)

ing shall proceed on the remaining issues.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997; 86 FR 23180, Apr. 30, 2021]

## § 78.16 Record of appeal proceeding.

(a) The proposed decision issued by the Presiding Officer, transcripts of oral hearings or oral arguments, written direct and rebuttal testimony, and any other written materials of any kind filed in the proceeding will be part of the record and will be available to the public in the office of the Hearing Clerk, subject to the requirements of part 2 of this chapter.

(b) Hearings and oral arguments shall be recorded as specified by the Presiding Officer, and thereupon transcribed. After the hearing or oral argument, the reporter will certify and file with the Hearing Clerk:

(1) The original transcript; and

(2) Any exhibits received or offered into evidence at the hearing.

(c) The Hearing Clerk will promptly give written notice to the parties when any transcript is available. Any party that desires a copy of the transcript may obtain a copy upon payment of costs.

(d) The Presiding Officer will allow witnesses, parties, and their counsel or representatives:

(1) Up to 7 days (or other shorter, reasonable period established by the Presiding Officer) from issuance of the notice under paragraph (c) of this section in order to file written proposed corrections of the transcript necessary to correct errors made in the transcribing; and

(2) Up to 7 days (or other shorter, reasonable period established by the Presiding Officer) from the submission of the corrections in order to file objections to the proposed corrections.

(e) The Presiding Officer will determine which, if any, corrections should be made to the transcript and incorporate them into the record.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997; 86 FR 23180, Apr. 30, 2021]

## Environmental Protection Agency

## § 78.19

### § 78.17 Proposed findings and conclusions and supporting brief.

Within 45 days (or other shorter, reasonable period established by the Presiding Officer) after issuance of a notice under § 78.16(c) that the complete transcript of the evidentiary hearing is available, any party may file with the Hearing Clerk proposed findings and conclusions on the issues referred to the Presiding Officer and a brief in support thereof. Briefs shall contain appropriate references to the record. The Presiding Officer may allow reply briefs.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997; 86 FR 23180, Apr. 30, 2021]

### § 78.18 Proposed decision.

(a) The Presiding Officer will review and evaluate the record, including the proposed findings and conclusions and any briefs filed by the parties, and issue a proposed decision on the factual, policy, and legal issues referred by the Environmental Appeals Board for decision under § 78.6(b)(2)(ii), accompanied by findings of fact and proposed conclusions of law, as appropriate, within a reasonable time after the evidentiary hearing is completed. The Hearing Clerk will promptly serve copies of the proposed decision on all parties and on the Environmental Appeals Board.

(b) The proposed decision of the Presiding Officer shall become the final agency action under section 307 of the Act unless:

(1) A party files objections with the Environmental Appeals Board pursuant to § 78.20(a), or

(2) The Environmental Appeals Board *sua sponte* files a notice that it will review the decision under § 78.20(b).

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997; 86 FR 23181, Apr. 30, 2021]

### § 78.19 Interlocutory appeal.

(a) Interlocutory appeal from orders or rulings of the Presiding Officer made during the course of a proceeding may be taken if the Presiding Officer certifies those orders or rulings to the Environmental Appeals Board for interlocutory appeal on the record. Any

requests to the Presiding Officer to certify an interlocutory appeal shall be filed within 10 days of notice of the order or ruling and shall state briefly the grounds for the request.

(b)(1) Within 15 days of the filing of any request for interlocutory appeal, the Presiding Officer may certify an order or ruling for interlocutory appeal to the Environmental Appeals Board if:

(i) The order or ruling involves an important question on which there is substantial ground for difference of opinion, and

(ii) Either:

(A) An immediate appeal of the order or ruling will materially advance the ultimate completion of the proceeding, or

(B) A review after the proceeding is completed will be inadequate or ineffective.

(2) If the Presiding Officer takes no action within 15 days of the filing of a request for interlocutory appeal, the request shall be automatically dismissed without prejudice.

(c) If the Presiding Officer grants certification, the Environmental Appeals Board may accept or decline the interlocutory appeal within 30 days of certification. If the Environmental Appeals Board decides that certification was improperly granted, it will decline to hear the interlocutory appeal. If the Environmental Appeals Board takes no action within 30 days of certification, the interlocutory appeal shall be automatically dismissed without prejudice.

(d) If the Presiding Officer declines to certify an order or ruling for an interlocutory appeal, the order or ruling may be reviewed by the Environmental Appeals Board only upon an appeal of the proposed decision following completion of the proceedings before the Presiding Officer, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would not be in the public interest. Such motion shall be filed with the Environmental Appeals Board within 5 days after the earlier of automatic dismissal of the request for interlocutory appeal or receipt by the party of notification that the Presiding Officer declines to certify an order or ruling for interlocutory appeal.



## § 78.20

(e) The failure of a party to request an interlocutory appeal shall not prevent an appeal of an order or ruling as part of an appeal of a proposed decision under § 78.20.

[58 FR 3760, Jan. 11, 1993, as amended at 86 FR 23181, Apr. 30, 2021]

### § 78.20 Appeal of decision of Administrator or proposed decision to the Environmental Appeals Board.

(a) Within 30 days after the issuance of a proposed decision by a Presiding Officer under this part, any party may appeal any matter set forth in the proposed decision, or any other order or ruling made during the proceeding to which the party objected during the proceeding before the Presiding Officer, by filing an objection with the Environmental Appeals Board. On appeal of an order, ruling, or proposed decision of a Presiding Officer:

(1) The party filing the objection shall have the burden of going forward to show that the order, ruling, or proposed decision is based on a finding of fact or conclusion of law that is clearly erroneous; or a policy determination or exercise of discretion that is arbitrary and capricious or otherwise warrants review; and

(2) The petitioner or the owners and operators shall have the burden of persuasion, as set forth in § 78.12(a)(1) and (2).

(b) Within 45 days (or other shorter, reasonable period established by the Environmental Appeals Board) after issuance of a proposed decision of a Presiding Officer, the Environmental Appeals Board may issue *sua sponte* in its discretion a notice of intent to review such proposed decision. The Environmental Appeals Board will serve such notice upon all parties to the proceeding.

(c) Within a reasonable time following the filing of a petition for administrative review of a decision of the Administrator under § 78.3, or, if any issues raised by such petition are referred to the Presiding Officer, the filing of objections under paragraph (a) of this section or the issuance of a notice of intent to review under paragraph (b) of this section, the Environmental Appeals Board will issue an order affirming, reversing, modifying, or remand-

## 40 CFR Ch. I (7–1–23 Edition)

ing the decision or proposed decision, as appropriate. Prior to issuing this order, the Environmental Appeals Board may provide an opportunity for parties to file additional briefs.

(d) If the Environmental Appeals Board issues an order affirming, reversing, or modifying the decision of the Administrator, then the decision as supplemented or changed by the order, shall be final agency action.

(e) If the Environmental Appeals Board issues an order affirming, reversing, or modifying the proposed decision, the proposed decision, as supplemented or changed by the order, shall be final agency action.

(f) If the Environmental Appeals Board issues an order remanding the proceeding, then final agency action occurs upon completion of the remanded proceeding, including any appeals to the Environmental Appeals Board in the remanded proceeding.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997; 86 FR 23181, Apr. 30, 2021]

## PART 79—REGISTRATION OF FUELS AND FUEL ADDITIVES

### Subpart A—General Provisions

#### Sec.

- 79.1 Applicability.
- 79.2 Definitions.
- 79.3 Availability of information.
- 79.4 Requirement of registration.
- 79.5 Periodic reporting requirements.
- 79.6 Requirement for testing.
- 79.7 Samples for test purposes.
- 79.8 Penalties.

### Subpart B—Fuel Registration Procedures

- 79.10 Application for registration by fuel manufacturer.
- 79.11 Information and assurances to be provided by the fuel manufacturer.
- 79.12 Determination of noncompliance.
- 79.13 Registration.
- 79.14 Termination of registration of fuels.

### Subpart C—Additive Registration Procedures

- 79.20 Application for registration by additive manufacturer.
- 79.21 Information and assurances to be provided by the additive manufacturer.
- 79.22 Determination of noncompliance.
- 79.23 Registration.