BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

In the Matter of: MULTISTAR INDUSTRIES, INC. Othello, Washington, Respondent. Proceeding pursuant to CERCLA Section 109(b), 42 U.S.C. § 9609; and EPCRA Section 325(b) and (c), 42 U.S.C. § 11045(b) and (c)	DOCKET NO. EPCRA-10-2019-0123 **COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING**

I. PRELIMINARY STATEMENT/INTRODUCTION

1.1. This administrative Complaint and Notice of Opportunity for Hearing ("Complaint") is issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 109 of the Comprehensive Emergency Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9609, and Section 325 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11045.

1.2. The Administrator has delegated this authority to issue administrative complaints for violations of CERCLA and EPCRA to the Regional Administrator for EPA Region 10 who in turn has delegated this authority to the Director of the Enforcement and Compliance Assurance Division, EPA Region 10 ("Complainant").

U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 155, M/S 11-C07
Seattle, Washington 98101
(206) 553-1037

1.3. Multistar Industries, Inc. ("Respondent") is hereby notified that Complainant alleges that Respondent violated the provisions identified herein and seeks the assessment of a civil penalty. This Complaint also provides notice of Respondent's opportunity to request a hearing.

II. STATUTORY AND REGULATORY BACKGROUND

CERCLA Emergency Release Notification Requirements (CERCLA Section 103)

2.1. Under CERCLA Section 103(a), 42 U.S.C. § 9603(a), and 40 C.F.R. § 302.6, with certain exceptions not relevant here, any person in charge of an onshore facility shall, as soon as that person has knowledge of any release of a hazardous substance from such facility in a quantity equal to or greater than the reportable quantity under CERCLA Section 102, 42 U.S.C. § 9602, and 40 C.F.R. § 302.4, immediately notify the National Response Center ("NRC") of such release.

2.2. Pursuant to CERCLA Sections 102 and 103, 42 U.S.C. §§ 9602 and 9603, EPA promulgated regulations at 40 C.F.R. Part 302 that designate hazardous substances, identify reportable quantities for these substances, and set forth notification requirements for these substances.

2.3. Subject to certain exceptions not relevant here, CERCLA Section 101(22), 42 U.S.C. § 9601(22), and 40 C.F.R. 302.3 define "release" as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. For purposes of this definition, "environment" includes the ambient air within or under the jurisdiction of the United States. CERCLA Section 101(8), 42 U.S.C. § 9601(8), and 40 C.F.R. § 302.3.

2.4. 40 C.F.R. § 302.3 defines "reportable quantity" as that quantity, as set forth in 40 C.F.R. Part 302, the release of which requires notification pursuant to 40 C.F.R. Part 302.

2.5. The notification requirements under CERCLA Section 103 are triggered by a release of a reportable quantity of a hazardous substance within any 24-hour period. 40 C.F.R. § 302.6(a).

2.6. Anhydrous ammonia (under the category "ammonia") is a hazardous substance listed in 40 C.F.R. § 302.4, with a reportable quantity of 100 pounds.

EPCRA Emergency Release Notification Requirements (EPCRA Section 304(a))

2.7. Under EPCRA Section 304(a), 42 U.S.C. § 11004(a), and 40 C.F.R. §§ 355.30 and 355.40(a), with certain exceptions not relevant here, if a release of an extremely hazardous substance occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release requires notification under CERCLA Section 103(a), 42 U.S.C. § 9603(a), the owner or operator of the facility shall immediately provide notice of such release to the community emergency coordinator for the Local Emergency Planning Committee ("LEPC") established pursuant to 42 U.S.C. § 11001(c) of any area likely to be affected by the release and to the State Emergency Response Commission ("SERC") of any state likely to be affected by the release, as provided in EPCRA Section 304(b), 42 U.S.C. § 11004(b), and 40 C.F.R. Part 355.

2.8. EPCRA Section 302(b)(2), 42 U.S.C. 11004(b)(2), and 40 C.F.R. § 355.40(a) specify the information that must be included in the immediate notification required by EPCRA Section 302(a), 42 U.S.C. 11004(a), and 40 C.F.R. §§ 355.30 and 355.40(a).

2.9. EPCRA Section 304(c), 42 U.S.C. 11004(c), and 40 C.F.R. §§ 355.30 and 355.40(b), require the owner or operator of a subject facility, as soon as practicable after a

reportable release occurs and except for releases that occur during transportation or storage incident to transportation, to provide the affected LEPC(s) and SERC(s) a written follow-up emergency notice (or notices as information becomes available) setting forth and updating the information required under Section 304(b), 42 U.S.C. 11004(b), and 40 C.F.R. § 355.40(b).

2.10. EPCRA Section 329(2), 42 U.S.C. § 11049(2), and 40 C.F.R. § 355.61 define "environment" as including water, air, and land and the interrelationship which exists among and between water, air, and land and all living things.

2.11. EPCRA Section 329(8), 42 U.S.C. § 11049(8), and 40 C.F.R. § 355.61 define "release" as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles) of any hazardous chemical, extremely hazardous substance, or CERCLA hazardous substance.

2.12. "Reportable quantity" is defined under 40 C.F.R. § 355.61 as, for any CERCLA hazardous substance, the quantity established in Table 302.4 of 40 C.F.R. § 302.4, for such substance; for any extremely hazardous substance, the quantity established in Appendices A and B of 40 C.F.R. Part 355 for such substance; or if no other quantity is established, a weight of one pound.

2.13. The notification requirements under EPCRA Section 304 are triggered by a release of a reportable quantity of a hazardous substance within any 24-hour period. 40 C.F.R. § 355.33.

2.14. Anhydrous ammonia (under the category "ammonia") is an extremely hazardous substance listed in 40 C.F.R. Part 355, Appendices A and B, with a reportable quantity of 100 pounds.

EPCRA Chemical Reporting Requirements (EPCRA Section 312)

2.15. Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and its implementing regulations at 40 C.F.R. Part 370 require the owner or operator of a facility which is required by the Occupational Safety and Health Administration ("OSHA") to prepare or have available a safety data sheet ("SDS")[1] for a hazardous chemical, to prepare and submit an emergency and hazardous chemical inventory form (Tier I or Tier II as described in 40 C.F.R. Part 370) to the SERC, the appropriate LEPC, and the fire department with jurisdiction over the facility ("Fire Department") by March 1 of each year. The form must contain the information required by Section 312(d) of EPCRA, 42 U.S.C. § 11022(d), and 40 C.F.R. § 370.40 for all hazardous chemicals required by OSHA to have an SDS that are present at the facility at any one time during the preceding year in amounts equal to or greater than 10,000 pounds or, in the case of an extremely hazardous substance, equal to or greater than 500 pounds or the threshold planning quantity designated by EPA and 40 C.F.R. Part 355, Appendices A and B, whichever is lower.

2.16. Under EPCRA Section 327, 42 U.S.C. § 11047, the reporting requirements of EPCRA Section 312 do not apply to the transportation, including the storage incident to such transportation, of any substance or chemical subject to EPCRA, including the transportation and distribution of natural gas.

[1] Effective May 25, 2012, OSHA changed the term "material safety data sheet" to "safety data sheet." 77 Fed. Reg. 17574 (March 26, 2012). For purposes of this Complaint, the term "material safety data sheet" shall mean "safety data sheet," and vice versa.

2.17. The OSHA Hazard Communication Standard ("OSHA Standard"), 29 C.F.R. § 1910.1200(b), requires employers to provide information to their employees about hazardous chemicals to which they are exposed by means of, *inter alia*, an SDS. This regulation applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.

2.18. "Hazardous chemical" is defined in 40 C.F.R. § 370.66 as any hazardous chemical as defined under 29 C.F.R. § 1910.1200(c), with certain exceptions not relevant here.

2.19. OSHA regulations at 29 C.F.R. § 1910.1200(c) define a hazardous chemical as any chemical which is a physical hazard or a health hazard.

2.20. Ammonia is listed as a toxic and hazardous substance under OSHA regulations at 29 C.F.R. § 1910.1000, Table Z-1, and is therefore a "hazardous chemical" as defined under 29 C.F.R. § 1910.1200(c).

2.21. Ammonia is listed in Appendices A and B of 40 C.F.R. Part 355 and is therefore an "extremely hazardous substance" under 40 C.F.R. § 370.66.

2.22. Ammonia has a threshold planning quantity ("TPQ") of 500 pounds as specified in 40 C.F.R. Part 355, Appendices A and B.

III. GENERAL ALLEGATIONS

3.1. Respondent Multistar Industries, Inc., is a corporation incorporated in the State of Washington.

3.2. Respondent owns and operates an ammonia storage and distribution facility located at 101 West Fir Street, Othello, Washington ("Multistar Facility").

3.3. Respondent is a "person" as defined in CERCLA § 101(21), 42 U.S.C. § 9601(21), EPCRA § 329(7), 42 U.S.C. § 11049(7), and 40 C.F.R. §§ 302.3, 355.61, and 370.66.

3.4. The Multistar Facility is a "facility" as defined in CERCLA § 101(9)(A), 42 U.S.C. § 9601(9)(A), EPCRA § 329(4), 42 U.S.C. § 11049(4), and 40 C.F.R. §§ 302.3, 355.61, and 370.66.

3.5. At all times relevant to this Complaint, Respondent has been the owner or operator of the Multistar Facility.

3.6. On August 24, 2014, a truck identified as Truck # 43 was parked at the Multistar Facility.

3.7. Truck #43 is a "facility" as defined in CERCLA § 101(9)(A), 42 U.S.C. § 9601(9)(A), EPCRA § 329(4), 42 U.S.C. § 11049(4), and 40 C.F.R. §§ 302.3, 355.61, and 370.66.

3.8. At all times relevant to this Complaint, Respondent has been the owner or operator of Truck # 43.

3.9. On August 24, 2014, Truck #43 had two tanks that were at least partly filled with anhydrous ammonia.

3.10. On August 24, 2014, Truck #43 was equipped with a portable pump that was owned by Respondent.

3.11. Between approximately 12:11 and 12:46 p.m. Pacific Daylight Time ("PDT") on August 24, 2015, there was a release of anhydrous ammonia into the environment from the portable pump on Truck # 43 ("Ammonia Release").

3.12. The Ammonia Release was a "release" as defined in CERCLA Section 101(22), 42 U.S.C. § 9601(22), EPCRA Section 329(8), 42 U.S.C. § 11049(8), and 40 C.F.R. §§ 302.3 and 355.61, of ammonia to the "environment," as defined in CERCLA Section 101(8), 42 U.S.C. § 9601(8), EPCRA Section 329(2), 42 U.S.C. § 11049(2), and 40 C.F.R. §§ 302.3 and 355.61,

3.13. The Ammonia Release did not occur while Truck 43 was in transportation or storage incident to transportation, as those terms are used in EPCRA Section 327, 42 U.S.C. § 11047, and 40 C.F.R. Part 355.

3.14. A person in charge of the Multistar Facility had knowledge that 100 pounds or more of ammonia had been released from the Multistar Facility at or around 12:26 p.m. PDT on August 24, 2019, when Multistar received a call from the Othello Police Department, but in any event no later than 12:46 p.m. PDT, when the release was contained.

3.15. Washington State was a state likely to be affected by the Ammonia Release.

3.16. The Adams County LEPC is a local emergency planning commission established pursuant to Section, 42 U.S.C. § 11001(c) and was appointed by the Washington SERC.

3.17. The Adams County LEPC was the LEPC for the area likely to be affected by the Ammonia Release.

3.18. Adams County Fire District No. 5 is the fire department with jurisdiction over the Multistar Facility.

3.19. During some period of time in calendar year 2014, 500 pounds or more of ammonia was present at the Multistar Facility.

3.20. The Multistar Facility is a facility at which employees may be exposed to ammonia.

3.21. At all times relevant to the Complaint, the OSHA Hazard Communications Standard ("OSHA Standard"), 29 C.F.R. § 1910.1200(b), required Multistar to prepare or have available an SDS for ammonia for its employees.

IV. VIOLATIONS

4.1. The allegations in Paragraphs 3.1 through 3.21 are incorporated by reference and realleged herein.

Count 1: Failure to immediately notify the NRC of the Ammonia Release

4.2. Respondent did not notify the NRC of the Ammonia Release until July 28, 2015.

4.3. The Ammonia Release was not a "federally permitted release" within the meaning of CERCLA Section 103(a), 42 U.S.C. § 9603(a).

4.4. Reporting of the Ammonia Release to the NRC was not exempted under 40 C.F.R. § 302.6(c), (d), or (e).

4.5. Respondent did not immediately notify the NRC of the Ammonia Release as soon as a person in charge of the Multistar Facility had knowledge that the Ammonia Release equaled or exceeded 100 pounds.

4.6. Respondent's failure to immediately notify the NRC of the Ammonia Release as soon as a person in charge of the Multistar Facility had knowledge that the Ammonia Release equaled or exceeded 100 pounds is a violation of CERCLA Section 103(a), 42 U.S.C. § 9603(a), and 40 C.F.R. § 302.6.

Count 2: Failure to immediately notify the Washington SERC of the Ammonia Release

4.7. Ammonia is produced, used, or stored at the Multistar Facility.

4.8. The Ammonia Release was required to be reported under CERCLA Section 103(a), 42 U.S.C. § 9603(a).

4.9. Reporting of the Ammonia Release to the NRC was not exempted under 40 C.F.R. § 355.31.

4.10. Respondent notified the Washington SERC of the Ammonia Release at approximately 1:25 p.m. PDT on August 24, 2019.

4.11. Respondent did not immediately notify the Washington SERC of the Ammonia Release.

4.12. Respondent's failure to immediately notify the Washington SERC of the Ammonia Release is a violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a), and 40 C.F.R. § 355.42(a)(2).

Count 3: Failure to submit a follow-up notification to the Washington SERC as soon as practicable

4.13. As of July 2019, Respondent has not submitted to the Washington SERC a written follow-up notification for the Ammonia Release meeting the requirements of EPCRA Section 304(c), 42 U.S.C. § 11004(c), and 40 C.F.R. § 355.40(b).

4.14. Respondent's failure to submit to the Washington SERC a written follow-up notification for the Ammonia Release meeting the requirements of EPCRA Section 304(c), 42 U.S.C. § 11004(c) and 40 C.F.R. § 355.40(b) as soon as practicable after the Ammonia Release occurred is a violation of Section 304(c) of EPCRA, 42 U.S.C. § 11004(c), and 40 C.F.R. § 355.42(a)(2).

Count 4: Failure to submit a follow-up notification to the Adams County LEPC as soon as practicable

4.15. As of July 2019, Respondent has not submitted to the Adams County LEPC a written follow-up notification for the Ammonia Release meeting the requirements of EPCRA Section 304(c), 42 U.S.C. § 11004(c) and 40 C.F.R. § 355.40(b).

4.16. Respondent's failure to submit to the Adams County LEPC a written follow-up notification for the Ammonia Release meeting the requirements of EPCRA Section 304(c), 42 U.S.C. § 11004(c) and 40 C.F.R. § 355.40(b) as soon as practicable after the Ammonia Release occurred is a violation of Section 304(c) of EPCRA, 42 U.S.C. § 11004(c), and 40 C.F.R. § 355.42(a)(1).

Count 5: Failure to timely submit to the Washington SERC an Emergency and Hazardous Chemical Inventory Form for ammonia

4.17. Respondent did not submit to the Washington SERC a completed Emergency and Hazardous Chemical Inventory Form that included ammonia for calendar year 2014 until April 30, 2015.

4.18. Respondent's failure to submit to the Washington SERC a completed Emergency and Hazardous Chemical Inventory Form that included ammonia for calendar year 2014 by March 1, 2015 violated EPCRA Section 312(a), 42 U.S.C. § 11022(a) and 40 C.F.R. § 370.45.

Count 6: Failure to timely submit to the Adams County LEPC an Emergency and Hazardous Chemical Inventory Form for ammonia

4.19. Respondent did not submit to the Adams County LEPC a completed Emergency and Hazardous Chemical Inventory Form that included ammonia for calendar year 2014 until April 30, 2015.

4.20. Respondent's failure to submit to the Adams County LEPC a completed Emergency and Hazardous Chemical Inventory Form that included ammonia for calendar year 2014 by March 1, 2015 violated EPCRA Section 312(a), 42 U.S.C. § 11022(a), and 40 C.F.R. § 370.45.

Count 7: Failure to timely submit to Adams County Fire District No. 5 an Emergency and Hazardous Chemical Inventory Form for ammonia

4.21. Respondent did not submit to Adams County Fire District No. 5 a completed Emergency and Hazardous Chemical Inventory Form that included ammonia for calendar year 2014 until April 30, 2015.

4.22. Respondent's failure to submit to Adams County Fire District No. 5 a completed Emergency and Hazardous Chemical Inventory Form that included ammonia for calendar year 2014 by March 1, 2015 violated EPCRA Section 312(a), 42 U.S.C. § 11022(a), and 40 C.F.R. § 370.45.

V. PROPOSED PENALTY

5.1. Pursuant to CERCLA Section 109(b), 42 U.S.C. § 9609(b), and 40 C.F.R. Part 19, EPA may assess a civil administrative penalty for each violation of CERCLA Section 103(a), 42 U.S.C. § 9603(a) and 40 C.F.R. Part 302. The applicable maximum civil penalty per day for each day during which the violation continues and that occurs after December 6, 2013 and on or before November 2, 2015 is $37,500 and, in the case of a second or subsequent violation, $117,500.

5.2. Pursuant to EPCRA Section 325(b)(2), 42 U.S.C. § 11045(b)(2), and 40 C.F.R. Part 19, EPA may assess a civil administrative penalty for each violation of EPCRA Section 304(a), (b), and (c), 42 U.S.C. § 11004(a), (b), and (c), and 40 C.F.R. Part 355. The applicable

maximum civil penalty per day for each day during which the violation continues and that occurs after December 6, 2013 and on or before November 2, 2015 is $37,500 and, in the case of a second or subsequent violation, $117,500.

5.3. Pursuant to EPCRA Section 325(c)(1), 42 U.S.C. § 11045(c)(1), and 40 C.F.R. Part 19, EPA may assess a civil administrative penalty for each violation of EPCRA Section 312(a), 42 U.S.C. § 11022(a), and 40 C.F.R. Part 370. The applicable maximum civil penalty per day for each day during which the violation continues and that occurs after December 6, 2013 and on or before November 2, 2015 is $37,500 and, in the case of a second or subsequent violation, $117,500

5.4. In determining the amount of penalty to be assessed, EPA has taken into account the particular facts and circumstances of this case; the factors specified in CERCLA Section 109(a)(3), 42 U.S.C. § 9609(a)(3), and EPCRA Section 325(b)(2), 42 U.S.C. § 11045(b)(2); the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. Part 19; and EPA's "Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act" dated September 30, 1999 ("EPCRA/CERCLA ERP"), a copy of which is enclosed with the Complaint. The EPCRA/CERCLA ERP, together with 40 C.F.R. Part 19, provide a rational, consistent, and equitable methodology for applying the statutory penalty factors referenced above to particular cases.

5.5. Based on an evaluation of the particular facts and circumstances of this case, and after considering the nature, circumstances, extent, and gravity of the violations, and with respect to Respondent, ability to pay, effect on ability to continue to do business, any prior history of

violations, the decree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require, Complainant proposes that an administrative penalty of $106,725 be assessed against Respondent as follows:

Count 1, Failure to immediately notify the NRC:	$9,350
Count 2, Failure to immediately notify the SERC:	$2,550
Count 3, Failure to file a follow-up report with the SERC:	$11,900
Count 4, Failure to file a follow-up report with the LEPC:	$11,900
Count 5, Failure to report to the SERC for 2014:	$23,675
Count 6, Failure to report to the LEPC for 2014:	$23,675
Count 7, Failure to report to the Fire Department for 2014:	$23,675

5.6. Complainant has reviewed publicly available information on Respondent's financial condition, as well as financial information provided by Respondent to Complainant, and has no information indicating that Respondent is unable to pay the proposed penalty. Complainant will consider any additional information submitted by Respondent related to its ability to pay the proposed penalty.

VI. OPPORTUNITY TO REQUEST A HEARING AND FILE ANSWER

6.1. Respondent has the right to request a hearing on the issues raised in this Complaint. Any such hearing would be conducted in accordance with 40 C.F.R. Part 22 ("Part 22 rules"). A copy of the Part 22 rules accompanies this Complaint. A request for a hearing must be incorporated in a written answer filed with the Regional Hearing Clerk within 30 days of service of this Complaint. In its answer, Respondent may contest any material fact contained in the Complaint. Respondent may also contest the appropriateness of the proposed penalty.

6.2. In accordance with 40 C.F.R. § 22.15, 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 and shall state: (1) the circumstances or arguments alleged to constitute the grounds of any defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and (4) whether a hearing is requested. Where Respondent has no knowledge as to a particular factual allegation and so states, the allegation is deemed denied.

6.3. Any failure of Respondent to admit, deny, or explain any material factual allegation contained in the Complaint will constitute an admission of that allegation.

6.4. Respondent' answer(s) must be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Suite 155, Mail Stop: 11-C07
Seattle, Washington 98101
(206) 553-1632
young.teresa@epa.gov

VII. FAILURE TO FILE AN ANSWER

7.1. To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondent must file a written Answer to this Complaint with the Regional Hearing Clerk within 30 days after service of this Complaint.

VIII. INFORMAL SETTLEMENT CONFERENCE

8.1 Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this case, the proposed penalty, and the

possibility of settling this matter. To request such a settlement conference, Respondent should contact:

Julie Vergeront, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Suite 155, Mail Stop: 11-C07
Seattle, Washington 98101
(206) 553-1497
Vergeront.julie@epa.gov

8.2 Note that a request for an informal settlement conference does not extend the 30-day period for filing a written Answer to this Complaint, nor does it waive Respondent's right to request a hearing.

8.3 Respondent is advised that pursuant to 40 C.F.R. § 22.8, after the Complaint is issued, the Consolidated Rules of Practice prohibit any *ex parte* (unilateral) discussion of the merits of these or any other factually related proceedings with the Administrator, the Environmental Appeals Board or its members, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision on this case.

FOR COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:

Dated: 8/8/2019

EDWARD J. KOWALSKI, Director
Enforcement and Compliance Assurance Division
EPA Region 10

PARTY DESIGNATED TO RECEIVE SERVICE ON BEHALF OF THE COMPLAINANT:

Julie Vergeront, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Suite 155, Mail Stop: 11-C07
Seattle, Washington 98101
(206) 553-1497
Vergeront.julie@epa.gov

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

In the Matter of: MULTISTAR INDUSTRIES, INC. Othello, Washington, Respondent. Proceeding pursuant to CERCLA Section 109(b), 42 U.S.C. § 9609; and EPCRA Section 325(b) and (c), 42 U.S.C. § 11045(b) and (c)	DOCKET NO. EPCRA-10-2019-0123 **CERTIFICATE OF SERVICE**

I hereby certify that the original of the Complaint and Notice of Opportunity for Hearing, Docket Number EPCRA-10-2019-0123, and one true and correct copy were hand-delivered today to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 155, Mail Stop 11-C07, Seattle, Washington 98101.

I also certify that true and correct copies of the Complaint (with accompanying copy of the Consolidated Rules of Practice and EPCRA/CERCLA ERP were sent by Certified Mail, Return Receipt Requested today, to:

Michael Gillette
The Gillett Law Firm
12535 15th Avenue N.E., Suite 212
Seattle, Washington 98125-4095

Multistar Industries, Inc.
Pete Vanourek
Registered Agent
101 West First Street
Othello, Washington 99344

DATED this 8th day of Aug. 2019

U.S. Environmental Protection Agency
Region 10

ENFORCEMENT RESPONSE POLICY FOR SECTIONS 304, 311 AND 312 OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT AND SECTION 103 OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

Office of Regulatory Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

September 30, 1999

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I. INTRODUCTION

In June 1990, the United States Environmental Protection Agency (EPA or the Agency) issued a Final Penalty Policy for addressing violations of §§ 302, 303, 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act (EPCRA) and § 103 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA). The Superfund Amendments and Reauthorization Act of 1986 (SARA) created EPCRA, and also amended the enforcement provision for violations of CERCLA § 103. This revised policy supersedes the June 1990 penalty policy and the January 1998 Interim Final Enforcement Response Policy, but does not supersede any other Agency policies in effect at the time of the violation or settlement.

This Enforcement Response Policy (ERP or the Policy) is effective immediately and will assist staff in calculating proposed penalties for all civil administrative actions, and for settling actions concerning EPCRA §§ 304, 311 and 312 and CERCLA § 103(a) issued after the date of this Policy, regardless of the date of the violation.[1] Although the application of this Policy is intended for typical cases, there may be circumstances that warrant deviation from the Policy.[2] The policies and procedures set forth herein are intended solely for the guidance of employees of the EPA. They are not intended to, nor do they, constitute a rulemaking by the EPA. They may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency reserves the right to act at variance with this Policy and to change it at any time without public notice.

The purpose of this Policy is to ensure that enforcement actions for violations of CERCLA § 103(a) and EPCRA §§ 304, 311 and 312 are legally justifiable, uniform and consistent; that the enforcement response is appropriate for the violations committed; and that persons will be deterred from committing such violations in the future.

This Policy may be used to develop internal negotiation penalty figures for civil judicial enforcement actions. This Policy does not constitute a statement of EPA policy regarding the prosecution of criminal violations of CERCLA § 103(a) and EPCRA § 304.

EPCRA § 313 is currently covered by the *Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990)*, dated August 10, 1992.

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[1]EPA reserves its right to propose statutory maximum penalties.

[2]Any deviation from this Policy should be documented in the case file.

II. SUMMARY OF STATUTORY REQUIREMENTS & AUTHORITIES

A. Statutory Requirements

CERCLA § 103(a) requires the person in charge of a facility or vessel from which a CERCLA hazardous substance has been released in an amount that meets or exceeds its reportable quantity (RQ) to immediately notify the National Response Center (NRC) as soon as he/she has knowledge of the release. The regulations set forth at Section 302.8 of Title 40 of the Code of Federal Regulations provide for reduced reporting requirements for releases that are continuous and stable in quantity and rate. Failure by the person in charge of the facility or vessel to fully comply with all requirements of 40 C.F.R. § 302.8(c) subjects such person to all of the reporting requirements of CERCLA § 103 and EPCRA § 304.

EPCRA § 302 requires the owner or operator of a facility that has present any extremely hazardous substances (EHSs) in amounts that exceed the chemical-specific threshold planning quantity (TPQ) to notify the State Emergency Response Commission (SERC) that the facility is subject to the planning provisions of the Act. If a facility newly acquires an EHS in excess of the TPQ, or if there is a revision to the list of EHSs and the facility has present a substance on the revised list in excess of the TPQ, the owner or operator of the facility is required to notify the SERC and the Local Emergency Planning Committee (LEPC) within 60 days after such acquisition or revision that the facility is subject to the planning provisions of the Act. EPCRA § 325(a) authorizes the EPA to issue orders compelling compliance. The U.S. District Court for the district in which the facility is located has authority to enforce the order and assess penalties of up to $27,500 per violation per day. *Violations of this provision are not addressed in the Policy.*

EPCRA § 303(d) requires owners or operators subject to § 302 to provide the LEPC with the name of a person who will act as the facility emergency coordinator. Additionally, § 303(d)(3) requires the owner or operator to promptly supply information to the LEPC upon request. The scope of the information request encompasses anything necessary for developing and implementing the emergency plan. EPA is authorized to issue orders compelling compliance with § 303(d). The U.S. District Court for the district in which the facility is located has authority to enforce the order and assess penalties of up to $27,500 per violation per day. *Violations of this provision are not addressed in the Policy.*

EPCRA § 304(a) requires the owner or operator to notify immediately the appropriate governmental entities for any release that requires CERCLA notification and for releases of EPCRA § 302 EHSs. The notification must be given to the SERCs for all states likely to be affected by the release and to the community emergency coordinators for the LEPCs for all areas likely to be affected by the release. If the release occurs during transportation, or storage incident to such transportation, the notice requirement shall be satisfied by dialing 911 or, in the absence of a 911 emergency telephone number, calling the operator and supplying the appropriate information.

EPCRA § 304(c) requires any owner or operator who has had a release that is reportable under EPCRA § 304(a) to provide, as soon as practicable, a follow-up written notice (or notices) to the SERC and LEPC updating the information required under § 304(b).

EPCRA § 311 requires that the owner or operator of a facility who is required to prepare or have available a Material Safety Data Sheet (MSDS) for a hazardous chemical under the Occupational Safety and Health Act (OSHA) of 1970 shall submit to the SERC, LEPC, and the fire department with jurisdiction over the facility a MSDS for each such chemical (or a list of such chemicals as described in that section) present at the facility in quantities equal to or greater than 10,000 pounds or the chemical-specific minimum threshold level established by the Administrator (whichever is lower). The submission(s) must be made within three (3) months after the owner or operator of a facility first becomes subject to OSHA's requirements for hazardous chemicals. If the hazardous chemical is a listed EHS under § 302, the threshold for reporting is 500 pounds or the chemical-specific threshold planning quantity, whichever is lower. A revised MSDS shall be provided within 3 months following discovery by an owner or operator of significant new information concerning an aspect of a hazardous chemical for which a MSDS was previously submitted. In addition, if a facility changes its inventory and a chemical becomes subject to these reporting requirements, the facility must provide the MSDS to the SERC, LEPC, and fire department within 3 months.

EPCRA § 312 provides that the owner or operator of a facility required to prepare or have available a MSDS for a hazardous chemical under OSHA, shall submit **annually** (on March 1) to the SERC, LEPC, and the fire department with jurisdiction over the facility, a completed emergency and hazardous chemical inventory form which may either be aggregate information by hazard category (Tier I) or specific information by chemical (Tier II). The form must include information on all hazardous chemicals present at the facility during the previous calendar year in amounts that meet or exceed thresholds.

EPCRA § 322 states that, with regard to a hazardous chemical, an extremely hazardous substance, or toxic chemical, any person required under Sections 303, 311, or 312, of EPCRA to submit information to any other person may withhold from such submittal the specific chemical identity (including the chemical name and other specific identification) if the requirements of EPCRA § 322(a)(2) are met. These requirements include trade secret claims. *Violations of this provision are not addressed in the Policy.*

EPCRA § 323 requires the owner/operator to submit chemical specific information to medical personnel in the event of a medical emergency and for preventative measures by local health professionals. *Violations of this provision are not addressed in the Policy.*

B. Statutory Penalty Authorities

CERCLA § 109 (b)(1) authorizes the President to assess a Class II penalty of up to $25,000 per day for each day during which a violation of CERCLA § 103(a) continues. As a result of the Debt Collection Improvement Act of 1996 (DCIA), and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (December 31, 1996), violations of § 103(a) which occur after January 30, 1997 will be subject to the new statutory maximum civil penalty of $27,500 per day for each day during which a violation continues.

For second or subsequent violations, CERCLA § 109(b)(1) authorizes EPA to assess a Class II penalty not to exceed $75,000 for each day in which the violation continues. As a result of the DCIA, and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, second or subsequent violations of CERCLA § 103(a) which occur after January 30, 1997 will be subject to the new statutory maximum civil penalty of $82,500 per day for each day a violation continues. CERCLA § 109(b) states that Class II penalties shall be assessed, and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for hearing on the record in accordance with the Administrative Procedures Act, 5 U.S.C. § 554 *et. seq*. The authority described above has since been delegated to the Regional Administrators through the EPA Administrator by EPA Delegation No. 14-31 dated September 13, 1987 and was updated on June 6, 1994.

EPCRA § 325 (b)(1) authorizes EPA to assess a Class I penalty of up to $25,000 per violation of any requirement of § 304. EPCRA § 325(b)(2) authorizes the Administrator to assess a Class II penalty for violations of § 304 in an amount not to exceed $25,000 for each day a violation continues. As a result of the DCIA, and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, violations of § 304 which occur after January 30, 1997 will be subject to the new statutory maximum civil penalty of $27,500 per day for each day a violation continues.

For second or subsequent violations of § 304, EPCRA § 325(b)(2) authorizes EPA to assess a Class II penalty not to exceed $75,000 for each day in which the violation continues. As a result of the DCIA, and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, second or subsequent violations of § 304 which occur after January 30, 1997 will be subject to the new statutory maximum civil penalty of $82,500 per day for each day a violation continues. Any civil penalty under § 325(b)(2) shall be assessed and collected in the same manner, and subject to the same provisions as in the case of civil penalties assessed and collected under § 16 of the Toxic Substances Control Act (TSCA). TSCA § 16 mandates that EPA consider the same factors in assessing penalties that are laid out in EPCRA § 325(b)(1)(C) and includes the additional requirement for EPA to consider the effect on the ability to continue to do business. EPA interprets EPCRA § 325(b)(2) to mean that the Agency must follow the procedural aspects of TSCA § 16 (*i.e.*, using the Consolidated Rules of Practice codified at 40 C.F.R. Part 22) and consider TSCA § 16 statutory factors for assessing penalties, but not any specific

penalty policies developed by the Agency under TSCA § 16.

For violations of EPCRA §§ 311, 323(b), and 322(a)(2), EPCRA § 325(c)(2) provides that the violator is subject to a penalty in an amount not to exceed $10,000 per violation. As a result of the DCIA, and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, violations of §§ 311, 323(b), and 322(a)(2) which occur after January 30, 1997 will be subject to the new statutory maximum civil penalty of $11,000. Section 325(c)(3) states that each day a violation of §§ 311, 323(b), and 322(a)(2) continues constitutes a separate violation.

For violations of EPCRA § 312, § 325(c)(1) states that any person who violates § 312 is liable for a penalty in an amount not to exceed $25,000 for each violation. As a result of the DCIA, and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, violations of § 312 which occur after January 30, 1997 will be subject to the new statutory maximum civil penalty of $27,500. Section 325(c)(3) states that each day a violation of § 312 continues constitutes a separate violation.

The authority described above was delegated to the Regional Administrators by EPA Delegation No. 22-3 dated September 13, 1987. Delegation 22-3 was updated (22-3-A) by the Administrator on October 31, 1989 and June 6, 1994.

III. LEVELS OF ACTION

Levels of action include: (A) notices of noncompliance; (B) civil administrative penalties; (C) civil judicial referrals; and (D) criminal sanctions.

A. Notices of Noncompliance

A Civil Administrative Complaint is the appropriate response for violations of EPCRA §§ 304, 311, and 312 and CERCLA § 103, except where the facts and circumstances support the issuance of a Notice of Noncompliance (NON). If a NON is issued, the violator should be given thirty (30) days from the date of issuance to come into compliance, if necessary. Failure to correct any violation for which a NON is issued may be the basis for issuance of a civil administrative complaint.

Examples of facts and circumstances which support the issuance of a NON:

- First time violations[3] of CERCLA § 103(a) and EPCRA § 304(a) and (c), provided that: (1) no other EPCRA violations were simultaneously discovered; (2) an EHS was not released; and (3) the release was less than two (2) times the reportable quantity (RQ).

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[3] Although prior receipt of a NON does not constitute a prior history of violations for purposes of increasing the penalty, it does preclude a facility from receiving another NON.

- First time violations of EPCRA § 311 or § 312, provided that: (1) no other CERCLA § 103(a) or EPCRA violations were simultaneously discovered; (2) fewer than five (5) chemicals were stored in quantities greater than the minimum threshold level; (3) the stored chemicals were in quantities less than five (5) times the minimum threshold level; and (4) none of the chemicals stored was an extremely hazardous substance.

- First time violations of EPCRA § 311 and § 312 where the facility has timely reported to two of the three reporting entities (SERC, LEPC, and fire department), and compliance with the third entity is needed.

B. Civil Administrative Complaints

See Section IV for the criteria for issuing a civil administrative complaint.

C. Civil Judicial Referrals

EPA, under EPCRA §§ 325(b)(3), 325(c)(4), 325 (d)(1)(B), and 325(e) may refer civil cases to the United States Department of Justice for assessment and/or collection of the penalty in the appropriate U.S. District Court.

D. Criminal Sanctions

Under CERCLA § 103(b)(3), any person who fails to notify the appropriate agency of the United States Government or who submits in such notification any information which such person knows to be false and misleading shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 of the U.S. Code or imprisoned for not more than three (3) years (or not more than five (5) years for a second or subsequent conviction), or both.

Under EPCRA § 325(b)(4), any person who knowingly and willfully fails to provide notice in accordance with EPCRA § 304, shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than two (2) years, or both. In the case of a second or subsequent conviction, such person shall be fined not more than $50,000 or imprisoned for not more than five (5) years, or both.

EPCRA does not provide for criminal sanctions for violations of EPCRA §§ 302, 303, 311, 312, 322 or 323, however, it is a criminal offense to falsify information submitted to the U.S. Government. The knowing failure to file or provide information under EPCRA may be prosecuted as a concealment prohibited by 18 U.S.C. § 1001.

IV. ELEMENTS OF THE CIVIL ADMINISTRATIVE PENALTY SYSTEM AND USE OF THE MATRIX

The success of EPCRA is attained primarily through voluntary, strict and comprehensive compliance with the Act and its regulations. Deviation from the reporting requirements weakens the expressed intent of the Act to allow communities to plan for and respond to chemical emergencies and to allow citizen guaranteed access to information on chemical hazards present in their community.

CERCLA § 109 and EPCRA § 325 authorize EPA to assess civil administrative penalties. Penalties are assessed through a Consent Order or Final Order. This Policy addresses the proposal of penalties by agency enforcement offices acting as complainant. Proposed penalties are to be determined in two stages.

First, a preliminary deterrence (base) penalty is calculated using the statutory factors that apply to the violation (nature, circumstances, extent, and gravity). The base penalty amounts are set forth in Tables I and II. The penalty amounts were established so that a worst-case scenario violation could result in the statutory maximum penalty being proposed.

After the base penalty is calculated, the statutory factors that apply to the violator are considered (ability to pay, prior history of violations, the degree of culpability, economic benefit or savings, and other matters as justice may require; *see* Section VIII). Together, the revised calculation will yield a proposed penalty amount that considers all the statutory factors and is appropriate for the violation.

Respondent's failure to provide notification to each point of compliance or submit required reports to each point of compliance is a separate violation. The term "points of compliance" refers to the specific entities designated to receive submissions and notices under CERCLA and EPCRA (*i.e.*, NRC, SERC, LEPC, and fire department).

V. DETERMINATION OF THE BASE PENALTY

Consider the following factors related to a violation when determining the base penalty:

A. The "Nature" of the violation;

B. The "Extent" of the violation;

C. The "Gravity" of the violation;

D. The "Circumstances" of the violation.

These factors are incorporated into one matrix for CERCLA § 103 and EPCRA

§§ 304 and 312 violations, and another matrix for § 311 violations. Two matrices are used because of the difference in the statutory maximum penalty associated with the different violations. The two primary factors used to establish the penalty amount in the matrices (gravity and extent) are equally weighted. The base penalty can be calculated from the matrices in Tables I and II (pp. 20-23, *infra*).

A. Nature

For the purposes of the EPCRA and CERCLA § 103(a) reporting requirements, there are basically two categories of violations: emergency response violations and emergency preparedness/right-to-know violations. Nature describes the requirement violated, separated by the category of violation. In the context of this Policy, nature is used to determine which specific penalty guidelines should be used to determine appropriate matrix levels of extent and gravity. The types of violations addressed by this Policy include, but are not limited to:

1. *Emergency Response Violations*

Failure to immediately notify the National Response Center (NRC) as required under CERCLA § 103(a); Failure to provide all the information required by statute or implementing regulations.

Failure to immediately notify all affected State Emergency Response Commissions (SERCs) and the emergency response coordinators for all affected Local Emergency Planning Committees (LEPCs) as required under EPCRA § 304 (a) and (b); Failure to provide all the information required by statute or implementing regulations.

In the case of a transportation related incident, failure to immediately call 911, or in the absence of a 911 emergency telephone number, failure to call the operator and provide the appropriate information as required under § 304(a) and (b); Failure to provide all the information required by statute or implementing regulations.

Failure to submit a written follow-up report to all affected SERCs and the emergency response coordinators for all affected LEPCs as soon as practicable after the release as required under § 304(c); Failure to provide all the information required by statute or implementing regulations.

2. *Emergency Preparedness/Right-to-Know Violations*

Failure to provide a MSDS for each required hazardous chemical (or list of such chemicals that require MSDSs) to each of the following: the appropriate LEPC, the SERC, and the fire department with jurisdiction over the facility as

required under § 311(a).

Failure to submit a MSDS to the LEPC upon request as required under EPCRA § 311(c).

Failure to submit (or incomplete submission of) an emergency and hazardous chemical inventory form to each of the following: the appropriate LEPC, the SERC, and the fire department with jurisdiction over the facility as required under EPCRA § 312.

Failure to provide information as described in EPCRA § 312(d) to a SERC, LEPC, or fire department upon request as required under § 312(e).

B. Extent

The timeliness of the required notifications and reports is a significant factor in determining the appropriateness of the penalty. Extent measures the deviation from this requirement in terms of timeliness of the notifications and submission of required reports.

1. *Emergency Response Violations*

In the event of a reportable release, notification of the proper authorities is required to occur immediately after the owner, operator or person in charge has knowledge of the release. Immediate notification allows federal, state, and local agencies to determine what level of government response is needed and with what urgency the response must take place. Measuring the seriousness of the violation by the delay in notification, rather than by the harm actually caused by the release, ensures that notification will serve its purpose of providing a mechanism whereby the public authorities are notified of every potentially hazardous release as soon as possible, leaving them to decide what response is necessary or feasible. The statutes and regulations, codified at 40 C.F.R. Parts 302 and 355, identify the information required to be reported in the event of an accidental release (*e.g.*, chemical identity, estimated quantity released, time/duration of the release, etc.). A delay in the notification, or incomplete notification, could seriously hamper federal and state response activities and pose serious threats to human health and the environment. Thus, the extent factor focuses on the notification and follow-up actions taken by the respondent, and the expediency with which those notifications occurred.

The statutes require that notification be made by the owner or operator or person in charge immediately after that person has knowledge of a release of an RQ or more of a hazardous substance or extremely hazardous substance. Notification by anyone other than the owner or operator or person in charge does not satisfy the obligation to report. Although this Policy does not define "immediate," it does establish guidelines to assist Agency personnel in determining whether or not an "immediate" standard was met. The "Legislative History of the

Superfund Amendments and Reauthorization Act of 1986" (Volume 2, October 1990, pps. 600-01), states that ordinarily, delays in making the required notifications should not exceed 15 minutes after the person in charge has knowledge of the release. Immediate notification requires shorter delays whenever practicable.

The Agency views knowledge as both actual and constructive. Constructive knowledge neither indicates nor requires actual knowledge but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts. The failure to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law. (*See, e.g., In the Matter of Thoro Products Company*, Docket No. EPCRA VIII 90-04, Administrative Law Judge Decision, May 19, 1992, pp. 21-22.)

Extenuating circumstances may be considered in evaluating the immediate notification requirement, but should not be confused with poor emergency planning and/or facility internal operating procedures that include elaborate reporting systems which cause unnecessary delays. Examples of extenuating circumstances are: downed telephone lines, delays in field personnel getting to a radio or telephone to make an immediate notification (such as may occur in farm situations and construction sites) and delays that result when the owner or operator or person in charge is severely injured and no one else from the facility is at the location.

The levels identified below reflect the benefit of expeditious notification by discounting from the maximum statutory penalty for the timeliness of the notification.

LEVEL 1

CERCLA § 103: No immediate notification to the NRC within 2 hours after the person in charge had knowledge that a RQ of a substance was released.

EPCRA § 304(a): No immediate notification to the appropriate SERC(s) and/or LEPC(s) within 2 hours after the owner or operator had knowledge that a RQ of a substance was released. In the case of a transportation related incident, no immediate call to 911, or in the absence of a 911 emergency telephone number, the telephone operator, within 2 hours after knowledge of the release.

EPCRA § 304(c): Written follow-up emergency notice provided to the appropriate SERC(s) and LEPC(s) more than 14 calendar days following the release.

LEVEL 2

CERCLA § 103: No immediate notification to the NRC within 1 hour but less than 2 hours after the person in charge had knowledge that a RQ of a substance was

released.

EPCRA § 304(a): No immediate notification to the appropriate SERC(s) and/or LEPC(s), or 911 or in the absence of a 911 emergency telephone number the telephone operator if a transportation related release, within 1 hour but less than 2 hours after the owner or operator had knowledge of the release.

EPCRA § 304(c): Written follow-up emergency notice provided to the appropriate SERC(s) and LEPC(s) more than 14 calendar days following the release, but prior to the commencement of a federal, state, or local agency inspection, investigation, or information request, or the regulated entity's knowledge that the discovery of the violation by a regulatory agency or third party was imminent.

LEVEL 3

CERCLA § 103: Notification to the NRC within one hour, but after 15 minutes.

EPCRA § 304(a): Notification to the appropriate SERC(s) and/or LEPC(s) within one hour, but after 15 minutes. For a transportation related incident, a call to 911, or in the absence of a 911 emergency telephone number, the telephone operator, within one hour, but after than 15 minutes.

EPCRA § 304(c): Written follow-up emergency notice provided to the appropriate SERC(s) and LEPC(s) more than 7 calendar days but less than or equal to 14 calendar days following the release.

2. *Emergency Preparedness/Right-to-Know Violations*

For emergency preparedness/right-to-know violations, the extent factor reflects the potential deleterious effect the noncompliance has on: the federal, state, or local government's ability to properly plan for chemical releases, and the public's ability to access the information. Specifically, extent addresses the timeliness and utility of reports submitted. Therefore, the extent factor is used, in part, to provide some built-in incentives for non-reporters to submit the required reports as soon as possible, even if late, and to provide incentives for submitters to fill out the forms in a manner consistent with the statutory and regulatory requirements.

For § 311 violations, the extent levels are:

LEVEL 1: Respondent fails to submit a MSDS for each required hazardous chemical (or list of such chemicals that require MSDSs) as required by § 311(a) to the SERC, LEPC, or fire department within 30 calendar days of the reporting deadline.

Respondent fails to include a chemical on list submitted.

Respondent fails to respond to request under § 311(c) within 30 calendar days of the reporting obligation.

LEVEL 2: Respondent submits MSDS (or list of chemicals that require MSDSs) to the SERC, LEPC, or fire department after 20 calendar days but within 30 calendar days of the reporting obligation.

Respondent responds to request under § 311(c) after 20 calendar days but within 30 calendar days of the request for information.

LEVEL 3: Respondent submits MSDS (or list of chemicals that require MSDSs) to the SERC, LEPC, or fire department after 10 calendar days within 20 calendar days of the reporting obligation.

Respondent responds to request under § 311(c) after 10 calendar days but within 20 calendar days of the reporting obligation.

For § 312 violations, the extent levels are:

LEVEL 1: Respondent fails to submit Inventory Form to the SERC, LEPC, or fire department within 30 calendar days of reporting deadline; or

Inventory form timely submitted fails to address each hazard category present at the facility. Respondent's failure to address all of the hazard categories renders the submission incomplete.

Inventory form timely submitted covers all hazard categories present at the facility, but fails to cover all hazardous chemicals present at the facility during the preceding calendar year in amounts equal to or greater than the reporting thresholds. Respondent's failure to address all of the hazardous chemicals renders the submission incomplete.

Respondent fails to respond to request under § 312(e) within 30 calendar days of the request for information.

LEVEL 2: Respondent submits Inventory Form to the SERC, LEPC, or fire department after 20 calendar days but within 30 calendar days of reporting deadline; or

Respondent responds to request under § 312(e) after 20 calendar days but within 30 calendar days of the required response date.

LEVEL 3: Respondent submits Inventory Form to the SERC, LEPC, or fire department after 10 calendar days but within 20 calendar days of reporting deadline.

Respondent responds to request under § 312(e) after 10 calendar days but within 20 calendar days of the required response date.

C. Gravity

The amount of the chemical involved in the violation is a significant factor in determining the appropriateness of the penalty. The penalty calculation scheme in this Policy assumes that the greater the quantity of chemical released, the more likely that a violation of the reporting requirements will undermine the emergency planning, emergency response, and right-to-know intentions of CERCLA § 103 and EPCRA. Similarly, the greater the amount of chemical stored on site, the greater the need for fire departments and emergency planners to know of its existence and location prior to any explosion or unpermitted release.

1. *Emergency Response Violations*

For emergency response violations, gravity levels are based on the amount of hazardous substance or EHS released. CERCLA hazardous substances and EPCRA EHSs have reportable quantities (RQs) that vary depending on the substance, but range from 1 pound to 10,000 pounds. Reportable quantities were established for hazardous substances to indicate an amount which, if exceeded in a release, would require immediate notification to the proper governmental authorities. The RQ scale itself is a relative measure of the hazards posed by the chemical and therefore the potential threat to human health and the environment; the lower the RQ, the greater the potential threat to human health and the environment. The greater the amount released over the RQ, the greater the potential risk from failure to notify.

If the released material is a mixture which contains one or more EHSs or CERCLA hazardous substances, the owner or operator or person in charge of the facility, must calculate the quantity of mixture which, if released, would result in a release of an EHS or CERCLA hazardous substance above its RQ. Also, "a release into the environment of a substance which is not listed as a CERCLA hazardous substance but which rapidly forms a CERCLA hazardous substance upon release, is subject to the notification requirements of CERCLA § 103. If the amount of the hazardous substance formed as such a reaction product equals or exceeds the RQ for that substance, the release must be reported to the NRC." Superfund Programs; *Reportable Quantity Adjustments*, 51 Fed. Reg. 34, 534 (September 29, 1986).

To determine gravity for emergency response violations, use the following levels:

LEVEL A: The amount released was greater than 10 times the RQ;

LEVEL B: The amount released was greater than 5, but less than or equal to 10 times the RQ;

LEVEL C: The amount released was greater than 1, but less than or equal to 5 times the RQ.

2. *Emergency Preparedness/Right-to-Know Violations*

For the purposes of emergency preparedness/right-to-know violations, the number and/or amount of the chemical(s) in excess of the reporting threshold present at the facility forms the basis for determining gravity. For §§ 311 and 312, the reporting threshold for EHSs is 500 pounds or the EHS-specific threshold planning quantity (TPQ), whichever is less. For other hazardous chemicals, the reporting threshold for each chemical is 10,000 pounds.

For § 311 violations, the gravity levels are:

LEVEL A: Amount of any hazardous chemical present at the facility at any time during the reporting period was greater than 10 times the reporting threshold;

LEVEL B: Amount of any hazardous chemical present at the facility at any time during the reporting period was greater than 5, but less than or equal to 10 times the reporting threshold;

LEVEL C: Amount of any hazardous chemical present at the facility at any time during the reporting period was greater than 1, but less than or equal to 5 times the reporting threshold.

For § 312 violations, the gravity levels are:

LEVEL A: Failure to report or failure to report in a timely manner: The amount of any hazardous chemical not included in the report was greater than 10 times the reporting threshold;

For reports timely submitted: 10 or more hazardous chemicals, which were required to be included in the report, were not included in the report.

LEVEL B: Failure to report or failure to report in a timely manner: The amount of any hazardous chemical not included in the report was greater than 5, but less than or equal to 10 times the reporting threshold;

For reports timely submitted: More than 5, but less than 10 hazardous chemicals, which were required to be included in the report, were not included in the report.

LEVEL C: Failure to report or failure to report in a timely manner: The amount of any hazardous chemical not included in the report was greater than 1, but less than or equal to 5 times the reporting threshold;

For reports timely submitted: 1 - 5 hazardous chemicals, which were required to be included in the report, were not included in the report.

D. Circumstances

Circumstances refers to the actual or potential consequences of the violation. One objective of the emergency notification provisions is to alert federal, state, and local officials that a response action may be necessary to prevent injuries or deaths to emergency responders, facility personnel, and the local community. One objective of the emergency planning and community right-to-know provisions is to assist state and local committees in planning for emergencies, and to make information on chemical presence and hazards available to the public. Thus, a failure to report in a manner that meets the standard required by the statute or rule could result in harm to human health and the environment. The potential for harm may be measured by:

the potential for emergency personnel, the community, and the environment, to be exposed to hazards posed by noncompliance;

the adverse impact noncompliance has on the integrity of the CERCLA § 103/EPCRA program;

the relative proximity of the surrounding population;

the effect noncompliance has on the LEPC's ability to plan for chemical emergencies; and

any actual problems that first responders and emergency managers encountered because of the failure to notify (or submit reports) in a timely manner.

After the extent and gravity of the violation have been determined (placing the proposed penalty in a given cell on the matrix), the circumstance factor is used to arrive at a specific penalty within the range for that cell. To incorporate the circumstances of the violation into the base penalty selection process, the case development team may choose any amount between, or including, one of the two end points for that cell. For example, a violation of EPCRA § 312 that occurred on or before January 30, 1997 has been determined to have a Level 1 extent and a Level B gravity, placing the proposed penalty in the matrix cell that contains the range of $18,750 - $12,501. If the circumstances of the violation indicate that the potential for emergency personnel and the surrounding community to be at risk of exposure in the event of a release was high (*e.g.*, the emergency personnel did not know of a chemical's

presence and could not plan for the safety of the surrounding community in the event of a release), the case development team may decide that the maximum amount for that cell is the appropriate base penalty. The selection of the exact penalty amount within each range is left to the discretion of the enforcement personnel in any given case.

Table I
Base Penalty Matrices For Violations Which Occurred On or Before January 30, 1997

CERCLA § 103 and EPCRA § 304[4]
GRAVITY (Quantity Released)

EXTENT (timeliness of notification)	LEVEL A (greater than 10 times the RQ)	LEVEL B (greater than 5 but less than or equal to 10 times the RQ)	LEVEL C (greater than 1 but less than or equal to 5 times the RQ)
LEVEL 1 (more than 2 hours)	$25,000 $18,751	$18,750 $12,501	$12,500 $6,251
LEVEL 2 (between 1 and 2 hours)	$18,750 $12,501	$12,500 $6,251	$6,250 $3,126
LEVEL 3 (within 1 hour, after 15 minutes)	$12,500 $6,251	$6,250 $3,126	$3,125 $1,562

EPCRA § 312
GRAVITY (Quantity Present)

EXTENT (timeliness of inventory submission)	LEVEL A (greater than 10 times the MTL)	LEVEL B (greater than 5 but less then or equal to 10 times the MTL)	LEVEL C (greater than 1 but less than or equal to 5 times the MTL)
LEVEL 1 (more than 30 days)	$25,000 $18,751	$18,750 $12,501	$12,500 $6,251
LEVEL 2 (after 20 but within 30 days)	$18,750 $12,501	$12,500 $6,251	$6,250 $3,126

[4]While the penalty amounts in this matrix apply to EPCRA § 304(c), the criteria associated with the levels do not apply. To determine the appropriate extent level for violations of § 304(c), *see* pp. 13-14, *supra*.

EXTENT (timeliness of inventory submission)	LEVEL A (greater than 10 times the MTL)	LEVEL B (greater than 5 but less then or equal to 10 times the MTL)	LEVEL C (greater than 1 but less than or equal to 5 times the MTL)
LEVEL 3 (after 10 but within 20 days)	$12,500 $6,251	$6,250 $3,126	$3,125 $1,562

EPCRA § 311
GRAVITY (Quantity Present)

EXTENT (timeliness of MSDS submission)	LEVEL A (greater than 10 times the MTL)	LEVEL B (greater than 5 but less than or equal to 10 times the MTL)	LEVEL C (greater than 1 but less than or equal to 5 times the MTL)
LEVEL 1 (more than 30 days)	$10,000 $7,501	$7,500 $5,001	$5,000 $2,501
LEVEL 2 (after 20 but within 30 days)	$7,500 $5,001	$5,000 $2,501	$2,500 $1,251
LEVEL 3 (after 10 but within 20 days)	$5,000 $2,501	$2,500 $1,251	$1,250 $625

Table II
Base Penalty Matrices For Violations Which Occur <u>After</u> January 30, 1997

CERCLA § 103 and EPCRA § 304[5]
GRAVITY (Quantity Released)

EXTENT (timeliness of notification)	LEVEL A (greater than 10 times the RQ)	LEVEL B (greater than 5 but less than or equal to 10 times the RQ)	LEVEL C (greater than 1 but less than or equal to 5 times the RQ)

[5]While the penalty amounts in this matrix apply to EPCRA § 304(c), the criteria associated with the levels do not apply. To determine the appropriate extent level for violations of § 304, *see* pp. 13-14, *supra*.

LEVEL 1 (more than 2 hours)	$27,500 $20,626	$20,625 $13,751	$13,750 $6,876
LEVEL 2 (between 1 and 2 hours)	$20,625 $13,751	$13,750 $6,876	$6,875 $3,439
LEVEL 3 (within 1 hour, after 15 minutes)	$13,750 $6,876	$6,875 $3,439	$3,438 $1,718

EPCRA § 312
GRAVITY (Quantity Present)

EXTENT (timeliness of inventory submission)	**LEVEL A (greater than 10 times the MTL)**	**LEVEL B (greater than 5 but less than or equal to 10 times the MTL)**	**LEVEL C (greater than 1 but less than or equal to 5 times the MTL)**
LEVEL 1 (more than 30 days)	$27,500 $20,626	$20,625 $13,751	$13,750 $6,876
LEVEL 2 (after 20 but within 30 days)	$20,625 $13,751	$13,750 $6,876	$6,875 $3,439
LEVEL 3 (after 10 but within 20 days)	$13,750 $6,876	$6,875 $3,439	$3,438 $1,718

EPCRA § 311
GRAVITY (Quantity Present)

EXTENT (timeliness of MSDS submission)	**LEVEL A (greater than 10 times the MTL)**	**LEVEL B (greater than 5 but less than or equal to 10 times the MTL)**	**LEVEL C (greater than 1 but less than or equal to 5 times the MTL)**
LEVEL 1 (more than 30 days)	$11,000 $8,251	$8,250 $5,501	$5,500 $2,751
LEVEL 2 (after 20 but within 30 days)	$8,250 $5,501	$5,500 $2,751	$2,750 $1,376

EXTENT (timeliness of MSDS submission)	LEVEL A (greater than 10 times the MTL)	LEVEL B (greater than 5 but less than or equal to 10 times the MTL)	LEVEL C (greater than 1 but less than or equal to 5 times the MTL)
LEVEL 3 (after 10 but within 20 days)	$5,500 $2,751	$2,750 $1,376	$1,375 $688

VI. PAST YEAR VIOLATIONS OF EPCRA § 312

For EPCRA § 312 violations detected for previous years of noncompliance, a flat penalty of $1,500 per year shall be proposed, except where the facts and circumstances warrant the imposition of the full gravity based penalty. The flat penalty applies regardless of the number of entities that failed to receive the report. If, at the time of investigation, solely past violations are detected, *i.e.*, a facility is in compliance for the most recent reporting period, those violations are calculated at the flat penalty of $1,500.

If at the time of the initial investigation an EPCRA § 312 violation is detected for the most recent reporting period, the base penalty matrices in Table I or Table II shall be used to determine the penalty. If during the time between the initial investigation and issuance of the complaint another reporting deadline passes and the facility complies in a timely manner, the penalty for the violation detected during the initial investigation should still be calculated pursuant to the penalty matrices in Table I or Table II. If during the time between the initial investigation and issuance of the complaint another reporting deadline passes and the facility again fails to submit the required report, that subsequent violation shall also be calculated pursuant to the penalty matrices in Table I or Table II (*i.e.*, both violations shall be calculated using the penalty matrices).

VII. PER DAY PENALTIES

EPCRA § 325 and CERCLA § 109 authorize the Agency to assess penalties for violations on a per day basis. Per day penalties serve to promote an expeditious return to compliance by creating disincentives for continued noncompliance and to level the playing field for those who complied in a timely manner. Facilities that delay in notifying the appropriate entities and submitting required information deny citizens their "right to know" of the existence of chemical hazards in their community.

Where a reportable release continues for more than one day, and notification has not occurred, the matrix shall be used to calculate a separate base penalty for each and every day the release continues. When per day penalties are proposed for all other violations, *i.e.*, when a release has ended but timely notification has not occurred, or for any violation of EPCRA § 311 or § 312, calculate the per day penalty component by proposing 1% of the base penalty for each day the violation continues, *i.e.*, each day after March 1st. The case development team should require the respondent to send EPA copies of required submissions to verify compliance.

VIII. ADJUSTMENT FACTORS

The Agency may consider a number of factors in agreeing to appropriate penalty adjustments. The statutory adjustment factors that apply to the violator are: (A) ability to pay; (B) prior history of violations; (C) degree of culpability; (D) economic benefit or savings (if any) resulting from the violation; and (E) such other matters as justice may require. In addition, the Agency considers the following additional factors in determining an appropriate penalty: (F) size of business; (G) attitude; (H) Supplemental Environmental Projects (SEPs); and (I) voluntary disclosure.

A. Ability to Pay/Continue in Business

The penalty amounts reflected in the matrix assume that the violator has the ability to pay. The Agency will generally not request penalties that are clearly beyond the financial means of the violator. In the event EPA proposes a penalty in excess of the respondent's ability to pay, the respondent must demonstrate its inability to pay the proposed penalty.[6] Nonetheless, EPA reserves the option, in appropriate circumstances, of seeking the full proposed penalty. For example, even when there is an inability to pay, it is unlikely that EPA would reduce a proposed penalty when a facility refuses to correct a serious violation or where a facility has a long history of violations. That long history would demonstrate that less severe measures are ineffective.

In order to determine the appropriateness of the proposed penalty in relation to a company's ability to pay, the case team should review Dun and Bradstreet reports, a company's filings with the Securities and Exchange Commission, or other publicly available financial reports prior to issuance of the complaint.

If an alleged violator raises the ability to pay argument as a defense in its answer, or in the course of settlement negotiations, EPA should request the following types of information[7]:

- An explanation by the alleged violator specifying the reason(s) for claiming an

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[6]Ability to continue in business must be considered, as a matter of law, only when proposing penalties for violations of EPCRA § 304 under EPCRA § 325(b)(2).

[7]ABEL can be used as an initial indicator of a company's ability to pay using the company's most recent 3 to 5 years tax returns. ABEL is the Agency's computer model that helps perform a preliminary analysis of ability to pay for compliance, clean-up, and/or penalties. In addition, the regional financial analyst, or a National Enforcement Investigations Center (NEIC) financial analyst, can help in assessing the financial ability to pay of publicly held corporations. Consult these analysts as to the relevant dates for this information, and any additional information that should be requested specific to the case.

inability to pay with supporting information

- S 3 -5 years of the most recent signed federal tax returns
- S For the same period as the tax returns: financial audits, reviews or compilations, or, if not performed, company generated financial statements to include but not limited to:
  - S Balance sheets
  - S Income statements
  - S Cash flows
  - S Depreciation schedules
  - S Year to date financial statement (from the end of the most recent fiscal year to the end of the most recent month preceding the request)
  - S Statement of operations
  - S Retained earnings statements
- S Loan applications, financing agreements, security agreements
- S Annual and quarterly reports to shareholders and the SEC, including 10K reports
- S Detail any ownership or control of other companies or ownership or control of the alleged violator company by others not already specified

The Agency reserves the right to request, obtain, and review all underlying and supporting financial documents that form the basis of these records to verify their accuracy. If the alleged violator fails to provide the necessary information, and the information is not readily available through other sources, then the Agency is entitled to rely on the information it does have.

B. Prior History of Violations

The penalty amounts reflected in the penalty matrices apply to first time violators. Where a violator has demonstrated a history of prior violations, the penalty may need to be adjusted upward. The need for such an upward adjustment derives from the violator not having been sufficiently motivated to comply by the penalty assessed for the previous violation. Another reason for penalizing repeat violators more severely than first offenders is the increased resources that are spent on the same violator.

For the purposes of this Policy, the Agency interprets prior violations to mean prior violations of CERCLA § 103(a) and/or prior violations of any of the provisions of EPCRA that have occurred within five (5) years of the date of the current violation. The following criteria apply in evaluating history of prior violations:

(1) Regardless of whether a respondent admits to the violation, evidence of a prior violation may be: a consent agreement and final order (CAFO) executed by a Regional Administrator or his or her designee or the Environmental Appeals

Board, a federal court judgment, a default judgment, a final administrative judgment, or a consent decree. A prior violation refers collectively to all the violations which may have been described in any of the documents listed above.

(2) Companies with multiple facilities, or wholly or partly owned subsidiaries with a parent corporation, may be considered as one when determining history of prior violations, however, two facilities may not necessarily affect each other's violation history if they are in substantially different lines of business, or if they are substantially independent of one another in their management and in the functioning of their Boards of Directors.

Upward adjustments to the base penalty may be calculated in the following manner:

! For second or subsequent violations of CERCLA § 103 and EPCRA § 304, the Acts authorize penalties of up to $82,500 per violation per day. For these violations, the base penalty may be increased up to three times the amount shown at the appropriate position of the matrix in Table I or II.

! For second violations of EPCRA §§ 311 and 312 the base penalty may be adjusted upward by 25%, not to exceed the statutory maximum penalty of $27,500. This upward adjustment may also be applied to violations of CERCLA § 103 or EPCRA § 304 when there exists prior violations of EPCRA §§ 311, 312, or 313.

! For third and subsequent violations of EPCRA §§ 311 and 312, the base penalty may be adjusted upward by 50%, not to exceed the statutory maximum penalty of $27,500. This upward adjustment may also be applied to violations of CERCLA § 103 or EPCRA § 304 when there exists prior violations of EPCRA §§ 311, 312, or 313.

C. Degree of Culpability

EPCRA is a strict liability statute, however, some adjustment may be made for a violator's culpability. The two principal criteria for assessing culpability are: (a) the violator's knowledge of the particular EPCRA requirement, and (b) the degree of the violator's control over the violative condition.[8] For penalty purposes, three levels of culpability have been assigned:

Level I: The violation is willful, *i.e.*, the violator intentionally committed an act which he/she knew would be a violation or would be hazardous to health or the environment. --- Adjust the penalty *upward* 25%.

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[8] *See Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act: PCB Penalty Policy*, 45 Fed. Reg. 59,770, 59,773 (September 10, 1980) for a description of "knowledge" and "degree of control over the violation."

Level II: The violator either had sufficient knowledge to recognize the hazard created by his/her conduct, or significant control over the situation to avoid committing the violation. --- No adjustment to the penalty.

Level III: The violator lacked sufficient knowledge of the potential hazard created by his/her conduct, and also lacked control over the situation to prevent occurrence of the violation. --- Adjust the penalty *downward* 25%.

It is anticipated that most cases will present Level II culpability. Level I situations, in many instances, could be treated as criminal violations.

D. Economic Benefit or Savings

EPA should consider any economic benefit from noncompliance that accrues to the violator when proposing penalties. Whenever there is an economic incentive to violate the law, it encourages noncompliance and thus weakens EPA's ability to implement the Acts and protect human health and the environment. The violator should not benefit from its violative acts.

For EPCRA §§ 304(c), 311, and 312 reporting violations, the economic benefit or savings typically is derived from the estimated cost of rule familiarization, producing and submitting the reports, and any filing fees that are imposed by states. *See* Table III, *infra*. For violations of EPCRA § 304(a) and CERCLA § 103 the economic benefit or savings typically is derived from the estimated cost of rule familiarization, release reportability determination, and the notification of the required reporting entities.

The Regulatory Impact Analyses for EPCRA §§ 304, 311, 312 and CERCLA § 103 regulations establish unit costs for producing the required reports and making the required notifications. These cost estimates should be used unless more accurate data is available. In using this information to determine economic savings for multiple violations, rule familiarization costs should be counted only once, while other costs should be counted for each violation. If the amount of economic benefit of noncompliance is less than or equal to $5,000, EPA, in its discretion, may choose to waive or forego seeking assessment of a civil penalty for such economic benefit which has accrued to Respondent from its noncompliance.

Table III
Costs Associated with EPCRA/CERCLA 103 Compliance[9]

EPCRA SECTION 304

RULE FAMILIARIZATION	Legal Hours $100/hr	Manager Hours $37.72/hr	Technical Hours $27.90/hr	Clerical Hours $16.69/hr	Total Costs of Compliance
Read and understand regulations at 40 C.F.R. Part 355	1.00	2.50	7.50	0.00	$404

EMERGENCY RELEASE NOTIFICATION (40 C.F.R. § 355.40)	Legal Hours $100/hr	Manager Hours $37.72/hr	Technical Hours $27.90/hr	Clerical Hours $16.69/hr	Total Costs of Compliance
Determine if release is an RQ (355.40(a))	0.00	0.10	0.10	0.00	$7
Notify LEPC and SERC of any RQ release (355.40(b)(1))	0.00	0.50	0.00	0.00	$19
Develop and submit written follow-up notice (355.40(b)(3))	0.50	0.65	2.25	0.95	$153
Notify 911 operator of transportation - related releases (355.40(b)(4)(ii))	0.00	0.25	0.00	0.00	$9

CERCLA SECTION 103

ACTIVITY	Legal Hours	Manager Hours $37.42/hr	Technical Hours $26.62/hr	Clerical Hours $16.19/hr	Other costs	Total Costs of Compliance
NRC Notification	n/a	1.00	1.00	0.00	$0.00	$64
Recordkeeping	n/a	0.10	1.00	1.00	$0.00	$47

EPCRA SECTIONS 311 & 312

RULE FAMILIARIZATION	Legal Hours $100/hr	Manager Hours $37.72/hr	Technical Hours $27.90/hr	Clerical Hours $16.69/hr	Total Costs of Compliance
Read and understand regulations at 40 C.F.R. Part 370	4.60	2.20	2.20	0.00	$604

[9]Sources: EPA, Office of Chemical Emergency Preparedness and Prevention Office, *Statement Supporting the Renewal of the Information Collection Procedure for the Community Right-to-Know of the Emergency Planning and Community Right-to-Know Act*, 1997; EPA, Office of Emergency and Remedial Response, *Economic Impact Analysis of Proposed Reportable Quantity Adjustments added as RCRA Hazardous Wastes and CERCLA Hazardous Substances, Volume VII*, 1996.

MSDS REPORTING (40 C.F.R. § 370.21)	Legal Hours $100/hr	Manager Hours $37.72/hr	Technical Hours $27.90/hr	Clerical Hours $16.69/hr	Total Costs of Compliance
Basic Reporting					
Determine which chemicals meet/exceed MTLs	0.00	0.25	0.90	0.00	$35
Calculate quantity for mixtures	0.00	0.50	1.80	0.00	$69
Submit MSDSs to LEPC, SERC, and fire department (370.21(a)); or	0.08	0.08	0.17	0.34	$21
Alternative Reporting					
Submit list of hazardous chemicals grouped by hazard category (370.21(b)(1))	0.00	0.00	0.00	0.17	$3
Submit list of chemical or common name of hazardous chemical as provided in each MSDS (370.21(b)(2))	0.00	0.00	0.00	0.17	$3
Supplemental Reporting					
Submit revised MSDSs (370.21(c)(1))	0.08	0.08	0.17	0.34	$21
Submit new MSDSs (370.21(c)(2))	0.08	0.08	0.17	0.34	$21
Additional Reporting					
Submit MSDS upon request (370.21(d))	0.08	0.08	0.17	0.34	$21

INVENTORY REPORTING (40 C.F.R. § 370.25)	Legal Hours $100/hr	Manager Hours $37.72/hr	Technical Hours $27.90/hr	Clerical Hours $16.69/hr	Total Costs of Compliance
Basic Reporting					
Develop and submit Tier I inventory form annually (370.25(a))	0.00	0.25	2.60	0.25	$86
Alternative Reporting					
Develop and submit Tier II inventory form, in lieu of Tier I form, annually (370.25(b))	0.00	0.25	2.60	0.25	$86
Additional reporting					
Submit Tier I form to LEPC, SERC, and fire department upon request (370.25(c))	0.00	0.00	0.00	0.17	$3
Provide specific location information to fire department upon request (370.25(d))	0.00	0.00	0.00	0.17	$3

E. Other Matters as Justice May Require

This Policy acknowledges that no two cases are exactly alike. Unique circumstances above and beyond those taken into account by the factors discussed in the previous sections may be significant in determining the appropriateness of a penalty for settlement. Any reductions made under this section shall be documented in the case file. It is suggested that this reduction not exceed 10% except where the facts and circumstances warrant a greater reduction.

F. Size of Business

Prior to issuance of the complaint, the Agency may reduce the proposed base penalty by 15% for first time violators whose business employs 100 or fewer people, **and** whose annual total corporate entity sales are less than $20 million except where the facts and circumstances preclude any reduction.

G. Attitude

The attitude adjustment has two components: (1) cooperation and (2) willingness to settle.

(1) The Agency may reduce the penalty up to 25% based on respondent's cooperation throughout the compliance evaluation/enforcement process. Factors include respondent's: responsiveness and expeditious provision of supporting documentation requested by EPA, cooperation and preparedness during the settlement process, and speed and completeness of achieving compliance. The Agency believes that a greater penalty reduction should be given to those respondents who come into compliance prior to the initiation of an EPA investigation.

(2) The Agency may reduce the penalty up to an additional 10% should the respondent and the Agency agree to a settlement in principle within 90 days from the date of the issuance of the complaint.

H. Supplemental Environmental Projects

To further the goals of the EPA to protect and enhance public health and the environment, certain environmentally beneficial projects, or Supplemental Environmental Projects (SEPs), may be included in the settlement.

SEPs are environmentally beneficial projects which a respondent agrees to undertake in settlement of an environmental enforcement action, but which the defendant is not otherwise legally required to perform. In return, some percentage of the cost of the SEP is considered as a factor in establishing the final penalty to be paid by the respondent.

EPA has broad discretion to settle cases with appropriate penalties. Evidence of a violator's commitment and ability to perform a SEP is a relevant factor for EPA to consider in establishing an appropriate settlement penalty. The commitment to perform a SEP may indicate a respondent's new or extraordinary efforts to be a good environmental citizen.

While SEPs may not be appropriate in settlement of all cases, they are an important part of EPA's enforcement program. Whether to include a SEP as part of a settlement of an enforcement action is within the sole discretion of EPA. EPA must ensure that the inclusion of a SEP in settlement is consistent with the Agency's SEP Policy in effect at the time of the settlement.

I. Voluntary Disclosure

Facilities that conduct an audit and voluntarily self-disclose any violations of EPCRA §§ 304, 311, 312, or CERCLA § 103 under the Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations Final Policy Statement, 60 Fed. Reg. 66,706 (December 22, 1995), may be eligible for a 100% reduction in the gravity-based penalty, if they meet the nine criteria established in the policy.

If a facility self-discloses violations not covered by the Agency's Self-Policing Policy, the penalty amount may still be reduced for such a voluntary disclosure. To be eligible for such a reduction, a facility must submit a signed statement of voluntary disclosure to EPA describing the alleged violations. A facility will not be eligible for any reduction if there has been notification of a scheduled inspection or the inspection has begun, or the facility has otherwise been contacted by EPA for the purpose of determining compliance with EPCRA/CERCLA § 103.

Voluntary disclosure of a violation will result in a 25% reduction of the gravity based penalty. To encourage immediate disclosure, an additional 25% reduction will be given for disclosures made within 30 days of having reason to believe that a violation occurred.

The reduction for voluntary disclosure and immediate disclosure may be made prior to issuing the Civil Complaint. The Civil Complaint should state the original penalty and the reduced penalty and the reason for the reduction.

PENALTY CALCULATION WORKSHEET

Respondent: _____
Count #: _____
Chemical Name/RQ/TPQ: _____

NATURE: Type of Violation: EPCRA 304 EPCRA 311 EPCRA 312 CERCLA 103 (Circle one).

EXTENT: Time passed from deadline to actual date of compliance (in hours or days): _____
Matrix Level: _____

GRAVITY: Divide amount of chemical involved in the violation (lbs.):_____ by _____ (RQ/TPQ) = _____
Matrix Level:_____

CIRCUMSTANCES: Specify choice of penalty amount from range listed for the cell of the matrix based on circumstance factors: _____

1.	Base Penalty		$_____
2.	If per day, continuing reportable release, multiply line 1 by _____ days, beginning with the second day of violation.		$_____
3.	Other per day violations, multiply line 1 by .01 = _____. Multiply the per day penalty _____ by _____ days, beginning with the second day of violation.		$_____
4.	Add lines 1-3		$_____
5.	Prior History: (Treble, 25%, 50%: +_____)	$_____	
6.	Culpability (% increase or decrease +/- _____%)	$_____	
7.	Other factors as justice may require (-_____%)	($_____)	
8.	Size of business reduction (-_____%)	($_____)	
9.	Attitude (-_____%)	($_____)	
10.	Supplemental Environmental Project (-_____)	($_____)	
11.	Voluntary Disclosure (-_____)	($_____)	
12.	Subtract lines (5-11) from line 4		$_____

Repeat procedure for each violation.

Prepared by:_____
Signature:_____ Date:_____

Base Penalty Matrix for Violations Which Occur After January 12, 2009 and On or Before December 6, 2013
ERP Table II, updated January 2009

Insert behind page 20-C.

Gravity-based penalty matrix to supplement Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-To-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act for violations that occur after January 12, 2009.

Table II

CIVIL PENALTY MATRIX FOR CERCLA SECTION 103, EPCRA SECTION 304†, AND EPCRA SECTION 312

GRAVITY (Quantity Released/Stored)

EXTENT (timeliness of notification/timeliness of inventory submission)	LEVEL A (greater than 10 times the RQ/MTL)	LEVEL B (greater than 5 but less than or equal to 10 times the RQ/MTL)	LEVEL C (greater than 1 but less than or equal to 5 times the RQ/MTL)
LEVEL 1 (more than 2 hours/30 days)	$37,500 $26,560	$26,560 $17,710	$17,710 $8,860
LEVEL 2 (between 1 and 2 hours/after 20 but within 30 days)	$26,560 $17,710	$17,710 $8,860	$8,860 $4,430
LEVEL 3 (within 1 hour, but after 15 minutes/after 10 but within 20 days)	$17,710 $8,860	$8,860 $4,430	$4,430 $2,220

† While the penalty amounts in this matrix apply to EPCRA § 304(c), the criteria associated with the levels do not apply. To determine the appropriate extent level for violations of § 304, *see* pp. 12-13, *supra*.

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Base Penalty Matrices for Violations Occurring After November 2, 2015
Applicable until issuance of new rules adjusting statutory penalty amounts
Adjusted according to the *Amendments to the EPA's Civil Penalty Policies to Account for Inflation (Effective January 15, 2018) and Transmittal of the 2018 Civil Monetary Penalty Inflation Adjustment Rule (January 11, 2018)*

CERCLA § 103 and EPCRA § 304[1]
GRAVITY (Quantity Released)

EXTENT (timeliness of notification)	LEVEL A (greater than 10 times the RQ)	LEVEL B (greater than 5 but less than or equal to 10 times the RQ)	LEVEL C (greater than 1 but less than or equal to 5 times the RQ)
LEVEL 1 (more than 2 hours)	$40,328 $30,248	$30,246 $20,166	$20,164 $10,084
LEVEL 2 (between 1 and 2 hours)	$30,246 $20,166	$20,164 $10,084	$10,082 $5,043
LEVEL 3 (within 1 hour, after 15 minutes)	$20,164 $10,084	$10,082 $5,043	$5,042 $2,519

EPCRA § 312
GRAVITY (Quantity Present)

EXTENT (timeliness of inventory submission)	LEVEL A (greater than 10 times the MTL)	LEVEL B (greater than 5 but less than or equal to 10 times the MTL)	LEVEL C (greater than 1 but less than or equal to 5 times the MTL)
LEVEL 1 (more than 30 days)	$40,328 $30,248	$30,246 $20,166	$20,164 $10,084
LEVEL 2 (after 20 but within 30 days)	$30,246 $20,166	$20,164 $10,084	$10,082 $5,043
LEVEL 3 (after 10 but within 20 days)	$20,164 $10,084	$10,082 $5,043	$5,042 $2,519

Statutory Max - $57,317 (2019 Rule)

EXTENT (timeliness of inventory submission)[1]	LEVEL A (greater than 10 times the MTL)	LEVEL B (greater than 5 but less than or equal to 10 times the MTL)	LEVEL C (greater than 1 but less than or equal to 5 times the MTL)
LEVEL 1 (more than 30 days)	$27,500 $20,626	$20,625 $13,751	$13,750 $6,876
LEVEL 2 (after 20 but within 30 days)	$20,625 $13,751	$13,750 $6,876	$6,875 $3,439
LEVEL 3 (after 10 but within 20 days)	$13,750 $6,876	$6,875 $3,439	$3,438 $1,718

1999 ERP amounts x 1.46649

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[1] While the penalty amounts in this matrix apply to EPCRA § 304(c), the criteria associated with the levels do not apply. To determine the appropriate extent level for violations of § 304, *see* pp. 13-14 of the September 30, *1999 Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act.*

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of July 25, 2019

Title 40 → Chapter I → Subchapter A → Part 22

Title 40: Protection of Environment

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

Contents

AUTHORITY: 7 U.S.C. 1361; 15 U.S.C. 2615; 33 U.S.C. 1319, 1342, 1361, 1415 and 1418; 42 U.S.C. 300g-3(g), 6912, 6925, 6928, 6991e and 6992d; 42 U.S.C. 7413(d), 7524(c), 7545(d), 7547, 7601 and 7607(a), 9609, and 11045.

SOURCE: 64 FR 40176, July 23, 1999, unless otherwise noted.

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Subpart A—General

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§22.1 Scope of this part.

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

(1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136*l*(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)), and a determination of nonconforming engines, vehicles or equipment under sections 207(c) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7541(c) and 7547(d));

(3) The assessment of any administrative civil penalty or for the revocation or suspension of any permit 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) The issuance of a compliance order or the issuance of a corrective action order, the termination of a permit pursuant to section 3008(a)(3), the suspension or revocation of authority to operate pursuant to section 3005(e), or the assessment of any civil penalty under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6925(d), 6925(e), 6928, 6991e, and 6992d)), except as provided in part 24 of this chapter;

(5) The assessment of any administrative civil penalty 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 Class II penalty under sections 309(g) and 311(b)(6), or termination of any permit issued pursuant to section 402(a) of the Clean Water Act, as amended (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).

(11) The assessment of any administrative civil penalty under section 1908(b) of the Act To Prevent Pollution From Ships ("APPS"), as amended (33 U.S.C. 1908(b)).

(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. Where inconsistencies exist between subparts A through G of this part and subpart H or I of this part, subparts H or I of this part shall apply.

(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.

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000; 79 FR 65900, Nov. 6, 2014; 81 FR 73970, Oct. 25, 2016]

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§22.2 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.

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§22.3 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.

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 an individual duly authorized to serve as Clerk of the Environmental Appeals Board.

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 proceeding; 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 adjudication.

Consolidated Rules of Practice means the regulations in this part.

Environmental Appeals Board means the Board within the Agency described in 40 CFR 1.25.

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 issued in accordance with §22.18.

Hearing means an evidentiary hearing on the record, open to the public (to the extent consistent with §22.22(a)(2)), conducted as part of a proceeding under these Consolidated Rules of Practice.

Hearing Clerk means the Hearing Clerk, Mail Code 1900, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., 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.

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

Permit action means the revocation, suspension or termination of all or part of a permit issued under section 102 of the Marine Protection, Research, and Sanctuaries Act (33 U.S.C. 1412) or termination under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) or section 3005(d) of the Solid Waste Disposal Act (42 U.S.C. 6925(d)).

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 §§22.4(b), 22.16(c) or 22.51 allow a Regional Judicial Officer to serve as Presiding Officer.

Proceeding means the entirety of a single administrative adjudication, from the filing of the complaint through the issuance of a final order, including any action on a motion to reconsider under §22.32.

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, who shall be neutral in every proceeding. Correspondence with the Regional Hearing Clerk shall be addressed to the Regional Hearing Clerk at the address specified in the complaint. 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 §22.4(b).

Respondent means any person against whom the complaint states a claim for relief.

(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.

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000; 79 FR 65901, Nov. 6, 2014]

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§22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.

(a) *Environmental Appeals Board.* (1) The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice, 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 §22.8. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or motions filed in matters that the Environmental Appeals Board has referred to the Administrator.

(2) In exercising its duties and responsibilities under these Consolidated Rules of Practice, the Environmental Appeals Board may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding, including imposing procedural sanctions against a party who without adequate justification fails or refuses to comply with these Consolidated Rules of Practice or with an order of the Environmental Appeals Board. Such sanctions may include drawing adverse inferences against a party, striking a party's pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding.

(b) *Regional Judicial Officer.* Each Regional Administrator shall delegate to one or more Regional Judicial Officers authority to act as Presiding Officer in proceedings under subpart I of this part, and to act as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice to which subpart I of this part 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 any case in which he serves as a Regional Judicial Officer. A Regional Judicial Officer shall not knowingly preside over a case involving any party concerning whom the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.

(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 Administrative Law Judge 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 Administrator, Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer or the Administrative Law Judge request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional Administrator, Regional Judicial Officer or Administrative Law Judge 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. There shall be no interlocutory appeal of the ruling on a motion for disqualification. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.

(2) If the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Administrative Law Judge 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.

[64 FR 40176, July 23, 1999, as amended at 82 FR 2234, Jan. 9, 2017]

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§22.5 Filing, service by the parties, and form of all filed documents; business confidentiality claims.

(a) *Filing of documents.* (1) The original and one copy of each document intended to be part of the record shall be filed with the Headquarters or Regional Hearing Clerk, as appropriate, 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 document is filed when it is received by the appropriate Clerk. When a document is required to be filed with the Environmental Appeals Board, the document shall be sent to the Clerk of the Board by U.S. Mail, delivered by hand or courier (including delivery by U.S. Express Mail or by a commercial delivery service), or transmitted by the Environmental Appeal Board's electronic filing system, according to the procedures specified in 40 CFR 124.19 (i)(2)(i), (ii), and (iii). The Presiding Officer or the Environmental Appeals Board may by order authorize or require filing by facsimile or an electronic filing system, subject to any appropriate conditions and limitations.

(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 documents.* Unless the proceeding is before the Environmental Appeals Board, a copy of each document filed in the proceeding shall be served on the Presiding Officer and on each party. In a proceeding before the Environmental Appeals Board, a copy of each document filed in the proceeding shall be served 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 with 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 agency of the United States complainant shall serve that agency as provided by that agency's regulations, or in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. 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 filed documents other than the complaint, rulings, orders, and decisions.* All documents filed by a party other than the complaint, rulings, orders, and decisions shall be served by the filing party on all other parties. Service may be made personally, by U.S. mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), by any reliable commercial delivery service, or by facsimile or other electronic means, including but not necessarily limited to email, if service by such electronic means is consented to in writing. A party who consents to service by facsimile or email must file an acknowledgement of its consent (identifying the type of electronic means agreed to and the electronic address to be used) with the appropriate Clerk. In addition, the Presiding Officer or the Environmental Appeals Board may by order authorize or require service by facsimile, email, or other electronic means, subject to any appropriate conditions and limitations.

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

(2) The first page of every filed document shall contain a caption identifying the respondent and the docket number. All legal briefs and legal memoranda greater than 20 pages in length (excluding attachments) shall contain a table of contents and a table of authorities with page references.

(3) The original of any filed 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 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 document filed by any person shall contain the name, mailing address, telephone number, and email address of an individual authorized to receive service relating to the proceeding on behalf of the person. Parties shall promptly file any changes in this information with the Headquarters or Regional Hearing Clerk or the Clerk of the Board, as appropriate, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (b)(2) of this section and §22.6.

(5) The Environmental Appeals Board or the Presiding Officer may exclude from the record any document which does not comply with 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 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 document is filed. A document filed without a claim of business confidentiality shall be available to the public for inspection and copying.

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

(i) One version of the 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 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 document containing the information claimed confidential has been filed with the Regional Hearing Clerk.

(3) Both versions of the document shall be served on the Presiding Officer and the complainant. Both versions of the document shall be served on any party, non-party participant, 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.

[64 FR 40176, July 23, 1999, as amended at 69 FR 77639, Dec. 28, 2004; 79 FR 65901, Nov. 6, 2014; 82 FR 2234, Jan. 9, 2017]

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§22.6 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 Headquarters or Regional Hearing Clerk, as appropriate, in any manner allowed for the service of such documents. All rulings, orders, decisions, and other documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Board. The Clerk of the Board, the Headquarters Hearing Clerk, or the Regional Hearing Clerk, as appropriate, must serve copies of such rulings, orders, decisions and other documents on all parties. Service may be made by U.S. mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), EPA's internal mail, any reliable commercial delivery service, or electronic means (including but not necessarily limited to facsimile and email).

[82 FR 2234, Jan. 9, 2017]

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§22.7 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 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) *Completion of service.* Service of the complaint is complete when the return receipt is signed. Service of all other documents is complete upon mailing, when placed in the custody of a reliable commercial delivery service, or for facsimile or other electronic means, including but not necessarily limited to email, upon transmission. Where a document is served by U.S. mail, EPA internal mail, or commercial delivery service, including overnight or same-day delivery, 3 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document. The time allowed for the serving of a responsive document is not expanded by 3 days when the served document is served by personal delivery, facsimile, or other electronic means, including but not necessarily limited to email.

[64 FR 40176, July 23, 1999, as amended at 82 FR 2234, Jan. 9, 2017]

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§22.8 *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 Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, 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, 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 person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to §22.18(b)(3).

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§22.9 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 Clerk of the 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.

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Subpart B—Parties and Appearances

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§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.

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§22.11 Intervention and non-party briefs.

(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. All requirements of these Consolidated Rules of Practice shall apply to a motion for leave to intervene as if the movant were a party. 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) *Non-party briefs.* Any person who is not a party to a proceeding may move for leave to file a non-party brief. The motion shall identify the interest of the applicant and shall explain the relevance of the brief to the proceeding. All requirements of these Consolidated Rules of Practice shall apply to the motion as if the movant were a party. 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 a non-party brief within 15 days after service of the non-party brief.

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§22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer or the Environmental Appeals Board 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. Proceedings subject to subpart I of this part may be consolidated only upon the approval of all parties. Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part shall not apply to the consolidated proceeding.

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

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Subpart C—Prehearing Procedures

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§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 may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to §22.18(b)(2) and (3).

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§22.14 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 each violation alleged;

(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, the number of violations (where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint;

(iii) A request for a Permit Action and a statement of its proposed terms and conditions; 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 Action;

(6) Notice if subpart I of this part applies to the proceeding;

(7) The address of the Regional Hearing Clerk; and

(8) Instructions for paying penalties, if applicable.

(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 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.

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§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 Action, 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 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 any proposed relief; and whether a hearing is requested.

(c) *Request for a hearing.* A hearing upon the issues raised by the complaint and answer may 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.

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§22.16 Motions.

(a) *General.* Motions shall be served as provided by §22.5(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. All motions, except those made orally on the record during a hearing, shall:

(1) Be in writing;

(2) State the grounds therefor, with particularity;

(3) Set forth the relief sought; and

(4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

(b) *Response to motions.* A party's response to any written motion must be filed within 15 days after service of such motion. The movant's reply to any written response must be filed within 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, an Administrative Law Judge) shall rule on all motions filed or made before an answer to the complaint is filed. Except as provided in §§22.29(c) and 22.51, an Administrative Law Judge shall rule on all motions filed or made after an answer is filed and before an initial decision becomes 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.

[64 FR 40176, July 23, 1999, as amended at 82 FR 2234, Jan. 9, 2017]

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§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 proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest 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 may seek resolution of all or part of the proceeding. 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.

(c) *Default order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or 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, and Permit Actions.* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 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). Any Permit Action ordered in the default order shall become effective without further proceedings on the date that the default order becomes final under §22.27 (c).

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§22.18 Quick resolution; settlement; alternative dispute resolution.

(a) *Quick resolution.* (1) A respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed. This paragraph (a) shall not apply to any complaint which seeks a compliance or corrective action order or Permit Action. In a proceeding subject to the public comment provisions of §22.45, this quick resolution is not available until 10 days after the close of the comment period.

(2) Any respondent who wishes to resolve a proceeding 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 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 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 contest the allegations 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 Action; and waives any right to contest the allegations and its right to appeal the proposed final 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) and (8). The parties shall forward the executed consent agreement and a proposed final order to the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board.

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

(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 this paragraph (d) 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 grants a motion for the appointment of a neutral, the Presiding Officer shall forward the motion to the Chief Administrative Law Judge, except in proceedings under subpart I of this part, in which the Presiding Officer shall forward the motion to the Regional Administrator. The Chief Administrative Law Judge or Regional Administrator, as appropriate, shall designate a qualified neutral.

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

(a) *Prehearing information exchange.* (1) In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in §22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify. Parties are not required to exchange information 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.

(2) Each party's prehearing information exchange shall contain:

(i) 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 (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

(3) If the proceeding is for the assessment of a penalty and complainant has already specified a proposed penalty, complainant shall explain in its prehearing information exchange how the proposed penalty was calculated in accordance with any criteria set forth in the Act, and the respondent shall explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated.

(4) If the proceeding is for the assessment of a penalty and complainant has not specified a proposed penalty, each party shall include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty. Within 15 days after respondent files its prehearing information exchange, complainant shall file a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in the Act.

(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 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 ensure that the record of the proceeding includes any stipulations, agreements, rulings or orders made during the conference.

(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 for purposes of settlement 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 reasonably 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. The Presiding Officer may issue a subpoena for discovery purposes only 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 §22.5(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 this paragraph (e) 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 any applicable law 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 exchanged information in response 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) *Failure to exchange information.* Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

(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(c).

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§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 a proceeding 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. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

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Subpart D—Hearing Procedures

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§22.21 Assignment of Presiding Officer; scheduling the hearing.

(a) *Assignment of Presiding Officer.* When an answer is filed, the Regional Hearing Clerk shall forward a copy of 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.* The Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact. The Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing not later than 30 days prior to the date set for the hearing. The Presiding Officer may require the attendance of witnesses or the production of

documentary evidence by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.

(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).

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§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 (28 U.S.C.) 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), (e) or (f) to all parties at least 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 paragraphs (c) and (d) of this section 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 party who has called 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.

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§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 the Presiding Officer denies a motion for admission into evidence, the party offering the information 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 information 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 information from evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

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§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.

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§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 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner.

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§22.26 Proposed findings, conclusions, and order.

After the hearing, any party may file proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a schedule for filing these documents and any reply briefs, but shall not require them before the last date for filing motions under §22.25 to conform the transcript to the actual testimony. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

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Subpart E—Initial Decision, Motion To Reopen a Hearing, and Motion To Set Aside a Default Order

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§22.27 Initial Decision.

(a) *Filing and contents.* After the period for filing 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, if appropriate, a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action. Upon receipt of an initial decision, the Regional Hearing Clerk 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. 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 Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become a final order 45 days after its service upon the parties and without further proceedings unless:

(1) A party moves to reopen the hearing;

(2) A party appeals the initial decision to the Environmental Appeals Board;

(3) A party moves to set aside a default order that constitutes an initial decision; or

(4) The Environmental Appeals Board elects to review the initial decision on its own initiative.

(d) *Exhaustion of administrative remedies.* 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 paragraph (c) of this section,

respondent waives its rights to judicial review. 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.

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§22.28 Motion to reopen a hearing or to set aside a default order.

(a) *Motion to reopen a hearing*—(1) *Filing and content.* A motion to reopen a hearing to take further evidence must be filed no later than 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 Headquarters or Regional Hearing Clerk, as appropriate. A copy of the motion shall be filed with the Clerk of the Board in the manner prescribed by §22.5(a)(1).

(2) *Disposition of motion to reopen a hearing.* Within 15 days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Headquarters or Regional Hearing Clerk, as appropriate, 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 timely filing of a motion to reopen a hearing shall automatically toll the running of the time periods for an initial decision becoming final under §22.27(c), for appeal under §22.30, and for the Environmental Appeals Board to elect to review the initial decision on its own initiative pursuant to §22.30(b). These time periods begin again in full when the Presiding Officer serves an order denying the motion to reopen the hearing or an amended decision. The Presiding Officer may summarily deny subsequent motions to reopen a hearing filed by the same party if the Presiding Officer determines that the motion was filed to delay the finality of the decision.

(b) *Motion to set aside default order*—(1) *Filing and content.* A motion to set aside a default order must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. The motion shall be made to the Presiding Officer and filed with the Headquarters or Regional Hearing Clerk, as appropriate. A copy of the motion shall be filed with the Clerk of the Board in the manner prescribed by §22.5(a)(1).

(2) *Effect of motion to set aside default.* The timely filing of a motion to set aside a default order automatically tolls the running of the time periods for an initial decision becoming final under §22.27(c), for appeal under §22.30(a), and for the Environmental Appeals Board to elect to review the initial decision on its own initiative pursuant to §22.30(b). These time periods begin again in full when the Presiding Officer serves an order denying the motion to set aside or an amended decision. The Presiding Officer may summarily deny subsequent motions to set aside a default order filed by the same party if the Presiding Officer determines that the motion was filed to delay the finality of the decision.

[82 FR 2235, Jan. 9, 2017]

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Subpart F—Appeals and Administrative Review

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§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 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the 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) *Interlocutory review.* If the Presiding Officer has recommended review and the Environmental Appeals Board determines that interlocutory review is inappropriate, or takes no action within 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 filed within 10 days of service of an order of the Presiding Officer refusing to recommend such order or ruling for interlocutory review.

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§22.30 Appeal from or review of initial decision.

(a) *Notice of appeal and appeal brief*—(1) *Filing an appeal*—(i) *Filing deadline and who may appeal.* Within 30 days after the initial decision is served, any party may file an appeal from any adverse order or ruling of the Presiding Officer.

(ii) *Filing requirements.* Appellant must file a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board as set forth in §22.5(a). One copy of any document filed with the Clerk of the Board shall also be served on the Headquarters or Regional Hearing Clerk, as appropriate. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants.

(iii) *Content.* 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 appropriate 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 specific citation or other appropriate reference to the record (*e.g.,* by including the document name and page number)), 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 any appellant includes attachments to its notice of appeal or appellate brief, the notice of appeal or appellate brief shall contain a table that provides the title of each appended document and assigns a label identifying where it may be found in the record.

(iv) *Multiple appeals.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal and accompanying appellate brief on any issue within 20 days after the date on which the first notice of appeal was served or within the time to appeal in paragraph (a)(1)(i) of this section, whichever period ends later.

(2) *Response brief.* Within 20 days of service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or non-party participant may file with the Environmental Appeals Board an original and one copy of a response brief responding to arguments raised by the appellant, together with specific citation or other appropriate reference to the record, initial decision, and opposing brief (*e.g.,* by including the document name and page number). Appellee shall simultaneously serve one copy of the response brief upon each party, non-party participant, and the Regional Hearing Clerk. Response briefs shall be limited to the scope of the appeal brief. If any responding party or non-party participant includes attachments to its response brief, the response brief shall contain a table that provides the title of each appended document and assigns a label identifying where it may be found in the record. Further briefs may be filed only with leave of the Environmental Appeals Board.

(3) *Length*—(i) *Briefs.* Unless otherwise ordered by the Environmental Appeals Board, appellate and response briefs may not exceed 14,000 words, and all other briefs may not exceed 7000 words. Filers may rely on the word-processing system used to determine the word count. As an alternative to this word limitation, filers may comply with a 30-page limit for appellate and response briefs, or a 15-page limit for replies. Headings, footnotes, and quotations count toward the word limitation. The table of contents, table of authorities, table of attachments (if any), statement requesting oral argument (if any), statement of compliance with the word limitation, and any attachments do not count toward the word or page-length limitation. The Environmental Appeals Board may exclude any appeal, response, or other brief that does not meet word or page-length limitations. Where a party can demonstrate a compelling and documented need to exceed such limitations, such party must seek advance leave of the Environmental Appeals Board to file a longer brief. Such requests are discouraged and will be granted only in unusual circumstances.

(ii) *Motions.* Unless otherwise ordered by the Environmental Appeals Board, motions and any responses or replies may not exceed 7000 words. Filers may rely on the word-processing system used to determine the word count. As an alternative to this word limitation, filers may comply with a 15-page limit. Headings, footnotes, and quotations count toward the word or page-length limitation. The Environmental Appeals Board may exclude any motion that does not meet word limitations. Where a party can demonstrate a compelling and documented need to exceed such limitations, such party must seek advance leave of the Environmental Appeals Board. Such requests are discouraged and will be granted only in unusual circumstances.

(b) *Review initiated by the Environmental Appeals Board.* Whenever the Environmental Appeals Board determines to review an initial decision on its own initiative, it shall issue an order notifying the parties and the Presiding Officer of its intent to review that decision. The Clerk of the Board shall serve the order upon the Regional Hearing Clerk, the Presiding Officer, and the parties within 45 days after the initial decision was served upon the parties. In that order or in a later order, the Environmental Appeals Board shall identify any issues to be briefed by the parties and establish a time schedule for 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, and to issues concerning subject matter jurisdiction. If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give the parties written notice of such determination to allow 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 in response to a request or on its own initiative, order oral argument on any or all issues in a proceeding. To request oral argument, a party must include in its substantive brief a statement explaining why oral argument is necessary. The Environmental Appeals Board may, by order, establish additional procedures governing any oral argument before the Environmental Appeals Board.

(e) *Motions on appeal*—(1) *General.* All motions made during the course of an appeal shall conform to §22.16 unless otherwise provided. In advance of filing a motion, parties must attempt to ascertain whether the other party(ies) concur(s) or object(s) to the motion and must indicate in the motion the attempt made and the response obtained.

(2) *Disposition of a motion for a procedural order.* The Environmental Appeals Board may act on a motion for a procedural order at any time without awaiting a response.

(3) *Timing on motions for extension of time.* Parties must file motions for extensions of time sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time and to provide the Environmental Appeals Board with a reasonable opportunity to issue an order.

(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 Permit Action. The Environmental Appeals Board may remand the case to the Presiding Officer for further action.

[64 FR 40176, July 23, 1999, as amended at 68 FR 2204, Jan. 16, 2003; 69 FR 77639, Dec. 28, 2004; 79 FR 65901, Nov. 6, 2014; 80 FR 13252, Mar. 13, 2015; 82 FR 2235, Jan. 9, 2017]

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Subpart G—Final Order

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§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 only those causes of action alleged in the complaint, or for proceedings commenced pursuant to §22.13(b), alleged in the consent agreement. 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 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 30 days after the effective date of the final order unless otherwise ordered. Payment shall be made by sending a cashier's check or certified check to the payee specified in the complaint, unless otherwise instructed by the complainant. The check shall note the case title and docket number. Respondent shall serve copies of the check or other instrument of payment 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 a Permit Action, shall become effective and enforceable without further proceedings on the effective date of the final order unless otherwise ordered.

(e) *Final orders to Federal agencies on appeal.* (1) A final order of the Environmental Appeals Board issued pursuant to §22.30 to a department, agency, or instrumentality of the United States shall become effective 30 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 30 days of service of the final order. If a timely request is made, a decision by the Administrator shall become the final order.

(2) A motion for reconsideration pursuant to §22.32 shall not toll the 30-day period described in paragraph (e)(1) of this section unless specifically so ordered by the Environmental Appeals Board.

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§22.32 Motion to reconsider a final order.

Motions to reconsider a final order issued pursuant to §22.30 shall be filed within 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 §22.4(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.

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Subpart H—Supplemental Rules

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§22.33 [Reserved]

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§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 §§22.1 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)), and a determination of nonconforming engines, vehicles or equipment under sections 207(c) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7541(c) and 7547(d)). Where inconsistencies exist between this section and §§22.1 through 22.32, this section shall apply.

(b) *Issuance of notice.* Prior to the issuance of a final order assessing a civil penalty or a final determination of nonconforming engines, vehicles or equipment, the person to whom the order or determination is to be issued shall be given written notice of the proposed issuance of the order or determination. Service of a complaint or a consent agreement and final order pursuant to §22.13 satisfies these notice requirements.

[81 FR 73971, Oct. 25, 2016]

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§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 §§22.1 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. 136l(a)). Where inconsistencies exist between this section and §§22.1 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 EPA office listed at 40 CFR 1.7 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.

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§22.36 [Reserved]

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

(a) *Scope.* This section shall apply, in conjunction with §§22.1 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 §§22.1 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 30 days after the order is served, the respondent requests a hearing pursuant to §22.15.

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§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 §§22.1 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 §§22.1 through 22.32, this section shall apply.

(b) *Consultation with States.* For proceedings pursuant to section 309(g), the complainant shall provide the State agency with the most direct authority over the matters at issue in the case an opportunity to consult with the complainant. Complainant

shall notify the State agency within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to §22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty.

(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, 33 U.S.C. 1369(b)(1), 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).

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§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 §§22.1 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(b) of CERCLA, 42 U.S.C. 9609(b), 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(a)(4) of CERCLA, 42 U.S.C. 9609(a)(4), 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 served on the parties.

(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.

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§22.40 [Reserved]

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§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 §§22.1 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 §§22.1 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.

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§22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§22.1 through 22.32, in administrative proceedings to assess a civil penalty under section 1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. 300g-3(g)(3)(B). Where inconsistencies exist between this section and §§22.1 through 22.32, this section shall apply.

(b) *Choice of forum.* A complaint which specifies that subpart I of this part applies shall also state that respondent has a right to elect a hearing on the record in accordance with 5 U.S.C. 554, and that respondent waives this right unless it requests in its answer a hearing on the record in accordance with 5 U.S.C. 554. Upon such request, the Regional Hearing Clerk shall recaption the documents in the record as necessary, and notify the parties of the changes.

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§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 §§22.1 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, 42 U.S.C. 300j-6(b). Where inconsistencies exist between this section and §§22.1 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 30 days after it has been served on the parties.

(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 30 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 instruction that persons seeking judicial review shall provide copies of any appeal to the persons described in 40 CFR 135.11(a).

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§22.44 Supplemental rules of practice governing the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act.

(a) *Scope of this subpart.* The supplemental rules of practice in this subpart shall also apply in conjunction with the Consolidated Rules of Practice in this part and with the administrative proceedings for the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act. Notwithstanding the Consolidated Rules of Practice, these supplemental rules shall govern with respect to the termination of such permits.

(b) In any proceeding to terminate a permit for cause under §122.64 or §270.43 of this chapter during the term of the permit:

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

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

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

[65 FR 30904, May 15, 2000]

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§22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§22.1 through 22.32, in administrative proceedings for the assessment of any civil penalty under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6)(B)(ii)), 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 §§22.1 through 22.32, this section shall apply.

(b) *Public notice*—(1) *General.* Complainant shall notify the public before assessing a civil penalty. Such notice shall be provided within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to §22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty. The notice period begins upon first publication of notice.

(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 directly to any person who requests such notice. The notice shall include:

(i) The docket number of the proceeding;

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

(v) A notice that persons shall submit comments 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 in writing within the public notice period under paragraph (b)(1) of this section. The person must provide his name, complete mailing address, and state that he wishes to participate in the proceeding.

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

(iv) A commenter wishing to present evidence at a hearing on the merits shall notify, in writing, the Presiding Officer and the parties of its 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 under §22.18, or commenced under §22.13(b), until 10 days after the close of the comment period provided in paragraph (c)(1) of this section.

(4) *Petition to set aside a consent agreement and proposed final 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 any consent agreement between the parties and the proposed final order.

(ii) Within 30 days of receipt of the consent agreement and proposed final order a commenter may petition the Regional Administrator (or, for cases commenced at EPA Headquarters, the Environmental Appeals Board), to set aside the consent agreement and proposed final order on the basis that material evidence was not considered. Copies of the petition shall be served on the parties, but shall not be sent to the Regional Hearing Clerk or the Presiding Officer.

(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 consent agreement and proposed final 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 Environmental Appeals Board 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 proposed final order;

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

(C) Whether a resolution of the proceeding 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 consent agreement and proposed final 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 proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial. The Petition Officer shall:

(A) File the order with the Regional Hearing Clerk;

(B) Serve copies of the order on the parties and the commenter; and

(C) Provide public notice of the order.

(viii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Regional Administrator may issue the proposed final order, which shall become final 30 days after both the order denying the petition and a properly signed consent agreement 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 final order is denied, the final order shall become effective 30 days after such denial has been filed with the Regional Hearing Clerk.

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§§22.46-22.49 [Reserved]

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

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§22.50 Scope of this subpart.

(a) *Scope.* This subpart applies to all adjudicatory proceedings for:

(1) The assessment of a penalty under sections 309(g)(2)(A) and 311(b)(6)(B)(i) of the Clean Water Act (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)).

(2) The assessment of a penalty under sections 1414(g)(3)(B) and 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300g-3(g)(3)(B) and 300h-2(c)), except where a respondent in a proceeding under section 1414(g)(3)(B) requests in its answer a hearing on the record in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 554.

(b) *Relationship to other provisions.* Sections 22.1 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. Where inconsistencies exist between this subpart and subparts A through G of this part, this subpart shall apply. Where inconsistencies exist between this subpart and subpart H of this part, subpart H shall apply.

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§22.51 Presiding Officer.

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

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§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.

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