

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Region 2

In the matter of:

Dimmid, Inc.,

Respondent.

Proceeding Under Section 16(a) of the Toxic  
Substances Control Act, as amended, 15  
U.S.C. § 2615(a).

**COMPLAINT AND NOTICE OF  
OPPORTUNITY FOR HEARING**

Docket No. TSCA-02-2023-9226

**COMPLAINT**

Complainant, on behalf of the Administrator of the United States Environmental Protection Agency (“EPA” or “Agency”), by and through her attorneys, hereby alleges as and for her complaint against Respondent:

**Jurisdiction**

1. This administrative proceeding is commenced pursuant to the provisions of Section 16(a) of the Toxic Substances Control Act, as amended (the “Act” or “TSCA”), 15 U.S.C. § 2615(a), for the assessment of a civil penalty for Respondent’s failure to have complied with requirements mandated pursuant to TSCA.

2. This tribunal is vested with jurisdiction over this proceeding pursuant to Section 16(a)(2) of TSCA, 15 U.S.C. § 2615(a)(2), and 40 C.F.R. § 22.1(a)(5).

3. This “COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING” (“Complaint”) constitutes the written notice required by Section 16(a)(2) of TSCA, 15 U.S.C. § 2615(a)(2), for the assessment of a civil penalty for any violation of Section 15 of TSCA, 15 U.S.C. § 2614.

4. Complainant in this proceeding is the Director of the Enforcement and Compliance Assurance Division of EPA, Region 2.

5. Complainant has been duly delegated the authority to institute this proceeding.

**The Toxic Substances Control Act, General Provisions**

6. Congress enacted the Toxic Substances Control Act in 1976 after finding, in part,

that “human beings and the environment are being exposed each year to a large number of chemical substances and mixtures,” in order that “adequate authority should exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment ... .” 15 U.S.C. § 2601(a)(1); 15 U.S.C. § 2601(b)(2), respectively.

7. Section 15(1) of TSCA, 15 U.S.C. § 2614(1), states, in part, that “[i]t shall be unlawful for any person to...fail or refuse to comply with any requirement of this subchapter [15 U.S.C. §§ 2601-2629] or any rule promulgated...under this subchapter.”

8. Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B), states, in part, that “[i]t shall be unlawful for any person to... fail or refuse to...submit reports, notices or other information...as required by this chapter [Chapter 53, 15 U.S.C. §§ 2601 to 2692] or a rule thereunder....”

9. Pursuant to the authority Congress granted the Agency in TSCA, EPA promulgated the following rules codified at each of these parts of the Code of Federal Regulations: (a) 40 C.F.R. Part 711, “TSCA Chemical Data Reporting Requirements,” promulgated under authority of Section 8(a) of TSCA, 15 U.S.C. § 2607(a); (b) 40 C.F.R. Part 720, “Pre-Manufacture Notification,” promulgated under authority of Sections 5, 8 and 14 of TSCA, 15 U.S.C. §§ 2604, 2607 and 2613, respectively; and (c) 40 C.F.R. Part 751, “Regulation of Certain Chemical Substances and Mixtures Under Section 6 of the Toxic Substances Control Act,” promulgated under authority of Sections 6 and 26(l)(4) of TSCA, 15 U.S.C. §§ 2605 and 2625(l)(4), respectively.

10. Pursuant to Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), any person who violates a provision of, *inter alia*, Section 15 of TSCA, 15 U.S.C. § 2614, shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation.

11. The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act (Section 701 of Pub.L. 114-74), 28 U.S.C. § 2461, in conjunction with the implementing regulations codified at 40 C.F.R. Part 19, increased, *inter alia*, the maximum statutory penalty EPA might obtain pursuant to Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), to \$46,989 for any violation of a provision under Section 15 of TSCA, 15 U.S.C. § 2614, provided such violation occurred after November 2, 2015 and that the penalty for such violation was assessed on or after January 6, 2023 88 *Fed. Reg.* 986 (January 6, 2023).

12. In relevant part, Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), states that “[e]ach day a violation of [Section 15 of TSCA, 15 U.S.C. § 2614] continues shall, for purposes of [Section 16(a) of TSCA, 15 U.S.C. § 2615(a)], constitute a separate violation of Section 2614 [15 U.S.C. § 2614] ... .”

13. Sub-paragraph (2)(A) of Section 16(a), 15 U.S.C. § 2615(a)(2)(A), authorizes the commencement of a proceeding for the assessment of penalty sought pursuant to Section 16(a).

**Respondent's Identity and Operations, Generally**

14. Respondent is Dimmid, Inc.
15. For all times relevant to the matters alleged below (specifically including the entirety of each of calendar years 2016, 2017, 2018, 2019 and 2020), Respondent has been, and is presently, a corporation existing under the laws of the State of New York.
16. For all times relevant to the matters alleged below (specifically including the entirety of each of calendar years 2016, 2017, 2018, 2019 and 2020), Respondent has been, and is presently, a "person" within the meaning of 40 C.F.R. § 711.3.
17. For a period that includes the entirety of calendar years 2016, 2017, 2018, 2019 and 2020, Respondent has owned and controlled, and at present owns and controls, an office facility, the address of which is 4635 Bedford Avenue in Brooklyn, New York 11235 ("Respondent's facility").
18. As more specifically set forth below, Respondent from time to time imported into the United States dichloromethane (also known as methylene chloride) [Chemical Abstract Services Registry Number ("CASRN") 75-09-2], trichloroethylene [CASRN 79-01-6] and a chemical commercially identified as "Clerane 180."
19. Each of dichloromethane, trichloroethylene and Clerane 180 constitutes a "chemical substance" (as that term is defined in Section 3(2) of TSCA, 15 U.S.C. § 2602(2)).
20. For each of the importations of dichloromethane, trichloroethylene and Clerane 180, Respondent has been listed on official United States custom records (*i.e.*, official United States Customs and Border Protection-authorized electronic data interchange system containing information concerning importations into the United States), as: (a) the importer of record, and (b) separately, as the consignee of record.
21. The transactions to secure the importations of dichloromethane, trichloroethylene and Clerane 180, including the legal and logistical arrangements to ensure the importations occur, were made and/or finalized at Respondent's facility.
22. As a consequence of Respondent's aforementioned importations, Respondent "manufactures" (as that term is defined in Section 3(7) of TSCA, 15 U.S.C. § 2602(7), and 40 C.F.R. § 711.3) "chemical substances" (as that term is defined in Section 3(2) of TSCA, 15 U.S.C. § 2602(2)).<sup>1</sup>

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<sup>1</sup> Terms that are herein defined by their statutory and/or regulatory definitions are subsequently used as so defined.

23. Beginning February 9, 2021, a duly designated representative of EPA (Jesse Miller, Ph.D.) from time to time sent e-mails to Respondent seeking information concerning its importation activities, and from time to time Respondent sent to EPA responsive e-mails.

**COUNT 1: FAILURE TIMELY TO FILE 40 C.F.R. PART 711 REPORT**

24. Complainant repeats and realleges each allegation contained in Paragraphs “1” through “23” with the same force and effect as if fully set forth herein.

25. Under the authority of Section 8 of TSCA, 15 U.S.C. § 2607, EPA promulgated regulations that govern the reporting of chemical data to the Agency, the regulations codified at 40 C.F.R. Part 711.

26. The regulation codified at 40 C.F.R. § 711.5, requires reporting to EPA for “[a]ny chemical substance that is in the Master Inventory at the beginning of a submission period described in § 711.20, unless the chemical substance is specifically excluded by [40 C.F.R.] § 711.6.”

27. The term “Master Inventory File” is defined, in part, at 40 C.F.R. § 711.3, as “EPA’s comprehensive list of chemical substances which constitutes the TSCA Inventory compiled under TSCA section 8(b) [15 U.S.C. § 2607(b)].”

28. The regulation codified at 40 C.F.R. § 711.8(a) requires reporting to EPA by “[a]ny person who manufactured (including imported) for commercial purposes 25,000 lb (11,340 kg) or more of a chemical substance described in [40 C.F.R.] § 711.5 at any single site owned or controlled by that person during any calendar year since the last principal reporting year.”

29. The regulation codified at 40 C.F.R. § 711.8(b) states, in pertinent part, “Any person who manufactured (including imported) for commercial purposes any chemical substance that is the subject of a rule proposed or promulgated under TSCA section...6...is subject to reporting as described in 40 C.F.R. § 711.8(a), except that the applicable production volume threshold is 2,500 lb (1,134 kg).”

30. The “last principal reporting year” prior to 2020 was, within the meaning of 40 C.F.R. § 711.8, 2015 (*i.e.*, the previously required quadrennial report was to have been filed in 2016), making 2016, 2017, 2018, and 2019 the years for which reporting was required in the most recent past quadrennial reporting period.

31. Pursuant to 40 C.F.R. § 711.9, while a person who qualifies as a “small manufacturer” (as defined in 40 C.F.R. § 704.3) is, pursuant to 40 C.F.R. § 711.9, excluded from the reporting requirements of 40 C.F.R. Part 711, that regulation further provides, in pertinent part, that “a person who qualifies as a small manufacturer...is subject to this part with respect to any chemical substance that is the subject of a rule proposed or promulgated under TSCA

section...6....”

32. For the period including the time from June 1, 2020 through January 29, 2021, Respondent qualified as a “small manufacturer” within the meaning of 40 C.F.R. § 711.9.

33. Pursuant to 40 C.F.R. § 711.15(a), any person obligated to report the importation of chemical substances under 40 C.F.R. § 711.8 was required to submit the necessary information to EPA using the Chemical Data Report (“CDR”) electronic submittal format.

34. Between May 5, 2016 and October 17, 2018, Respondent imported into the United States eleven (11) shipments (on ten [10] separate days) of dichloromethane, more particularly as follows: (a) in five separate shipments in calendar year 2016; (b) in two separate shipments in calendar year 2017; and (c) in four separate shipments in calendar year 2018.

35. Between January 7, 2016 and February 13, 2019, Respondent imported into the United States nineteen (19) shipments of trichloroethylene, more particularly as follows: (a) in eight separate shipments in calendar year 2016; (b) in five separate shipments in calendar year 2017; (c) in five separate shipments in calendar year 2018; and (d) in one shipment in calendar year 2019.

36. For the aforementioned importations of dichloromethane and trichloroethylene, Respondent imported each in a volume greater than 2,500 pounds in at least one of the four calendar years (2016, 2017, 2018 and 2019).

37. The aforementioned importations of dichloromethane and trichloroethylene were for commercial purposes.

38. Each of dichloromethane and trichloroethylene was on EPA’s Master Inventory File as of June 1, 2020.

39. For a period of time including (but not limited to) June 1, 2020, dichloromethane was subject to a TSCA Section 6 rule (40 C.F.R. Part 751, Subpart B).

40. For a period of time including (but not limited to) June 1, 2020, trichloroethylene was subject to a proposed rule under TSCA Section 6 (81 *Fed. Reg.* 91592) [December 16, 2016].

41. The period during which the required reporting for the four calendar years (2016, 2017, 2018 and 2019) was to have occurred was June 1, 2020 through January 29, 2021 (40 C.F.R. § 711.20; 85 *Fed. Reg.* 75235 (November 25, 2020)).

42. Because dichloromethane was subject to a TSCA Section 6 rule (40 C.F.R. Part 751, Subpart B), as alleged above, and because trichloroethylene was subject to a proposed rule under TSCA Section 6 (81 *Fed. Reg.* 91592) [December 16, 2016], as alleged above, Respondent

was not excluded from the reporting requirement pursuant to 40 C.F.R. § 711.9.

43. Because Respondent was not, for the reasons set forth above (Paragraphs 39 and 40, above) excluded from the 40 C.F.R. Part 711 reporting requirement pursuant to 40 C.F.R. § 711.9, Respondent was required during the June 1, 2020 through January 29, 2021 period to file a CDR for its importation of dichloromethane and trichloroethylene for any of the four calendar years (2016 through 2019) during which its importation of either exceeded the regulatorily-prescribed 2,500-pound reporting threshold.

44. Respondent did not file a CDR for either dichloromethane or trichloroethylene during the prescribed June 1, 2020 through January 29, 2021 reporting period.

45. As of March 15, 2023, Respondent had not filed a CDR for either dichloromethane or trichloroethylene for its importation of these two chemical substances during calendar years 2016 through 2019.

46. Neither dichloromethane nor trichloroethylene was excluded pursuant to 40 C.F.R. § 711.6 from the CDR requirement under 40 C.F.R. Part 711.

47. Respondent's failure to report its importation of dichloromethane for any calendar year (2016 through 2019) in which its importation of such chemical substance exceeded the 2,500-pound threshold constitutes a failure or refusal to comply with 40 C.F.R. § 711.5, and thereby constitutes an unlawful act pursuant to, and thus a violation of, Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B).

48. Respondent's failure to report its importation of trichloroethylene for any calendar year (2016 through 2019) in which its importation of such chemical substance exceeded the 2,500-pound threshold constitutes a failure or refusal to comply with 40 C.F.R. § 711.5, and thereby constitutes an unlawful act pursuant to, and thus a violation of, Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B).

49. Respondent's failures to have reported its 2016-2019 importations of each of dichloromethane and trichloroethylene during the June 1, 2020 through January 29, 2021 reporting period subjects it to liability to the United States pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a).

## **COUNT 2: FAILURE TO PROVIDE REQUIRED "DOWNSTREAM" NOTIFICATION**

50. Complainant repeats and realleges each allegation contained in Paragraphs "1" through "23" with the same force and effect as if fully set forth herein.

51. The regulation codified at 40 C.F.R. § 751.107 provides, in relevant part, that "[e]ach person who manufactures [which includes imports] ... methylene chloride for any use after August 26, 2019, must, prior to or concurrent with the shipment, notify companies to whom

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methylene chloride is shipped, in writing, of the restrictions described in this subpart.”

52. Forty C.F.R. § 751.107 further prescribes the specific notification that must be provided and that it must be provided in a “Safety Data Sheet” (“SDS”) [formerly known as a “Material Safety Data Sheet” or “MSDS”].

53. The prescribed notification requirement that must be included in the text of the SDS states, in relevant part, that the methylene chloride “is not and cannot be distributed in commerce...or processed... for consumer paint or coating removal.”

54. An April 30, 2021 e-mail from EPA (Jesse Miller, Ph.D.) to Respondent requested information, *inter alia*, concerning Respondent’s distribution of methylene chloride since August 26, 2019.

55. EPA’s April 30, 2021 e-mail included a request for “copies of the...SDS supplied to each company to whom methylene chloride was shipped.”

56. In its May 18, 2021 e-mail response (sent by Leo Vernovsky, identified as Dimmid’s President) to EPA’s April 30<sup>th</sup> e-mail, Respondent admitted having “sold out one container with 19.98 MT [metric tons, *i.e.*, 19,980 kilograms or 43,956 lbs.] ... [of methylene chloride] to another company” since August 26, 2019.

57. Respondent’s May 18<sup>th</sup> e-mail included an attached SDS (therein identified as an MSDS) for the sale of the methylene chloride that had been provided to the “[]other company.”

58. The SDS Respondent provided to the company to which it sold 19.98 metric tons of methylene chloride lacked the prescribed notification provisions specified in and required by 40 C.F.R. § 751.107.

59. Respondent’s failure to provide to the company to which it sold the 19.98 metric tons of methylene chloride an SDS containing the notification provisions specified in and required by 40 C.F.R. § 751.107 constitutes a failure or refusal to comply with said regulation, and thereby constitutes an unlawful act pursuant to, and thus a violation of, Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B).

60. Respondent’s failure to have provided an SDS with the prescribed 40 C.F.R. § 751.107 notification subjects Respondent to liability to the United States pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a).

### **COUNT 3: PRE-MANUFACTURE NOTIFICATION VIOLATIONS**

61. Complainant repeats and realleges each allegation contained in Paragraphs “1” through “23” with the same force and effect as if fully set forth herein.

62. The regulation codified at 40 C.F.R. § 720.22(b)(1) provides that “[a]ny person who intends to import a new chemical substance into the United States for commercial purposes must submit a notice, unless the substance is excluded under [40 C.F.R.] § 720.30 or unless the substance is imported as part of an article.”

63. A “new chemical substance” is defined pursuant to 40 C.F.R. § 720.3(v) as “any chemical substance which is not included on the [TSCA Master] Inventory” (the TSCA Inventory EPA has compiled under TSCA Section 8(b), 15 U.S.C. § 2607(b)).

64. For purposes of 40 C.F.R. Part 720, a “chemical substance” is defined in 40 C.F.R. § 720.3(e).

65. Respondent, in calendar year 2018, imported into the United States Clerane 180 in ten (10) separate shipments occurring on eight separate days between April 5, 2018 and May 18, 2018.

66. Each of the ten (10) imported shipments of Clerane 180 was in excess of 7,500 pounds.

67. Respondent’s May 18, 2021 e-mail included an SDS for Clerane 180.

68. The SDS provided by Respondent identified Clerane 180 by the chemical name “hydrocarbons, C10-C13, n-alkanes, isoalkanes, cyclics, [less than] 2% aromatics” with a “chemical nature” of “[a] complex and variable combination of paraffinic and cyclic hydrocarbons having a carbon number range predominantly of C10 to C13 and boiling in the range of approximately 160 °C to 245 °C” and a REACH registration number of 01-2119457273-39.

69. The European Chemicals Agency (ECHA) has identified hydrocarbons, C10-C13, n-alkanes, isoalkanes, cyclics, [less than] 2% aromatics with the European Community (EC) number 918-481-9.

70. At no time during Respondent’s 2018 importations of Clerane 180 was it listed on the TSCA Inventory.

71. Respondent imported Clerane 180 for commercial purposes.

72. Clerane 180 was not excluded from the 40 C.F.R. § 720.22(b)(1) notice requirement under 40 C.F.R. § 720.30, nor was it excluded therefrom because it was not imported as an “article” (as defined in 40 C.F.R. § 720.3(b)).

73. Clerane 180 constitutes a new chemical substance.

74. Respondent was required to file a 40 C.F.R. § 720.22 pre-manufacture notice

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prior to its importation of Clerane 180.

75. Respondent never filed a pre-manufacture notice for its importation of Clerane 180.

76. Respondent's failure to have filed a pre-manufacture notice for its importation of Clerane 180 constitutes a failure or refusal to comply with 40 C.F.R. § 720.22, and thereby an unlawful act pursuant to, and thus a violation of, Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B).

77. Respondent's failure to have filed a pre-manufacture notice for its importation of Clerane 180 subjects Respondent to liability to the United States pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a).

#### **COUNT 4: TSCA CERTIFICATION VIOLATIONS**

78. Complainant repeats and realleges each allegation contained in Paragraphs "1" through "23" and "65" through "77" with the same force and effect as if fully set forth herein.

79. Section 13(a) of TSCA, 15 U.S.C. § 2612(a), provides, in relevant part, "The Secretary of the Treasury shall refuse entry into the customs territory of the United States...of any chemical substance, mixture, or article containing a chemical substance or mixture offered for such entry if [ ] it fails to comply with any rule in effect under this chapter [Chapter 53, 15 U.S.C. §§ 2601 to 2692] .... "

80. Section 13(b) of TSCA, 15 U.S.C. § 2612(b), states, "The Secretary of the Treasury, after consultation with the [EPA] Administrator, shall issue rules for the administration of subsection (a) of this section."

81. The *Federal Register* notice of December 27, 2016, issued by U.S. Customs and Border Protection, the Department of Homeland Security and the Department of the Treasury, "amend[ed] the U.S. Customs and Border Protection (CBP) regulations regarding the requirement to file a Toxic Substances Control Act (TSCA) certification when importing into the customs territory of the United States chemicals in bulk form or as part of mixtures and articles containing a chemical or mixture." 81 *Fed. Reg.* 94980.

82. The aforementioned amendment "was prepared in consultation with EPA, the agency with primary responsibility for implementing TSCA." 81 *Fed. Reg.* 94980 (December 27, 2016).

83. The regulations codified at 19 C.F.R. §§ 12.118 through 12.127 have been issued under authority of, in part, TSCA, 15 U.S.C. § 2601 *et seq.*

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84. The regulation codified at 19 C.F.R. § 12.118 provides, in pertinent part, that TSCA “governs the importation into the customs territory of the United States of a chemical substance in bulk form.... Such importations are also governed by these regulations which are issued under the authority of section 13(b) of TSCA (15 U.S.C. 2612(b)).”

85. The regulation codified at 19 C.F.R. § 12.119 provides, in pertinent part, the provisions set forth in 19 C.F.R. §§ 12.120 through 12.127 “apply to the importation into the customs territory of the United States of...[c]hemical substances in bulk form....”

86. Pursuant to 19 C.F.R. § 12.120(b), the phrasing “TSCA chemical substance in bulk form” is defined to mean “a chemical substance as set forth in section 3(2) of TSCA, (15 U.S.C. 2602(2)) (other than as part of an article) in containers used for purposes of transportation or containment, provided that the chemical substance is intended to be removed from the container and has an end use or commercial purpose separate from the container.”

87. Pursuant to 19 C.F.R. § 12.120(d), the phrasing “TSCA-excluded chemical” is defined to mean “any chemicals that are excluded from the definition of TSCA chemical substance by section 3(2)(B) (ii)-(vi) of TSCA, (15 U.S.C. 2602(2) (B) (ii)-(vi)) (other than as part of a mixture), regardless of form.”

88. The regulation codified at 19 C.F.R. § 12.121(a)(1) provides, “The importer or the authorized agent of such an importer of a TSCA chemical substance in bulk form or as part of a mixture, must certify in writing or electronically that the chemical shipment complies with all applicable rules and orders under TSCA by filing with CBP the following statement”:

I certify that all chemical substances in this shipment comply with all applicable rules or orders under TSCA and that I am not offering any chemical substance for entry in violation of TSCA or any applicable rule or order thereunder.

89. The regulation codified at 19 C.F.R. § 12.121(a)(2) provides, “The importer or the authorized agent of such an importer of any TSCA-excluded chemical not clearly identified as such must certify in writing or electronically that the chemical shipment is not subject to TSCA by filing with CBP the following statement”: “I certify that all chemicals in this shipment are not subject to TSCA.”

90. Each of the ten (10) shipments of the Clerane 180 was imported into, within the meaning of 19 C.F.R. § 12.121, the “customs territory of the United States.”

91. For each of the ten (10) imported shipments of Clerane 180, Respondent was, within the meaning of 19 C.F.R. § 12.121, the: (a) “importer”; or (b) “authorized agent of such importer.”

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92. The Clerane 180 in each of the ten (10) imported shipments of said chemical substance constituted “a TSCA chemical substance in bulk form” within the meaning of 19 C.F.R. § 12.121(a)(1).

93. At no time during the course of the ten (10) imported shipments of the Clerane 180 did it constitute “a TSCA-excluded chemical” within the meaning of 19 C.F.R. § 12.121(a)(1).

94. For the ten (10) imported shipments of Clerane 180 between April 5, 2018 and May 18, 2018, Respondent certified that each such shipment complies with all applicable TSCA provisions (including rules promulgated under TSCA) and, further, that it was “not offering any chemical substance for entry in violation of TSCA or any applicable rule or order thereunder.”

95. Each of the ten (10) imported shipments of the Clerane 180 failed to comply with all applicable TSCA provisions (including rules promulgated thereunder).

96. Each of the ten (10) imported shipments of Clerane 180 constituted Respondent “offering [a] chemical substance for entry in violation of” a rule promulgated under TSCA.

97. Each of the ten (10) certifications Respondent made was incorrect inasmuch as the imported chemical substance (the Clerane 180) was subject to the pre-manufacture notification requirement, a requirement with which Respondent had failed to comply (as alleged in Paragraphs “61” through “77,” above).

98. For each of the ten (10) importations of Clerane 180, Respondent failed to truthfully and accurately comply with the certification requirement set forth in 19 C.F.R. § 12.121(a)(1).

99. Nineteen C.F.R. § 12.121 constitutes a rule under Chapter 53, 15 U.S.C. §§ 2601 to 2692.

100. Each such failure to have truthfully and accurately complied with the certification requirement set forth in 19 C.F.R. § 12.121(a)(1) regarding Respondent’s importations of Clerane 180 constitutes a failure or refusal to comply with said regulation, and thereby constitutes an unlawful act pursuant to, and thus a violation of, Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B).

101. For each such failure to comply truthfully and accurately with the 19 C.F.R. § 12.121(a)(1) certification requirement, Respondent is subject to liability to the United States pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a).

### **PROPOSED CIVIL PENALTY**

For purposes of determining the amount of any penalty to be assessed, Section 16(a)(2)(B) of

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TSCA, 15 U.S.C. § 2615(a)(2)(B), provides, “In determining the amount of a civil penalty, the Administrator [of EPA] shall take into account the nature, circumstances, extent, and gravity of the violation or violations, and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.” This Complaint does not specify a proposed penalty. EPA will do so pursuant to 40 C.F.R. § 22.19(a)(4), which provides:

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 fifteen (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 [TSCA].

At such time as it proposes a specified penalty for the violations alleged in this Complaint, EPA will consider the above-listed statutory factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), and such consideration will include any credible documentary information Respondent has introduced into the litigation or has otherwise provided EPA for settlement purposes. In developing a specified penalty for each of the set of violations alleged in this Complaint, EPA will utilize the guidance set forth in EPA’s Enforcement Response Policy for Reporting and Recordkeeping Rules and Requirements for TSCA Sections 8, 12 and 13 (revised March 31, 1999 and effective June 1, 1999) (hereinafter the “TSCA Section 8 ERP”) and the TSCA Section 5 Enforcement Response Policy, as amended (“TSCA Section 5 ERP”). These policies are available upon request to EPA or may be obtained from the Internet, at [https://www.epa.gov/sites/production/files/documents/erp8\\_12r.pdf](https://www.epa.gov/sites/production/files/documents/erp8_12r.pdf).

Each of EPA’s penalty policy guidance documents (each denominated an “Enforcement Response Policy”) provides guidance to effect rational, consistent, and equitable calculation methodologies for applying the statutory penalty criteria (enumerated above) to particular cases.

As set forth above in Paragraphs 10 and 11 of the allegations, above, at the time of TSCA’s passage in 1976, \$25,000 represented the maximum amount per violation EPA could seek and obtain for any violation of Section 15 of TSCA, 15 U.S.C. § 2614; that amount has been increased to \$46,989 for any such violation occurring after November 2, 2015 and for which a penalty has been assessed after January 6, 2023. 88 *Fed. Reg.* 986 (January 6, 2023). Accordingly, this \$46,989 amount constitutes the maximum penalty authorized under the Inflation Adjustment Act for each of the aforementioned alleged violations. *See* 40 C.F.R. Part 19.

Complainant thus sets forth the following:

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**Count 1: TSCA Section 8(a): Failure to Submit Chemical Data Report for Two Reportable Chemical Substances**

**Requirement:** The applicable requirements regarding the relevant provisions have been alleged above (40 C.F.R. §§ 711.5; 711.8(a); 711.8(b); 711.15(a); and 711.20 together with 85 *Fed. Reg.* 75235 (November 25, 2020)).

**Violation:** Respondent failed to file a 2020 CDR within the prescribed reporting period (June 1, 2020 through January 29, 2021) for two chemical substances (dichloromethane and trichloroethylene) that are subject to rules promulgated or proposed pursuant to Section 6 of TSCA (15 U.S.C. § 2605) and that were on EPA's Master Inventory File on June 1, 2020 (as of March 15, 2023, Respondent has not filed a 2020 CDR); each such chemical substance had been imported in excess of 2,500 pounds in at least one of the four pertinent calendar years for this reporting cycle (2016, 2017, 2018 and/or 2019).

**Number of Violations:** Two violations. One violation per chemical.

**Severity of Violation:** Respondent's failure to comply with the requirement thwarts EPA's ability properly and comprehensively to track chemical substances in commerce, a central mission of the Agency.

**Statutory Authority for Penalty:** 15 U.S.C. §§ 2614, 2615(a)(1).

**Count 2: TSCA Section 6: Failure to Include Appropriate Downstream Notification**

**Requirement:** The applicable requirement is set forth in 40 C.F.R. § 751.107 as to what specific notification language must be included in the SDS sent prior to or with each shipment.

**Violation:** Respondent imported one shipment of methylene chloride after August 26, 2019 and then sent the shipment to a company without the accompanying SDS including the text of the notification required by 40 C.F.R. § 751.107.

**Number of Violations:** One violation.

**Severity of Violation:** Respondent's failure to comply with the requirement thwarts EPA's efforts to ensure the safe, lawful and proper use of chemical substances.

**Statutory Authority for Penalty:** 15 U.S.C. §§ 2614, 2615(a)(1).

**Count 3: Pre-Manufacture Notification Violations for the Importation of Clerane 180**

**Requirement:** 40 C.F.R. § 720.22(b)(1).

**Violation:** Respondent imported into the United States a new chemical substance (ten (10)

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shipments on eight separate days) without having filed the required pre-manufacture notification.

**Number of Violations:** Eight violations. One violation per day of import.

**Severity of Violation:** Respondent's failure to comply with the requirement thwarts EPA's ability properly and comprehensively to track chemical substances in commerce, a central mission of the Agency.

**Statutory Authority for Penalty:** 15 U.S.C. §§ 2614, 2615(a)(1).

**Count 4: Inaccurate and incorrect TSCA certifications for imported new chemical substance**

**Requirement:** 19 C.F.R. § 12.121(a)(1)

**Violation:** Respondent provided incorrect and inaccurate certifications for its ten (10) importations (on eight separate days) of Clerane 180.

**Number of Violations:** Eight violations. One violation per day of import.

**Severity of Violation:** Respondent's failure to comply with the requirement thwarts EPA's ability properly and comprehensively to track chemical substances in commerce, a central mission of the Agency.

**Statutory Authority for Penalty:** 15 U.S.C. §§ 2614, 2615(a)(1).

**PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION**

The rules of procedure governing this administrative litigation, originally published in the Federal Register on July 23, 1999 (64 *Fed. Reg.* 40138), are entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS" ("Consolidated Rules") and are codified at 40 C.F.R. Part 22. These rules were recently amended to simplify the administrative processing of cases by expanding the availability of electronic filing and service procedures and eliminating inconsistencies. 82 *Fed. Reg.* 2230 (January 9, 2017). These amendments became effective on May 22, 2017 and apply to all new Part 22 case filings after that date. A copy of the current version of the Consolidated Rules, incorporating these recent amendments, accompanies service of this Complaint.

**A. Answering the Complaint**

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to

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judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within thirty (30) calendar days after service of the Complaint. 40 C.F.R. §§ 22.15(a) and 22.7. The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th floor  
New York, New York 10007-1866**

(NOTE: any documents that are filed after the Answer has been filed should be filed as specified in "D" below.)

The accompanying Standing Order issued by the Regional Judicial Officer of the U.S. Environmental Protection Agency, Region 2, dated August 3, 2020, authorizes electronic service of certain Part 22 documents, including Respondent's Answer to this Complaint (see Attachment A). Respondent may therefore electronically serve its Answer to this Complaint upon the Regional Hearing Clerk, at the following address: [maples.karen@epa.gov](mailto:maples.karen@epa.gov)

A copy of Respondent's Answer, including any request for a hearing, must also be sent to Complainant. 40 C.F.R. § 22.15(a). Complainant has designated Assistant Regional Counsel (ARC) Lee Spielmann to receive service on her behalf. Pursuant to the accompanying Consent from Complainant, dated March 6, 2023, Respondent may electronically send documents filed in this matter to ARC Spielmann at [spielmann.lee@epa.gov](mailto:spielmann.lee@epa.gov) (as noted above, Respondent's Answer must be separately sent, either electronically or in hard copy, to the Regional Hearing Clerk) (see Attachment B).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in the Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b).

The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

## **B. Opportunity To Request A Hearing**

If requested by Respondent, a hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If, however, Respondent requests a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c).

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. §22.21(d). A hearing of this matter will be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22. *See* Section 16(a)(2)(A) of TSCA, 15 U.S.C. § 2615(a)(2)(A), which states, in part, “A civil penalty for a violation of section 2614 of this title [15 U.S.C. § 2614] shall be assessed by the Administrator [of EPA] by an order made on the record after opportunity...for a hearing in accordance with section 554 of Title 5 [5 U.S.C. § 554].”

If Respondent fails to request a hearing, such failure may operate to preclude Respondent from obtaining judicial review of an adverse EPA final order. *See* Section 16(a)(2)(A) of TSCA, 15 U.S.C. § 2615(a)(2)(A), which states, in part, “Any person who requested in accordance with paragraph (2)(A) [15 U.S.C. § 2615(a)(2)(A)] a hearing respecting the assessment of a civil penalty and who is aggrieved by an order assessing a civil penalty may file a petition for judicial review with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business.”

## **C. Failure To Answer**

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely (*i.e.*, in accordance with the thirty (30) day period set forth in 40 C.F.R. § 22.15(a)) Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). 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. 40 C.F.R. § 22.17(a). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 calendar days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court.

## **D. Filing of Documents Filed After the Answer**

Unless otherwise ordered by the Presiding Officer for this proceeding, all documents filed after Respondent has filed an Answer should be filed with the Headquarters Hearing Clerk acting for

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the Regional Hearing Clerk, addressed as follows:

If filing by the United States Postal Service, address to:

**Headquarters Hearing Clerk  
Office of Administrative Law Judges  
U.S Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1900R  
Washington, DC 20460**

If filing by UPS, FedEx, DHL or other courier, or personal delivery, address to:

**Headquarters Hearing Clerk  
Office of Administrative Law Judges  
Ronald Reagan Building, Rm M1200  
1300 Pennsylvania Avenue, N.W.  
Washington, DC 20460**

Alternatively, Respondent may register to use the EPA e-filing system:

<https://yosemite.epa.gov/OA/EAB/EAB-ALJ Upload.nsf/HomePage?ReadForm>

#### **E. Exhaustion Of Administrative Remedies**

Where Respondent fails to appeal an adverse initial decision to the EPA's Environmental Appeals Board ("EAB," 40 C.F.R. § 1.25(e)) pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives the right to judicial review. 40 C.F.R. § 22.27(d).

To appeal an initial decision to the EAB, Respondent must do so "[w]ithin thirty (30) days after the initial decision is served upon the parties." 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, "five days shall be added to the time allowed by these [rules] for the filing of a responsive pleading or document." Note that the forty-five (45) day period provided for in 40 C.F.R. § 22.27(c) (discussing when an initial decision becomes a final order) does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

#### **INFORMAL SETTLEMENT CONFERENCE**

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of TSCA and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in the Complaint, and Respondent may also provide whatever additional information that it believes to be relevant to the disposition of this matter, including:

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(1) actions Respondent has taken to correct any or all of the violations herein alleged, and/or (2) any other special facts or circumstances Respondent wishes to raise. At any such conference, EPA will have counsel present, and, if it so elects, Respondent may be represented by counsel.

Section 16(a)(2)(C) of TSCA, 15 U.S.C. § 2615(a)(2)(C), provides, in part, “The Administrator [of EPA] may compromise, modify, or remit, with or without conditions, any civil penalty which shall be imposed under this sub-section.” Accordingly, Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant, or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is also referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this complaint should be directed to:

**Lee A. Spielmann**  
**Office of Regional Counsel**  
**U.S. Environmental Protection Agency**  
**290 Broadway, 16th floor**  
**New York, New York 10007-1866**  
**212-637-3222**  
[spielmann.lee@epa.gov](mailto:spielmann.lee@epa.gov)

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent’s request for a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent’s obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives the right to contest the allegations in the Complaint and waives the right to seek administrative or judicial review of the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). To conclude the proceeding, a final order ratifying the parties’ agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

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Respondent entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in such Consent Agreement terminate this administrative litigation arising out of the allegations made in the Complaint. Respondent entering into a settlement does not extinguish, waive, satisfy, or otherwise affect its obligation and responsibility to comply with all applicable TSCA statutory and regulatory requirements in its operation of its importing business, and to maintain such compliance, including the obligation pertaining to the required quadrennial submission of the CDR.

**Dated:** March , 2023  
New York, New York

**COMPLAINANT:**

**DORE LAPOSTA** Digitally signed by DORE LAPOSTA  
Date: 2023.04.12 15:10:09 -04'00'

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Dore F. LaPosta, Director  
Enforcement and Compliance Assurance Division  
Environmental Protection Agency, Region 2  
290 Broadway, 21<sup>st</sup> floor  
New York, New York 10007-1866

**To:** Leo Vernovsky, President  
Dimmid, Inc.  
4635 Bedford Avenue  
Brooklyn, New York 11235

Attachment A: Standing Order issued by the Regional Judicial Officer of the U.S. Environmental Protection Agency, Region 2, dated August 3, 2020

Attachment B: Consent from Complainant, dated March 6, 2023



§ 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. 1361(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 (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.

§ 22.2 Use of number and gender.

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

§ 22.3 Definitions.

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(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.

§ 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 Administrator by 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.

§ 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.

**§ 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).

**§ 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.

#### § 22.8 Ex parte discussion of proceeding.

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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).

#### § 22.9 Examination of documents filed.

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(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.

#### § 22.10 Appearances.

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

#### § 22.11 Intervention and non-party briefs.

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(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.

§ 22.12 Consolidation and severance.

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(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.

§ 22.13 Commencement of a proceeding.

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(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).

§ 22.14 Complaint.

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(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.

#### § 22.15 Answer to the complaint.

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(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.

#### § 22.16 Motions.

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(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.

#### § 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).

§ 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.

§ 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).

§ 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.

§ 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).

§ 22.22 Evidence.

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(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.

§ 22.23 Objections and offers of proof.

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(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.

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

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

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

§ 22.25 Filing the transcript.

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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.

§ 22.26 Proposed findings, conclusions, and order.

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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.

§ 22.27 Initial Decision.

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(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 complainant 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.

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

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(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.

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

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(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.

§ 22.30 Appeal from or review of initial decision.

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(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.

#### § 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.

§ 22.32 Motion to reconsider a final order.

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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.

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

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(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.

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

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(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. 1361(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.

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

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(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.

§ 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).

§ 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.

§ 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.

§ 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.

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(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.

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

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(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).

§ 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.

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(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.

§ 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.

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(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: