UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	
	)	
Bluestone Coke, LLC	)	
3500 35th Avenue North	)	PROCEEDING UNDER SECTION
Birmingham, Alabama 35207	)	3008(a) and (h) OF THE RESOURCE
	)	CONSERVATION AND RECOVERY
Respondent.	)	ACT, 42 U.S.C. § 6928(a) and (h)
	)	
v.	)	
	)	
EPA ID. No. ALD 000 828 848	)	DOCKET NO: RCRA-04-2023-2106

RESPONDENT'S PREHEARING EXCHANGE

COMES NOW, Respondent, Bluestone Coke, LLC, by counsel, and pursuant to the Presiding Officer's Prehearing Order of July 11, 2024, and provides the following as its Prehearing Exchange:

I. Respondent's List of Witnesses Intended to be Called at the Hearing

Respondent may call any or all of the following witnesses at the hearing. Respondent may choose not to call one or more witnesses on this list if, at the time of hearing, the substance of their testimony is undisputed or stipulated, if they are otherwise determined by Respondent to be unnecessary, or if they are unavailable. Respondent respectfully reserves the right to supplement this list of witnesses to the full extent allowed by 40 C.F.R. Part 22, or by order of the Presiding Officer.

Stephen W. Ball (Fact Witness)

Mr. Ball is Executive Vice President and General Counsel for Bluestone Resources, Inc. Mr. Ball is an attorney licensed in the state of West Virginia and serves as Bluestone's corporate representative in legal matters and also the company's acting Chief Financial Officer.

Mr. Ball is expected to testify about the following topics:

a. Respondent's obligation regarding the EPA's required financial assurance for corrective action at its facility located at 3500 35th Avenue North in Birmingham, Alabama (the Facility) since April 2021;

b. The Respondent's review and interpretation of the records related to financial assurance in this matter;

c. The financial assurance requirements imposed on Respondent by the 2016 Order;

d. Respondent's financial information and documents in relation to the use of the financial test; and

e. The insurance policy submitted by Respondent and its sufficiency to meet the financial assurance requirements.

Additionally, to the extent that admissibility of such records remains in dispute at the time of the hearing, Mr. Ball will provide a foundation for the authentication of both Agency records that he oversaw or created and/or maintained and public records regarding the ownership of the Facility.

Don Wiggins (Fact Witness)

Mr. Wiggins is the Bluestone Coke plant manager currently supervising and working on site at the closed Bluestone facility. Mr. Wiggins has an engineering degree from Auburn University. Mr. Wiggins has been employed at the Facility since December 1989. Mr. Wiggins has served in the following positions at the Facility: Project Engineer (Coke Plant) – project work; Plant Engineer (Fiber Plant) – maintenance and project work; Plant Manager (Fiber Plant) – Operations, Quality, and Accounting; General Manager (Fiber Plant) – Operations, Quality, Accounting and Sales; Manager of Technical Services (Complex) – Complex Engineering, Safety, BTF DMR preparer, DMR Certifier; Operations, Representative of the Company (Complex) – advised management on operations, safety, and DMR Certifier. Today, Mr. Wiggins conducts maintenance as needed, grounds upkeep, security,

manage EPA RCRA order via consulting firm, manage JCDH requirements, BTF pH sampling done in-house.

Mr. Wiggins is expected to testify about the following topics:

a. Respondent's obligation regarding the EPA's "on the ground" requirements at its facility located at 3500 35th Avenue North in Birmingham, Alabama (the Facility) since April 2021;

b. Respondent's day to day actions in compliance with the EPA's requirements at the Facility

Additionally, to the extent that admissibility of such records remains in dispute at the time of the hearing, Mr. Wiggins will provide a foundation for the authentication of both Agency records that he oversaw or created and/or maintained while managing the Facility.

II. Exhibits that Respondent Intends to Produce at the Hearing

Respondent includes with this Prehearing Exchange the exhibits it intends to introduce into evidence. Three of Respondent's exhibits contain Confidential Business Information (CBI) that is relevant to Respondent's case. These exhibits (RX09, RX10, and RX11) have been redacted prior to filing in the OALJ's E-Filing system. Unredacted versions of these exhibits have been provided separately to the OALJ pursuant to instructions received therefrom. These exhibits are identified in the table below, in bold, and they have been handled and submitted according to applicable law and the procedures provided by the OALJ to Complainant for filing CBI in this matter.

Respondent's exhibits are identified in the following table of exhibits:

Exhibit Number	Pages	Document Date	Document Title/Description
RX01	59	3/28/2024	Complainant's Initial Complaint
RX02	19	6/27/2024	Respondent's Answer
RX03	34	3/25/2024	EPA Rules of Procedure

RX04	3	8/2/2024	Joint Preliminary Statement
RX05	2	8/2/2024	Joint Status Report
RX06	1	8/5/2024	Jeff Muth Document Letter 1
RX07	1	8/5/2024	Jeff Muth Document Letter 2
RX08	1	8/5/2024	Jeff Muth Document Letter 3
RX09	2036	11/15/2023	Confidential Business Information 1
RX10	29	8/6/2024	Confidential Business Information 2
RX11	7	6/30/2024	Confidential Business Information 3

III. Respondent's Estimate of the Time Need to Present its Case

Respondent estimates that it will take approximately 1 day to present its case. The Respondent's timeframe will be directly influenced by how much or how little rebuttal testimony and evidence it will present after hearing the Complainant's case. This timeframe may be shortened significantly if the parties agree prior to the hearing to stipulate to any of the facts in dispute and/or to the admission of Complainant's or Respondent's documents and exhibits.

This timeframe also could be shortened significantly if the parties reach agreement on any of the elements of the expected testimony of any of Complainant's or Respondent's witnesses.

IV. Translation Services

Respondent does not anticipate that it will need the services of an interpreter with regard to any of its witnesses.

Dated: September 13, 2024

Respectfully submitted,

/s/ James V. Seal (SEA034)

OF COUNSEL:
Ron H. Hatfield, Jr., Esq.
James V. Seal, Esq.
Bluestone Resources, Inc.
302 South Jefferson Street
Roanoke, VA 24011
Phone: (540) 759-2621
Fax: (540) 301-1370
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that on October 28, 2024, I electronically filed the foregoing Respondent's Prehearing Exchange with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System and sent it by electronic mail to:

Shannon L. Richardson
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 4
(404) 562-8929
Email: R4_Regional_Hearing_Clerk@epa.gov

Stefanie Neale
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900R
Washington, D.C. 20460
Email: Neale.stefanie@epa.gov

Joan Redleaf Durbin
Senior Attorney
U.S. Environmental Protection Agency
61 Forsyth Street, SW
13th Floor, ORC
Atlanta, Georgia 30303
(404) 562-9544
Email: redleaf-durbin.joan@epa.gov

Respectfully submitted,

/s/ James V. Seal (SEA034)

Exhibit - RX01

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Stephen W. Ball
Executive Vice President and General Counsel
Bluestone Coke, LLC
302 S. Jefferson Street
Roanoke, Virginia 24011

Ronald H. Hatfield, Jr.
General Counsel – Litigation
302 S. Jefferson Street
Roanoke, Virginia 24011

SUBJ: Administrative Complaint, Compliance Order, and Opportunity to Request a Hearing Pursuant to Section 3008(a) and (h) of RCRA
Bluestone Coke, LLC, 3500 35th Avenue N., Birmingham, Alabama 35207
Docket No. RCRA-04-2023-2106
EPA ID. No. ALD 000 828 848

Dear Stephen W. Ball, Esq. and Ronald H. Hatfield, Jr., Esq.:

Enclosed is an Administrative Complaint, Compliance Order, and Opportunity to Request a Hearing (Complaint) issued to Bluestone Coke, LLC (Respondent) by the U.S. Environmental Protection Agency, Region 4. The Complaint is issued pursuant to Section 3008(a) and (h) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a) and (h), as well as the EPA's *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation/Termination or Suspension of Permits* (Consolidated Rules), a copy of which are also enclosed.

The Complaint alleges that Respondent has violated the Administrative Order on Consent, Docket No. RCRA-04-2016-4250, issued to Bluestone Coke, LLC (formerly known as ERP Compliant Coke, LLC) on August 11, 2016, pursuant to Section 3008(h)(1) of RCRA, 42 U.S.C. § 6928(h)(1). The enclosed Complaint contains a Compliance Order and seeks a civil penalty.

Resources for small business compliance and enforcement are available here:
http://www2.epa.gov/enforcement/small-businesses-and-enforcement.

Pursuant to Section XI (Opportunity to Request a Hearing) of the Complaint, and 40 C.F.R. § 22.15 of the Consolidated Rules, **Respondent may request a hearing by filing an Answer to the Complaint,**

along with a request for a hearing, with the Regional Hearing Clerk within 30 days after service of the Complaint. If a written Answer to the Complaint is not filed with the Regional Hearing Clerk within 30 days after service of this Complaint, **Respondent may be found in default pursuant to 40 C.F.R. § 22.17 of the Consolidated Rules.**

In addition, pursuant to Section XIII (Informal Settlement Conference) of the Complaint, **Respondent may request a settlement conference**. If you would like to schedule an informal settlement conference, please contact Joan Redleaf Durbin, Senior Attorney, at (404) 562-9544 or at redleaf-durbin.joan@epa.gov. **Please note that the scheduling of an informal settlement conference does not relieve Respondent of the obligation to file a written Answer within 30 days after service of the Complaint**.

If you have any technical questions regarding the Complaint, please contact Corey Hendrix, Financial Assurance Specialist, by phone at (404) 562-8738, or by email at hendrix.corey@epa.gov, or Brooke York, of my staff, by phone at (404) 562-8025, or by email at york.brooke@epa.gov. Any questions of a legal nature concerning this matter should be directed Joan Redleaf Durbin, Senior Attorney, at (404) 562-9544, or by email at redleaf-durbin.joan@epa.gov.

Sincerely,

KIMBERLY BINGHAM
Digitally signed by KIMBERLY BINGHAM
Date: 2024.03.27 14:24:37 -04'00'

Kimberly L. Bingham
Acting Deputy Director
Enforcement and Compliance Assurance Division

Enclosures

cc: Don Wiggins, Bluestone Coke, dwiggins@bluestone-coal.com
Stephen Cobb, Alabama Department of Environmental Management, sac@adem.alabama.gov
Sonja Favors, Alabama Department of Environmental Management, smb@adem.alabama.gov
Brent Watson, Alabama Department of Environmental Management, baw@adem.alabama.gov

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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IN THE MATTER OF:	)	
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Bluestone Coke, LLC	)	
3500 35th Avenue North	)	PROCEEDING UNDER SECTION
Birmingham, Alabama 35207	)	3008(a) and (h) OF THE RESOURCE
	)	CONSERVATION AND RECOVERY
Respondent.	)	ACT, 42 U.S.C. § 6928(a) and (h)
	)	
EPA ID. No. ALD 000 828 848	)	DOCKET NO: RCRA-04-2023-2106

COMPLAINT, COMPLIANCE ORDER, AND OPPORTUNITY TO REQUEST A HEARING

I. NATURE OF THE ACTION

1. This is a civil administrative enforcement action, seeking injunctive relief and the imposition of civil penalties pursuant to Section 3008(a) and (h) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a) and (h), for violations of an Administrative Order on Consent, Docket No. RCRA-04-2016-4250, issued to Bluestone Coke, LLC (formerly known as (f/k/a) ERP Compliant Coke, LLC) on August 11, 2016, pursuant to Section 3008(h)(1) of RCRA, 42 U.S.C. § 6928(h)(1).

II. THE PARTIES

2. Complainant is the Deputy Director, Enforcement and Compliance Assurance Division, United States Environmental Protection Agency (EPA), Region 4. Complainant is authorized to issue this Complaint, Compliance Order, and Opportunity to Request a Hearing (Complaint) pursuant to Section 3008(a) and (h) of RCRA, 42 U.S.C. § 6928(a) and (h), and applicable delegations of authority.

3. Respondent is Bluestone Coke, LLC, f/k/a ERP Compliant Coke, LLC (Bluestone Coke), a Delaware corporation, and the owner and operator of a facility located at 3500 35th Ave. North in Birmingham, Jefferson County, Alabama, EPA Identification Number ALD 000 828 848 (Facility).

III. JURISDICTION

4. This Complaint is issued pursuant to Section 3008(a) and (h) of RCRA, 42 U.S.C. § 6928(a) and (h), the EPA's *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation/Termination or Suspension of Permits* (Consolidated Rules), which are found at 40 C.F.R. Part 22, and the EPA's *Rules Governing Issuance of and Administrative Hearings on Interim Status Corrective Action Orders,* which are found at 40 C.F.R. Part 24. Pursuant to 40

C.F.R. § 24.01(b), the Consolidated Rules will govern any administrative hearing held regarding this Complaint.

5. Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the State of Alabama has received final authorization from the EPA to carry out a hazardous waste program in lieu of the federal program set forth in RCRA. The requirements of the Alabama authorized program are found within the Alabama Hazardous Waste Management and Minimization Act of 1978 (AHWMMA), Ala. Code §§ 22-30-1 through 22-30-24, and Alabama Department of Environmental Management (ADEM) Administrative Code (ADEM Admin. Code) r. 335-14-1 through 335-14-17.

6. Pursuant to Section 3006(g) of RCRA, 42 U.S.C. § 6926(g), the requirements established by the Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. 98-616, are immediately effective in all states regardless of their authorization status and are implemented by the EPA until a state is granted final authorization with respect to those requirements. The State has received final authorization for certain portions of HSWA, including those recited herein.

7. Although the EPA has granted the State of Alabama authority to enforce its own hazardous waste program, the EPA retains jurisdiction and authority to initiate an independent enforcement action, pursuant to Section 3008(a) and (h) of RCRA, 42 U.S.C. § 6928(a) and (h), to address violations of the requirements of the authorized state program. This authority is exercised by the EPA in the manner set forth in the Memorandum of Agreement between the EPA and the State of Alabama.

8. Where applicable, the citations to the regulatory hazardous waste program herein will be to the State of Alabama's authorized hazardous waste program, as it operates in lieu of the federal RCRA program; however, for ease of reference, the federal citations will follow in brackets. In addition, the citations to the financial assurance requirements herein will be to the federal financial assurance requirements, as those are what are referenced in the Administrative Order on Consent, Docket No. RCRA-04-2016-4250.

9. Pursuant to Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), Complainant has given notice of this action to the State of Alabama prior to issuing this Complaint.

IV. STATUTORY AND REGULATORY BACKGROUND

10. Pursuant to Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may: (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

11. Section 22-30-16 of the Code of Alabama, Ala. Code § 22-30-16 [Section 3004 of RCRA, 42 U.S.C. § 6924], requires the promulgation of standards applicable to owners and operators

of hazardous waste treatment, storage, and disposal facilities. The implementing regulations for these requirements are found at ADEM Admin. Code r. 335-14-5 [40 C.F.R. Part 264].

12. Section 22-30-12 of the Code of Alabama, Ala. Code § 22-30-12 [Section 3005 of RCRA, 42 U.S.C. § 6925] sets forth the requirement that a facility treating, storing, or disposing of hazardous waste must have a permit or interim status.

13. Pursuant to Section 22-30-12(i) of the Code of Alabama, Ala. Code § 22-30-12(i) [Section 3005(e) of RCRA, 42 U.S.C. § 6925(e)], any person who owns or operates a facility required to have a permit under this section, and has made an application for a permit under this section, shall be treated as having been issued such permit until such time as final administrative disposition of such application is made, which is referred to as having interim status. The implementing regulations for interim status facilities are found at ADEM Admin. Code r. 335-14-6 [40 C.F.R. Part 265].

14. Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), authorizes the Administrator of the EPA or his delegate to issue an order requiring corrective action or such other response which he deems necessary to protect human health or the environment, if, on the basis of any information, he determines that there is or has been a release of hazardous waste or hazardous constituents into the environment from an interim status facility that is, was, or should have been authorized to operate under Section 3005(e) of RCRA, 42 U.S.C. § 6925(e).

15. Pursuant to ADEM Admin. Code r. 335-14-1-.02(1)(a)206. [40 C.F.R. § 260.10], a "'person' means any and all persons, natural or artificial, including, but not limited to any individual, partnership, association, society, joint stock company, firm company, corporation, institution, trust, estate, or other legal entity or other business organization or any governmental entity, and any successor, representative, agent or agency of the foregoing."

16. Pursuant to ADEM Admin. Code r. 335-14-1-.02(1)(a)202. [40 C.F.R. § 260.10], an "'owner' means the person who owns in fee simple the property on which a facility or part of a facility is sited."

17. Pursuant to ADEM Admin. Code r. 335-14-1-.02(1)(a)200. [40 C.F.R. § 260.10], an "'operator' means the person responsible for the overall operation of a facility."

18. Pursuant to ADEM Admin. Code r. 335-14-1-.02(1)(a)106. [40 C.F.R. § 260.10], a "'facility' means: (i) All contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste, or for managing hazardous secondary materials prior to reclamation. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them). (ii) For the purpose of implementing corrective action under 335-14-5-.06(12), all contiguous property under the control of the owner or operator seeking a permit under Chapter 30 of Title 22, Code of Alabama 1975, (AHWMMA). This definition also applies to facilities implementing corrective action under § 22-30-19 et seq., Code of Alabama 1975, and/or RCRA Section 3008(h)."

19. Pursuant to ADEM Admin. Code r. 335-14-1-.02(1)(a)274. [40 C.F.R. § 260.10], "'surface impoundment' or 'impoundment' means a facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials) which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons."

20. Pursuant to ADEM Admin. Code r. 335-14-1-.02(1)(a)154. [40 C.F.R. § 260.10], "'landfill' means a disposal facility or part of a facility where hazardous waste is placed in or on land and which is not a pile, a land treatment facility, a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, an underground mine, a cave or a corrective action management unit."

21. Pursuant to ADEM Admin. Code r. 335-14-1-.02(1)(a)125. [40 C.F.R. § 260.10], a "'hazardous waste management unit' is a contiguous area of land on or in which hazardous waste is placed, or the largest area in which there is a significant likelihood of mixing hazardous waste constituents in the same area." Hazardous waste management units include surface impoundments, waste piles, land treatment areas, and landfill cells.

22. Pursuant to ADEM Admin. Code r. 335-14-1-.02(1)(a)77. and 335-14-1-.02(1)(a)78. [40 C.F.R. § 260.10], a "disposal facility" means a "disposal site" which is the location where any ultimate disposal of hazardous waste occurs.

23. Pursuant to ADEM Admin. Code r. 335-14-2-.01(2) [40 C.F.R. § 261.2], a "solid waste" is any discarded material that is not otherwise excluded from the regulations.

24. Pursuant to ADEM Admin. Code r. 335-14-2-.01(3) [40 C.F.R. § 261.3], a solid waste is a "hazardous waste" if it is not excluded from regulation as a hazardous waste under ADEM Admin. Code r. 335-14-2-.01(4)(b) [40 C.F.R. § 261.4(b)], and it meets any of the criteria specified in Admin. Code r. 335-14-2-.01(3)(a)2. [40 C.F.R. § 261.3(a)(2)].

25. Pursuant to ADEM Admin. Code r. 335-14-2-.03(1) and (3) [40 C.F.R. §§ 261.20 and 261.22], a solid waste that exhibits the characteristic of corrosivity is a hazardous waste and is identified with the EPA Hazardous Waste Number D002.

26. Pursuant to ADEM Admin. Code r. 335-14-2-.04(3)(a) [40 C.F.R. § 261.32], certain source-specific wastes, which are designated as particular solid wastes from certain specific industries are K-listed hazardous wastes. Wastes included on the K list are found in the regulations at ADEM Admin. Code r. 335-14-2-.04(3)(a) [40 C F.R. § 261.32]. Decanter tank tar sludge from coking operations is listed as K087.

27. Pursuant to ADEM Admin. Code r. 335-14-5-.06(1)(a)(2) and (11) [40 C.F.R. §§ 264.90(a)(2) and 264.101(b)] the owner or operator of a facility at which corrective action is required must establish financial assurance for corrective action.

V. STATEMENT OF FACTS

28. Respondent is a "person" within the meaning of ADEM Admin. Code r. 335-14-1-.02(1)(a)206. [40 C.F.R. § 260.10].

29. Respondent is the current "owner" and "operator" of a "facility" located at 3500 35th Ave. North in Birmingham, Alabama, as those terms are defined in ADEM Admin. Code r. 335-14-1-.02(1)(a)202., 200., and 106. [40 C.F.R. § 260.10]. This Facility contains one "hazardous waste management unit," previously operated as a "surface impoundment" and closed as a "landfill," as those terms are defined in ADEM Admin. Code r. 335-14-1-.02(1)(a)125., ADEM Admin. Code r. 335-14-1-.02(1)(a)274., and 335-14-1-.02(1)(a)154. [40 C.F.R. § 260.10].

30. Certain wastes found at the Facility are hazardous wastes as defined by Section 1004(5) of RCRA, 42 U.S.C. § 6903(5). These are also hazardous wastes within the meaning of ADEM Admin. Code r. 335-14-2-.01 [40 C.F.R. Part 261].

31. The Facility is a facility that is, was, or should have been authorized to operate under Section 3005(e) of RCRA, 42 U.S.C. § 6925(e).

32. There is or has been a release of hazardous wastes into the environment from the Facility requiring corrective action under Section 3008(h) of RCRA, 42 U.S.C. § 6928(h).

33. Neither the EPA nor ADEM ever issued a RCRA or AHWMMA permit to the Facility.

34. On September 17, 2012, pursuant to Section 3008(h) of RCRA, the EPA issued an Administrative Order on Consent (Docket No. RCRA-04-2112-4255) to Walter Coke, Inc. (2012 Order), the owner and operator of the Facility prior to ERP Compliant Coke, LLC. The 2012 Order became effective September 24, 2012. The 2012 Order required a Corrective Measures Study (CMS) to identify and evaluate alternatives for corrective measures (also referred to as remedies) to address releases of hazardous waste from solid waste management units (SWMUs), to implement the approved remedies, to perform any other activities necessary, including interim measures, and to implement and maintain appropriate institutional controls. The 2012 Order also required cost estimates to be completed and financial assurance to be demonstrated once remedies were selected. The cost estimates and financial assurance were required to be updated annually thereafter.

35. On February 2, 2016, ERP Compliant Coke, LLC formed as a limited liability company in Delaware.

36. On February 5, 2016, ERP Compliant Coke, LLC registered as a foreign limited liability company in the State of Alabama.

37. On February 12, 2016, ERP Compliant Coke, LLC purchased the Facility from Walter Coke, Inc., because of Walter Coke, Inc.'s bankruptcy, and agreed to implement the 2012 Order.

38. On August 11, 2016, the EPA modified and reissued the 2012 Order to the new owner of the Facility, ERP Compliant Coke, LLC, as Administrative Order on Consent, Docket No. RCRA-04-2016-4250 (2016 Order), also issued pursuant to Section 3008(h) of RCRA.

39. Paragraph 5 of the 2016 Order states that the 2016 Order shall apply to and be binding upon the EPA, ERP Compliant Coke, LLC and its officers, directors, employees, agents, successors and assigns, heirs, trustees, receivers, and upon all persons, including but not limited to contractors and consultants, acting on behalf of ERP Compliant Coke, LLC.

40. Paragraph 6 of the 2016 Order states that "[n]o change in ownership or corporate or partnership status relating to the Facility will in any way alter [ERP Compliant Coke, LLC's] responsibility under this Order. Any conveyance of title, easement, or other interest in the Facility, or a portion of the Facility, shall not affect [ERP Compliant Coke, LLC's] obligations under this Order. [ERP Compliant Coke, LLC] will be responsible for and liable for any failure to carry out all activities required of [ERP Compliant Coke, LLC] by the terms and conditions of the Order, regardless of [ERP Compliant Coke, LLC's] use of employees, agents, contractors, or consultants to perform any such tasks."

41. Pursuant to Paragraph 34 of the 2016 Order, following issuance of each approved remedy, ERP Compliant Coke, LLC shall provide cost estimates, and demonstrate financial assurance for completing the approved remedy, in accordance with Attachment C (Financial Assurance) to the 2016 Order. Pursuant to Attachment C (Financial Assurance), the financial assurance mechanism shall be one that is allowed under 40 C.F.R. §§ 264.140 through 264.151. These mechanisms include a trust fund, surety bond guaranteeing payment, surety bond guaranteeing performance, letter of credit, insurance, financial test and/or corporate guarantee.

42. The SWMUs at the Facility are grouped into solid waste management areas (SMAs) to facilitate cleanup. The first two SMAs that had approved remedies and therefore required a demonstration of financial assurance under the 2016 Order are SMA 5 (Former Pig Iron Foundry) and SMA 4 (Former Chemical Plant).

43. Pursuant to Attachment C (Financial Assurance), Paragraph 1.b., until the approved remedy required by the 2016 Order is completed, ERP Compliant Coke, LLC is required to annually adjust the cost estimates (referred to as the Estimated Cost of Corrective Measures Work) for inflation within 30 days after the close of ERP Compliant Coke, LLC's fiscal year if using the financial test and corporate guarantee, or within 60 days prior to the anniversary date of the establishment of any other financial assurance instrument.

44. On July 11, 2019, the EPA approved the Corrective Measures Implementation Work Plan for the remedy for SMA 5 (Former Pig Iron Foundry) which included a cost estimate for corrective measures in the amount of $121,294.80. Pursuant to Paragraph 34 of the 2016 Order, which references Paragraph 1.e. of Attachment C (Financial Assurance), ERP Compliant Coke, LLC was required to demonstrate financial assurance within 60 calendar days after the

EPA's written approval of the cost estimate for SMA 5, which was on or before September 9, 2019.

45. On July 31, 2019, the majority members of ERP Compliant Coke, LLC transferred and assigned all of their membership interests in ERP Compliant Coke, LLC to Bluestone Mineral, Inc. Specific details of this transfer in ownership were not shared with the EPA due to a non-disclosure provision of the Membership Interest Transfer Agreement between ERP Compliant Coke, LLC and Bluestone Mineral, Inc.

46. Bluestone Mineral, Inc. is wholly owned by Bluestone Resources, Inc.

47. On August 2, 2019, the EPA was notified by letter of a transfer of ownership of ERP Compliant Coke, LLC to Bluestone Mineral, Inc.

48. On September 5, 2019, ERP Compliant Coke, LLC requested a 45-day extension to submit the financial assurance for SMA 5. The EPA granted an extension until October 31, 2019.

49. On September 24, 2019, a Certificate of Amendment was filed with the Delaware Secretary of State to amend the ERP Compliant Coke, LLC Certificate of Formation to reflect the new name of Bluestone Coke, LLC.

50. On October 4, 2019, ERP Compliant Coke, LLC filed an Amendment to Registration with the Alabama Secretary of State's Office to document a name change from ERP Compliant Coke, LLC to Bluestone Coke, LLC.

51. On October 10, 2019, the EPA was notified that ERP Compliant Coke, LLC had changed its name to Bluestone Coke, LLC.

52. On October 31, 2019, Bluestone Mineral, Inc. submitted a Certificate of Insurance to the EPA to fulfill Respondent's financial assurance obligation at SMA 5.

53. On December 18, 2019, the EPA approved the Corrective Measures Implementation Work Plan for the remedy for SMA 4 (Former Chemical Plant) which included a cost estimate for corrective measures in the amount of $4,043,516.41. Pursuant to Paragraph 34 of the 2016 Order, which references Paragraph 1.e. of Attachment C (Financial Assurance), Respondent was required to demonstrate financial assurance within 60 calendar days after the EPA's written approval of the cost estimate for SMA 4, which was on or before February 16, 2020.

54. On February 4, 2020, the EPA informed Bluestone Mineral, Inc. and Respondent that the submitted insurance policy for SMA 5 was insufficient. The EPA's review concluded that the policy did not conform to the regulations outlined in 40 C.F.R. §§ 264.143(e) and 264.145(e).

55. On February 12, 2020, April 3, 2020, and April 30, 2020, the EPA requested adequate financial assurance in the total amount for SMA 4 and SMA 5 of $4,164,811.21 via emails to Respondent.

56. On May 6, 2020, Respondent informed the EPA that it had been working to demonstrate financial assurance to the EPA, but the COVID-19 pandemic had a severe financial impact on the Facility and therefore it was unable to afford acceptable financial assurance.

57. On August 28, 2020, the EPA sent Respondent an Opportunity to Show Cause why the EPA should not take formal enforcement action against Respondent for its violations of the financial assurance requirements applicable to the Facility.

58. On October 29, 2020, the EPA held a show cause teleconference with representatives of Respondent and Bluestone Resources, Inc. to discuss issues related to financial assurance.

59. Pursuant to Paragraph 34 of the 2016 Order, which references Attachment C (Financial Assurance), Paragraph 6, if the "Respondent provides financial assurance by means of a corporate guarantee or financial test pursuant to 40 C.F.R. § 264.151, Respondent shall also comply with the other relevant requirements of 40 C.F.R. § 264.143(f), 40 C.F.R. § 264.151(f), and 40 C.F.R. § 264.151(h)(1) relating to these methods, unless otherwise provided in the Order, including but not limited to, (1) initial submission of required financial reports and statements from the guarantors' chief financial officer and independent certified public accountant; (2) annual re-submission of such reports and statements within 90 days after the close of each of the guarantors' fiscal years; and (3) notification of EPA within 90 days after the close of any of the guarantors' fiscal years in which any such guarantor no longer satisfies the financial test requirements set forth at 40 C.F.R.§ 264.143(f)(l)."

60. On March 2, 2021, Bluestone Resources, Inc., on behalf of Respondent, submitted a Financial Test and Corporate Guarantee (Bluestone Corporate Guarantee) providing financial assurance coverage based on information from Bluestone Resources, Inc.'s fiscal year 2019 company financial statements. This submittal demonstrated sufficient financial assurance coverage for SMA 5 and SMA 4 only until March 30, 2021, at which time the annual re-submission would have been due as Bluestone Resources, Inc.'s fiscal year ended on December 31, 2020.

61. Respondent's next demonstration of financial assurance from April 1, 2021, to March 31, 2022, was due to the EPA on or before March 31, 2021. As required by Attachment C (Financial Assurance), Paragraph 6 of the 2016 Order, pursuant to 40 C.F.R. § 264.143(f)(5), to continue using the financial test and corporate guarantee for financial assurance coverage, an owner or operator must submit updated information annually within 90 days of the close of the company's fiscal year. Bluestone Resources, Inc.'s fiscal year ended on December 31, 2020. Therefore, in order for Respondent to continue using the financial test and corporate guarantee for financial assurance coverage, an annual update for 2021 based on Bluestone Resources, Inc.'s 2020 year-end financial statements, must have been submitted to the EPA by March 30, 2021.

62. Pursuant to Paragraph 7 of the Bluestone Corporate Guarantee, "[g]uarantor agrees that within 30 days after being notified by an EPA Regional Administrator of a determination that guarantor no longer meets the financial test criteria or that he is disallowed from

continuing as a guarantor of corrective action or corrective action care, he shall establish alternate financial assurance as specified in subpart H of 40 C.F.R. part 264 or 265, as applicable, in the name of Bluestone Coke, LLC unless Bluestone Coke, LLC has done so."

63. Pursuant to Paragraph 8 of the Bluestone Corporate Guarantee, "[g]uarantor agrees to remain bound under this guarantee notwithstanding any or all of the following: amendment or modification of the corrective action or corrective action plan, amendment or modification of the permit, the extension or reduction of the time of performance of corrective action ... or any other modification or alteration of an obligation of the owner or operator pursuant to 40 C.F.R. part 264 or 265."

64. Pursuant to Paragraph 9 of the Bluestone Corporate Guarantee, "[g]uarantor agrees to remain bound under this guarantee for as long as Bluestone Coke, LLC must comply with the applicable financial assurance requirements of subpart H of 40 CFR parts 264 and 265 ..." for the Facility.

65. On March 2, 2021, April 1, 2021, April 26, 2021, and May 12, 2021, the EPA informed Respondent and Bluestone Resources, Inc. via email that a new financial test and corporate guarantee submittal based on fiscal year 2020 was due on or before March 30, 2021.

66. On June 28, 2021, the EPA sent a Notice of Violation to Respondent documenting that since April 1, 2021, Respondent had failed to comply with the 2016 Order and with 40 C.F.R. § 265.143(e) by: 1) failing to maintain financial assurance for the benefit of the EPA in the amount stated in the approved Estimated Cost of Corrective Measures Work for SMA 5 and SMA 4; and 2) failing to submit Bluestone Resources, Inc.'s updated annual financial reports and statements to the Regional Administrator, as required with use of the financial test and corporate guarantee for financial assurance coverage at SMA 5 and SMA 4.

67. Pursuant to Paragraph 34 of the 2016 Order, which references Attachment C (Financial Assurance), Paragraph 8, "[i]f at any time EPA determines that a financial assurance instrument provided pursuant to this Section is inadequate, or no longer satisfies the requirements set forth or incorporated by reference in the Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, EPA shall so notify the Respondent in writing.... Within 30 days of receipt of notice of the EPA's determination, or within 30 days of Respondent becoming aware of such information, as the case may be, Respondent shall obtain and present to EPA for approval, a proposal for a revised or alternative form of financial assurance listed in 40 C.F.R. § 264.151 that satisfies all requirements set forth or incorporated by reference in this Section."

68. On August 9, 2021, Bluestone Resources, Inc. submitted incomplete information to meet the criteria of the financial test on behalf of Respondent.

69. On August 11, 2021, and August 24, 2021, the EPA requested by email the information from Bluestone Resources, Inc. that was missing from the August 9, 2021 financial assurance submittal. Missing documents included:

a. An original, signed written guarantee worded as specified in 40 C.F.R. § 264.151(h) as required by Attachment C (Financial Assurance), Paragraph 6 of the 2016 Order;
b. A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year pursuant to Attachment C (Financial Assurance), Paragraph 6 of the 2016 Order and 40 C.F.R. § 265.143(e)(3)(ii);
c. A special report from the owner's or operator's independent certified public accountant to the owner or operator pursuant to Attachment C (Financial Assurance), Paragraph 6 of the 2016 Order and 40 C.F.R. § 265.143(e)(3)(iii); and
d. Fiscal year 2020 audited financial statements pursuant to Attachment C (Financial Assurance), Paragraph 6 of the 2016 Order and 40 C.F.R. § 265.143(e)(7).

70. On August 27, 2021, Bluestone Resources, Inc. responded to the EPA stating that it did not have the documents necessary to complete the financial assurance submission.

71. On September 29, 2021, the EPA sent Respondent and Bluestone Resources, Inc. a letter documenting its finding that Bluestone Resources, Inc. had failed to meet the requirements of the financial test found in 40 C.F.R. § 265.143(e) and therefore was unable to provide a corporate guarantee, as outlined in 40 C.F.R. § 265.143(e)(10), for the Facility. Respondent and Bluestone Resources, Inc. were given 30 days, or until October 29, 2021, to provide alternative financial assurance.

72. On October 28, 2021, the EPA again notified Bluestone Resources, Inc. by email that it had failed to meet the requirements of the financial test found in 40 C.F.R. § 265.143(e) and therefore was unable to provide a corporate guarantee as outlined in 40 C.F.R. § 265.143(e)(10). As a result of this determination, the EPA required Bluestone Resources, Inc. immediately, but no later than October 29, 2021, to obtain alternative financial assurance through one or more of the approved financial assurance mechanisms identified in Subpart H of 40 C.F.R. Parts 264 and 265.

73. On March 24, 2022, the EPA notified Respondent and Bluestone Resources, Inc. by letter of the accrual of stipulated penalties related to financial assurance pursuant to Section XXVII (Delay In Performance/ Stipulated Penalties) of the 2016 Order. The EPA determined that as of March 1, 2022, stipulated penalties had accrued to $1,306,000 and would continue to increase by $2,000 each business day until Respondent and Bluestone Resources, Inc. came into compliance with the financial assurance provisions of the 2016 Order.

74. On April 7, 2022, Bluestone Resources, Inc. notified the EPA that as a result of the Greensill Capital (UK) Ltd. bankruptcy, Bluestone Resources, Inc. had no ability to borrow

money because of its assets being pledged to Greensill Capital (UK).[1] This letter also stated that Bluestone Resources, Inc. had no access to working capital and that it had not been able to complete its annual audit because of the Greensill Capital (UK) bankruptcy.

75. On October 6, 2022, the EPA sent an email to Respondent and Bluestone Resources, Inc. requesting a conversation with Bluestone Resources, Inc. financial staff to better understand the company's financial resources and constraints.

76. On October 12, 2022, Bluestone Resources, Inc. responded saying that it was working on obtaining the correct company financial contact. No contact was ever provided by Respondent or Bluestone Resources, Inc. to the EPA.

77. On January 6, 2023, the EPA received an email from Respondent's counsel providing a letter from a Certified Public Accountant that stated that an audit of Bluestone Resources, Inc. and its subsidiaries' (including Respondent) annual financial statements for year-end December 31, 2022, was anticipated to be complete on March 31, 2023.

78. On February 7, 2023, the EPA sent Respondent and Bluestone Resources, Inc. a letter requiring them to provide alternative financial assurance within 14 days. Receipt of this letter was confirmed by email on February 20, 2023. In the confirmation email, Respondent and Bluestone Resources, Inc. also reiterated that the financial audit for Bluestone Resources, Inc. and its subsidiaries was expected to be completed by March 31, 2023.

79. On May 26, 2023, Bluestone Resources, Inc. provided to the EPA its consolidated financial statements including its subsidiaries for the year ended December 31, 2022. The EPA notified Bluestone Resources, Inc. via email on May 30, 2023, that the submittal was not a complete financial assurance submittal. Although the EPA's email did not provide these details, the submittal did not demonstrate that Bluestone Resources, Inc. met the financial test as there was no letter signed by the owner's or operator's chief financial officer worded as specified in 40 C.F.R. § 264.151(f) as required by Attachment C (Financial Assurance), Paragraph 6 of the 2016 Order, nor did the submittal include a special report from the owner's or operator's independent certified public accountant to the owner or operator pursuant to Attachment C (Financial Assurance), Paragraph 6 of the 2016 Order and 40 C.F.R. 265.143(3)(3)(iii). Additionally, an original, signed written guarantee worded as specified in 40 C.F.R. § 264.151(h) as required by Attachment C (Financial Assurance), Paragraph 6 of the 2016 Order was not provided. The EPA did state in its email that Respondent and Bluestone Resources, Inc. must provide alternate financial assurance given the repeated, and continued, failure to comply with the Bluestone Corporate Guarantee provisions, the 2016 Order, and applicable regulations. The EPA requested alternate financial assurance within two weeks (on or before June 14, 2023). No

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[1] In the same letter, Bluestone Resources, Inc. stated that "Greensill was Bluestone's primary lender and source of credit..."

additional information or alternate financial assurance has been provided to the EPA by Respondent.

VI. COUNT 1: FAILURE TO DEMONSTATE FINANCIAL ASSURANCE

80. Paragraphs 1 through 79 are incorporated by reference as if fully set forth herein.

81. Paragraph 34 of the 2016 Order requires Respondent to demonstrate financial assurance for completing the approved remedy.

82. Since April 1, 2021, neither Respondent nor its parent company Bluestone Resources, Inc. has met the financial test criteria as referenced in Attachment C (Financial Assurance) of the 2016 Order; therefore, Respondent is therefore unable to continue utilizing a corporate guarantee as the mechanism for assuring financial responsibility for completing corrective action at the Facility.

83. The EPA notified Respondent by emails and with a Notice of Violation on June 28, 2021, that neither Respondent nor its parent company Bluestone Resources, Inc. has met the financial test criteria as of April 1, 2021. The EPA provided Respondent 30 days from its receipt of EPA's Notice of Violation, or until July 28, 2021, to provide alternate financial assurance. To date, Respondent has not demonstrated adequate financial assurance as required by the 2016 Order.

84. Therefore, Respondent has violated Paragraph 34 of the 2016 Order and Attachment C (Financial Assurance) by failing to demonstrate financial assurance for completing the approved remedy in the amount stated in the approved Estimated Cost of Corrective Measures Work for SMA 5 and SMA 4 of $4,164,811.21.

85. Due to Respondent's violation of the 2016 Order, Respondent is liable for injunctive relief pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and civil penalties of up to $73,045 pursuant to Section 3008(h)(2) of RCRA, 42 U.S.C. § 6928(h)(2), and 40 C.F.R. Part 19 for each day of continued noncompliance.

VII. COUNT 2: FAILURE TO UPDATE COST ESTIMATES

86. Paragraphs 1 through 85 are incorporated by reference as if fully set forth herein.

87. Paragraph 34 of the 2016 Order requires Respondent to provide a revised cost estimate (Estimated Cost of Corrective Measures Work) annually for each approved remedy. There is an approved remedy for SMA 4 and SMA 5.

88. Attachment C (Financial Assurance), Paragraph 1.b. of the 2016 Order states that until the approved remedy required by the 2016 Order is completed, Respondent shall annually adjust the Estimated Cost of Corrective Measures Work for inflation within 30 days after the close of Respondent's fiscal year if using the financial test and corporate guarantee, or within 60 days prior to the anniversary date of the establishment of any other financial assurance instrument.

89. To date, Respondent has not provided the EPA with a revised cost estimate annually to reflect inflation for 2022, 2023, or 2024.

90. Therefore, Respondent has violated Paragraph 34 and Attachment C (Financial Assurance) of the 2016 Order by failing to revise the cost estimate annually for each approved remedy for SMA 4 and SMA 5.

91. Due to Respondent's violations of the 2016 Order, Respondent is liable for injunctive relief pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and civil penalties of up to $73,045 pursuant to Section 3008(h)(2) of RCRA, 42 U.S.C. § 6928(h)(2), and 40 C.F.R. Part 19 for each day of continued noncompliance.

VIII. COMPLIANCE ORDER

92. Pursuant to 40 C.F.R. § 22.37(b), the Compliance Order hereby included is equivalent to a Compliance Order under Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Based upon the foregoing, Respondent is ordered to come into and maintain compliance with the 2016 Order by undertaking the following acts within the times specified below pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a):

a. Within 30 days from the Effective Date of this Complaint, Respondent will establish and maintain thereafter a financial assurance mechanism for corrective action at the Facility in the amount of $4,839,811.64 (which includes the required annual inflation adjustments), in accordance with Attachment C (Financial Assurance), Paragraph 1.d. of the 2016 Order. Respondent may choose from the following options with references to corrective action added where appropriate as determined by the EPA:

   i. Trust fund pursuant to 40 C.F.R. § 264.143(a) or 40 C.F.R. § 264.145(a);
   ii. Surety bond guaranteeing performance pursuant to 40 C.F.R. § 264.143(c) or 40 C.F.R. § 264.145(c);
   iii. Letter of credit pursuant to 40 C.F.R. § 264.143(d) or 40 C.F.R. § 264.145(d); or
   iv. Insurance pursuant to 40 C.F.R. § 264.143(e) or 40 C.F.R. § 264.145(e).

b. Pursuant to Paragraph 34 of the 2016 Order, Respondent shall review the approved Estimated Cost of Corrective Measures Work, adjust the financial assurance instrument, and submit the revised Estimated Cost of Corrective Measures Work and instrument to the EPA annually for each approved remedy.

IX. PROPOSED CIVIL PENALTY

93. Section 3008(h)(2) of RCRA, 42 U.S.C. § 6928(h)(2), and 40 C.F.R. Part 19, authorize the assessment of a civil penalty of up to $73,045 per day for failure to comply with an order issued pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h).

94. Complainant proposes, subject to the receipt and evaluation of further relevant information from Respondent, that a civil penalty be assessed up to the statutory maximum as stated in Section 3008(h)(2) of RCRA, 42 U.S.C. § 6928(h)(2), and 40 C.F.R. Part 19 against Respondent for the violations alleged in this Complaint.

X. IMMINENT AND SUBSTANTIAL ENDANGERMENT

95. Notwithstanding any other provision of this Complaint, an enforcement action may be brought against Respondent pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973, and/or any other applicable statutory or regulatory authority, should the EPA find that the handling, storage, treatment, transportation, or disposal of solid or hazardous waste at Respondent's Facility may present an imminent and substantial endangerment to human health or the environment.

XI. OPPORTUNITY TO REQUEST A HEARING

96. As provided in Section 3008(b) of RCRA, 42 U.S.C. § 6928(b), and 40 C.F.R. § 22.15(a) and (c), Respondent has the right to request a formal hearing to contest any matter of law or material fact set forth in this Complaint or to contest the appropriateness of the amount of the proposed penalty. In the event that Respondent does intend to request a hearing, a written Answer to this Complaint must be filed pursuant to 40 C.F.R. § 22.15 with the Regional Hearing Clerk within 30 days after service of this Complaint.

97. The written Answer should clearly and directly admit, deny, or explain each of the factual allegations contained in this 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: (1) the circumstances or arguments which are alleged to constitute the grounds for defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and (4) whether a hearing is requested. Failure of Respondent to admit, deny, or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation.

98. If a written Answer to this Complaint is not filed with the Regional Hearing Clerk within 30 days after service of this Complaint, Respondent may be found in default pursuant to 40 C.F.R. § 22.17.

99. For purposes of this action, default constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations under Section 3008 of RCRA, 42 U.S.C. § 6928. A Default Order, pursuant to 40 C.F.R. § 22.17, may thereafter be issued by the Presiding Officer, and the civil penalty proposed herein may be assessed without further proceedings.

100. Pursuant to 40 C.F.R. § 22.5(a)(1) and (b)(2), on June 26, 2020, the EPA Region 4 Regional Judicial Officer filed a Standing Order entitled "Authorization of EPA Region 4

Electronic Filing System for Filing and Serving Documents Electronically in Proceedings Governed by 40 C.F.R. Part 22" (Standing Order), a copy of which is enclosed. Pursuant to the Standing Order, and following the requirements therein, the written Answer must be sent electronically to:

Shannon L. Richardson
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 4
(404) 562-8929
R4_Regional_Hearing_Clerk@epa.gov

The name of the matter and the Docket Number should be included in the subject line of the email. If Respondent is unable to electronically file, then Respondent shall contact the Regional Hearing Clerk to discuss other options for filing permissible by 40 C.F.R. § 22.5(a)(1).

101. A copy of the Answer and other documents that Respondent files in this action should be sent to the following attorney who represents the EPA in this matter and who is authorized to receive service for the EPA in this proceeding:

Joan Redleaf Durbin
Senior Attorney
U.S. Environmental Protection Agency
61 Forsyth Street, SW
13th Floor, ORC
Atlanta, Georgia 30303
(404) 562-9544
redleaf-durbin.joan@epa.gov

The EPA strongly encourages electronic filing. Therefore, pursuant to 40 C.F.R. § 22.5(b)(2) and the Standing Order, the Complainant hereby consents to receipt of service electronically, by the above-named attorney on behalf of Complainant, by email at redleaf-durbin.joan@epa.gov.

102. Hearings held on the assessment of civil penalties will be conducted in accordance with the provisions of the Administrative Procedure Act (5 U.S.C. §§ 551-559) and the Consolidated Rules, 40 C.F.R. Part 22, a copy of which is included with this Complaint.

XII. APPEAL RIGHTS AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

103. The decision issued by the Presiding Officer after a hearing constitutes an initial decision. Likewise, a Default Order issued by the Presiding Officer constitutes an initial decision. Respondent has the right to appeal an adverse initial decision to the Environmental Appeals Board (EAB). Such an appeal must be made in accordance with 40 C.F.R. § 22.30(a)(1) within 30 days after the initial decision is served, at the address below:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, N.W.
Mail Code 1103M
Washington, D.C. 20460-0001

104. Pursuant to 40 C.F.R. § 22.7(c), "where a document is served by U.S. 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." Therefore, the maximum time for filing of an appeal under 40 C.F.R. § 22.30(a)(1) is 33 days unless an extension is granted by the EAB. Note that the 45-day period provided in 40 C.F.R. § 22.27(c) (discussing when an initial decision becomes a final order) does not pertain to nor extend the 30 days prescribed in 40 C.F.R. § 22.30(a)(1) for filing an appeal.

105. If Respondent fails to appeal an adverse initial decision to the EAB in accordance with 40 C.F.R. § 22.30 and that initial decision thereby becomes a final order pursuant to 40 C.F.R. § 22.27(c), Respondent will have waived its right to judicial review.

XIII. INFORMAL SETTLEMENT CONFERENCE

106. Whether or not Respondent requests a hearing, the EPA encourages settlement of the proceeding consistent with the provisions of RCRA. At an informal conference, Respondent may comment upon the allegations and provide whatever additional information Respondent believes is relevant to the disposition of this matter, including actions taken to correct the violation or any other special circumstance Respondent chooses to raise.

107. Any request for an informal conference and other questions regarding this Complaint should be directed to:

Joan Redleaf Durbin
Senior Attorney
U.S. Environmental Protection Agency, Region 4
(404) 562-9544
redleaf-durbin.joan@epa.gov

108. The scheduling of an informal conference does not relieve Respondent of the obligation to file a written Answer within 30 days after service of this Complaint. A request for an informal conference does not extend the 30-day period in which a written Answer and request for hearing must be submitted. The informal conference may be pursued as an alternative to or simultaneously with a request for a hearing.

XIV. EFFECTIVE DATE

109. This Complaint will become effective as provided in Section 3008(b) of RCRA, 42 U.S.C. § 6928(b), and the Consolidated Rules.

IN THE MATTER OF:
Bluestone Coke, LLC

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 4
Complainant

KIMBERLY BINGHAM

Digitally signed by KIMBERLY BINGHAM
Date: 2024.03.27 17:09:31 -04'00'

Acting Deputy Director
Enforcement and Compliance Assurance Division

CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, I electronically filed the foregoing Complaint, Compliance Order, and Opportunity to Request a Hearing In the Matter of: Bluestone Coke, LLC, Docket No. RCRA-04-2023-2106, with the Regional Hearing Clerk, Region 4, EPA, and that I served one copy of the Complaint, Compliance Order, and Opportunity to Request a Hearing on the addressees listed below by causing said copies to be deposited in the U.S. Mail, First Class (Certified Mail, Return Receipt Requested, postage prepaid), in Atlanta, Georgia.

3/28/2024
Date

Complainant
U.S. Environmental Protection Agency
61 Forsyth Street, S.W.
Atlanta, GA 30303

Stephen W. Ball (Via Certified Mail – Return Receipt Requested)
Executive Vice President and General Counsel
Bluestone Coke, LLC
302 S. Jefferson Street
Roanoke, Virginia 24011

Ronald H. Hatfield, Jr. (Via Certified Mail – Return Receipt Requested)
General Counsel – Litigation
302 S. Jefferson Street
Roanoke, Virginia 24011

Electronic copies were provided to the following EPA personnel:

Joan Redleaf Durbin
Senior Attorney
redleaf-durbin.joan@epa.gov

Corey Hendrix
Financial Assurance Specialist
hendrix.corey@epa.gov

Araceli Chavez
Chief, RCRA Enforcement Section
chavez.araceli@epa.gov

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
SAM NUNN ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

STANDING ORDER

AUTHORIZATION OF EPA REGION 4 ELECTRONIC FILING SYSTEM FOR FILING AND SERVING DOCUMENTS ELECTRONICALLY IN PROCEEDINGS GOVERNED BY 40 C.F.R. PART 22

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, set forth at 40 C.F.R. Part 22 (Consolidated Rules of Practice or Part 22), state that "[t]he Presiding Officer . . . may by order authorize or require filing by . . . an electronic filing system, subject to any appropriate conditions and limitations." 40 C.F.R. § 22.5(a)(l).[1] Pursuant to this authority, I hereby authorize the U.S. Environmental Protection Agency's (EPA) Microsoft Outlook email-based system as a Region 4 electronic filing system for utilization in Part 22 proceedings and adopt the following conditions and limitations to facilitate electronic filing. Additionally, during an EPA Region 4 mandatory or unscheduled telework period of five business days or longer, including, but not limited to a mandatory or unscheduled telework period related to the Coronavirus Disease 2019 pandemic, I hereby require that documents shall be filed electronically in Part 22 proceedings and sent to the R4_Regional_Hearing_Clerk@epa.gov email account subject to the following conditions and limitations.[2]

In addition, the Consolidated Rules of Practice state that "the Presiding Officer . . . may by order authorize or require service by . . . email, or other electronic means, subject to any appropriate conditions and limitations." 40 C.F.R. § 22.5(b)(2). Pursuant to this Order, I also hereby authorize parties to serve documents covered by this Order by email, subject to the following conditions and limitations.

I. Filing Documents by Email in Region 4

The following conditions and limitations apply to the filing of documents by email in proceedings governed by the Consolidated Rules of Practice before the Regional Judicial Officer serving as a Presiding Officer.[3]

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[1] The Regional Judicial Officer is the Presiding Officer in proceedings under Subpart I of the Consolidated Rules of Practice. 40 C.F.R. §§ 22.4(b) and 22.51. The Regional Judicial Officer also acts as the Presiding Officer until the respondent files an answer in proceedings under the Consolidated Rules of Practice in which Subpart I does not apply. 40 C.F.R. § 22.4(b).

[2] If a party is unable to electronically file during an EPA Region 4 mandatory or unscheduled telework time period of five business days or longer, the party shall contact the Regional Hearing Clerk to discuss other options for filing permissible by 40 C.F.R. § 22.5(a)(1). Other than this mandatory electronic filing requirement, this Order does not mandate electronic filing by email. Rather, it authorizes the use of electronic filing in Region 4 as an option to those methods already authorized and enumerated in the Consolidated Rules of Practice by 40 C.F.R. § 22.5(a)(1).

[3] This Order does not apply to the electronic filing of documents with the EPA Office of Administrative Law Judges or the EPA Environmental Appeals Board. Consult the EPA Office of Administrative Law Judges website at: https://www.epa.gov/alj, the EPA Environmental Appeals Board website at: https://www.epa.gov/eab, and/or

1. **Email address and subject line**. All documents filed electronically shall be sent to the R4_Regional_Hearing_Clerk@epa.gov email account. The subject line of the email shall contain the name and docket number of the proceeding.

2. **Format and contact information**. Electronically filed documents shall be submitted in portable document format (PDF), shall contain the contact name, phone number, mailing address, and email address of the filing party or its authorized representative, and shall otherwise conform to all applicable form requirements of 40 C.F.R. § 22.5(c). Where there are multiple attachments to a document, the attachments should be filed in a single electronic file to the extent technically practicable.

3. **Content**. A party electronically filing a document shall comply with all Consolidated Rules of Practice, including, but not limited to, all rules pertaining to content of the particular document being filed. To the extent this Standing Order conflicts with any requirements of the Consolidated Rules of Practice, the Consolidated Rules of Practice shall control.

4. **Electronic signature.** Documents electronically filed shall be signed in accordance with 40 C.F.R. § 22.5(c)(3). Electronically filed documents may be signed either by submitting a PDF copy of a wet ink signature or by electronic signature. Electronic signatures by EPA employees shall comply with the March 31, 2020 *Implementation of Electronic Signatures in the Region 4 Memorandum* issued by the Senior Information Official and any subsequent amendments thereto or modifications. Electronic signatures by non-EPA employees shall bear a "valid electronic signature" for purposes of EPA's Cross-Media Electronic Reporting Rule (CROMERR) regulations.[4] A Certificate Based Digital Signature, such as one created using digital signature software,[5] can constitute a "valid electronic signature" for CROMERR purposes. Software utilized to electronically sign a document shall embed metadata identifying a unique user and the time and date that the signature was applied to the document to establish a valid electronic signature. The metadata in the document should demonstrate that the signature was valid and was not altered in the time after the digital signature was applied. Since this information is embedded in the document itself, the electronic version of a document that has been electronically signed is considered the "original," and shall be preserved (with all relevant metadata) in accordance with any applicable records retention schedules. If a

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contact the Headquarters Hearing Clerk or Board Hearing Clerk, as appropriate, for the applicable tribunal's filing procedures and requirements.

[4] EPA's CROMERR regulations define "valid electronic signature" to mean "an electronic signature on an electronic document that has been created with an electronic signature device that the identified signatory is uniquely entitled to use for signing that document, where this device has not been compromised, and where the signatory is an individual who is authorized to sign the document by virtue of his or her legal status and/or his or her relationship to the entity on whose behalf the signature is executed." 40 C.F.R. § 3.3.

[5] These software programs create certificate based digital signatures using a digital ID that is unique to the signer. The digital ID contains a private key that is used to create the signature, and a certificate with a public key that is applied to the document, allowing the recipient to verify the signature upon opening the document.

party files a document that has been electronically signed, the party must file the "original" version of the electronic document in order to preserve the metadata establishing that the digital signature is valid.

5. **Signature representation.** By filing a document electronically through EPA's Microsoft Outlook email-based system, a party, or its attorney or other representative, represents that the signatory has read the document, that to the best of his or her knowledge, information, and belief, the statements made therein are true, and that the document is not interposed for delay. 40 C.F.R. § 22.5(c)(3).

6. **Certificate of Service.** In accordance with 40 C.F.R. § 22.5(a)(3), each document electronically filed by a party shall be accompanied by a certificate of service.

7. **Documents sent to other email addresses.** Documents shall be submitted to the R4_Regional_Hearing_Clerk@epa.gov email account or will not be accepted for electronic filing and will not be deemed to be filed as part of the administrative record for the matter, except for settlement documents in proceedings initiated under 40 C.F.R. §§ 22.13(b) and 22.18(b).[6]

8. **Date/time of filing**. A document is filed when received by the Regional Hearing Clerk (RHC). 40 C.F.R. § 22.5(a)(1).[7] For purposes of electronic filing, the date and time indicated on the email that is received by the R4_Regional_Hearing_Clerk@epa.gov email account will be deemed the official filing date. Therefore, to be considered timely, documents electronically submitted to the R4_Regional_Hearing_Clerk@epa.gov email account must be received by 11:59 p.m. Eastern Time on the day the document is required to be filed.

9. **Original and copy**. The Consolidated Rules of Practice require that "[t]he original and one copy of each document intended to be part of the record shall be filed with the . . . Regional Hearing Clerk . . . when the proceeding is before the Presiding Officer . . . ." 40 C.F.R. § 22.5(a)(1). A party who files electronically is deemed to satisfy this requirement.

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[6] Respondents who electronically sign Consent Agreements or Expedited Settlement Agreements initiated under 40 C.F.R. §§ 22.13(b) and 22.18(b) shall send original and valid electronic signatures, as defined by 40 C.F.R. § 3.3, on such documents to the EPA email address provided by EPA Region 4 personnel in settlement communications. Such EPA Microsoft Outlook email accounts are hereby deemed an electronic document receiving system in Region 4 designated for receipt of such submissions for purposes of 40 C.F.R. § 3.10. Electronic signatures of respondents deemed invalid on such settlement documents will not be accepted for electronic filing.

[7] For documents filed through non-electronic means, the inked date stamp physically applied by the Regional Hearing Clerk to the paper copy of the documents will continue to serve as the official record of the date and time of filing. The Regional Hearing Clerk may receive such paper filings between the hours of 6:30 a.m. and 4:00 p.m. Eastern Time, Monday through Friday. Any such paper document received by the Regional Hearing Clerk after 4:00 p.m. Eastern Time shall be treated as having been filed the next business day.

10. **Stamping of filed documents**. The Regional Hearing Clerk shall electronically stamp documents electronically submitted to the R4_Regional_Hearing_Clerk@epa.gov email account the date of filing.

11. **RHC email acknowledgement**. The Regional Hearing Clerk will send to all parties an email acknowledging receipt of a document electronically filed utilizing the R4_Regional_Hearing_Clerk@epa.gov email account. The email acknowledgment shall include the date and time that the document was received by the email account.

12. **Amendments**. Once a document is received by the R4_Regional_Hearing_Clerk@epa.gov email account, it becomes part of the administrative record of the matter. The document shall not be retrieved, deleted or altered in any manner by any submitting party. Amendments to filed documents can only be performed in accordance with the Consolidated Rules of Practice.

13. **Complaint.** This Order applies only in proceedings in which the Complaint clearly provides notice of the availability of electronic filing for the filing of an Answer or Motion, and in which the Complaint is accompanied by a copy of this Standing Order and the Consolidated Rules of Practice. Prior to utilizing electronic filing, the parties shall confer regarding valid electronic addresses of each.

14. **Termination.** In all proceedings not initiated under 40 C.F.R. Part 22, Subpart I, the applicability of this Order pertaining to filing of documents terminates as to any particular proceeding when an answer is filed pursuant to 40 C.F.R. § 22.15. The applicability of this Order does not terminate during the pendency of proceedings before the Regional Judicial Officer initiated under 40 C.F.R. Part 22, Subpart I.[8]

15. **Consent Agreements/Final Orders and Expedited Settlement Agreements.** This Order does not apply to the filing of settlement documents in proceedings initiated under 40 C.F.R. §§ 22.13(b) and 22.18(b). However, the electronic signature requirements contained herein do apply to such settlement documents filed with the Regional Hearing Clerk after ratification of a settlement agreement via issuance of a Final Order by the Regional Judicial Officer or the Regional Administrator.

16. **Confidential business information (CBI) and personally identifiable information (PII).** It shall be the responsibility of the party electronically filing a document to ensure the document does not contain confidential business information (CBI) or personally identifiable information (PII). Any claim of confidentiality for business information will be deemed waived if such information is submitted electronically to the R4_Regional_Hearing_Clerk@epa.gov email account. Additionally, filers may not electronically submit other private information the disclosure of which would constitute

[8] The Regional Judicial Officer shall serve as the Presiding Officer in proceedings initiated under 40 C.F.R. Part 22, Subpart I and conduct hearings and rule on all motions until an initial decision has become final or has been appealed. 40 C.F.R. § 22.51.

8. **Service on the Regional Judicial Officer**. Documents, other than Consent Agreements/Final Orders and Expedited Settlement Agreements initiated under 40 C.F.R. §§ 22.13(b) and 22.18(b), submitted electronically to the R4_Regional_Hearing_Clerk@epa.gov email account shall be deemed served on the Regional Judicial Officer when serving as a Presiding Officer in either a proceeding initiated under 40 C.F.R. Part 22, Subpart I, or until an answer is filed in a Part 22 proceeding not subject to Subpart I of Part 22. 40 C.F.R. § 22.5(b).

The conditions and limitations set forth in this Order may be amended or revoked generally or in regard to a specific case or group of cases by further order at any time. In addition, I may issue an order modifying these conditions and limitations if deemed appropriate. This Order shall remain in effect until further notice.

IT IS SO ORDERED this 26th day of June 2020.

TANYA FLOYD

Digitally signed by TANYA FLOYD
Date: 2020.06.26 12:07:27 -04'00'

Tanya Floyd
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 4

Title 40 —Protection of Environment
Chapter I —Environmental Protection Agency
Subchapter A —General

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

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

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

Subpart A—General

§ 22.1 Scope of this part.

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

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

(2) The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d) and 7547(d)), and a determination of nonconforming engines, vehicles or equipment under sections 207(c) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7541(c) and 7547(d));

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

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

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

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

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

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

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

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

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

(b) The supplemental rules set forth in subparts H and I of this part establish special procedures for proceedings identified in paragraph (a) of this section where the Act allows or requires procedures different from the procedures in subparts A through G of this part. Where inconsistencies exist between subparts A through G of this part and subpart H or I of this part, subparts H or I of this part shall apply.

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

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

§ 22.2 Use of number and gender.

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

§ 22.3 Definitions.

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

Act means the particular statute authorizing the proceeding at issue.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105.

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

Agency means the United States Environmental Protection Agency.

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

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

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

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

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

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

Consolidated Rules of Practice means the regulations in this part.

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

Final order means:

(1) An order issued by the Environmental Appeals Board or the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order, disposing of the matter in controversy between the parties;

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

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

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

Hearing Clerk means the Hearing Clerk, Mail Code 1900, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Initial decision means the decision issued by the Presiding Officer pursuant to §§ 22.17(c), 22.20(b) or 22.27 resolving all outstanding issues in the proceeding.

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

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

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

Presiding Officer means an individual who presides in an administrative adjudication until an initial decision becomes final or is appealed. The Presiding Officer shall be an Administrative Law Judge, except where §§ 22.4(b), 22.16(c) or 22.51 allow a Regional Judicial Officer to serve as Presiding Officer.

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

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

Regional Hearing Clerk means an individual duly authorized to serve as hearing clerk for a given region, who shall be neutral in every proceeding. Correspondence with the Regional Hearing Clerk shall be addressed to the Regional Hearing Clerk at the address specified in the complaint. For a case initiated at EPA Headquarters, the term Regional Hearing Clerk means the Hearing Clerk.

Regional Judicial Officer means a person designated by the Regional Administrator under § 22.4(b).

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

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

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

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

(a) *Environmental Appeals Board.*

(1) The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice, and approves settlement of proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters. The Environmental Appeals Board may refer any case or motion to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and references to the Environmental Appeals Board in these Consolidated Rules of Practice shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate § 22.8. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or motions filed in matters that the Environmental Appeals Board has referred to the Administrator.

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

(b) *Regional Judicial Officer.* Each Regional Administrator shall delegate to one or more Regional Judicial Officers authority to act as Presiding Officer in proceedings under subpart I of this part, and to act as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice to which subpart I of this part does not apply. The Regional Administrator may also delegate to one or more Regional Judicial Officers the authority to approve settlement of proceedings pursuant to § 22.18(b)(3). These delegations will not prevent a Regional Judicial Officer from referring any motion or

case to the Regional Administrator. A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or another Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer. A Regional Judicial Officer shall not knowingly preside over a case involving any party concerning whom the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.

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

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

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

(3) Administer oaths and affirmations and take affidavits;

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

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

(6) Admit or exclude evidence;

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

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

(9) Issue subpoenas authorized by the Act; and

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

(d) *Disqualification, withdrawal and reassignment.*

(1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may not perform functions provided for in these Consolidated Rules of Practice regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion to the Administrator, Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer or the Administrative Law Judge request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional Administrator, Regional Judicial Officer or Administrative Law Judge is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator. There shall be no interlocutory appeal of the ruling on a motion for disqualification. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.

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

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

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

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

(a) *Filing of documents.*

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

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

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

(b) *Service of documents.* Unless the proceeding is before the Environmental Appeals Board, a copy of each document filed in the proceeding shall be served on the Presiding Officer and on each party. In a proceeding before the Environmental Appeals Board, a copy of each document filed in the proceeding shall be served on each party.

(1) *Service of complaint.*

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

(ii)

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

(B) Where respondent is an agency of the United States complainant shall serve that agency as provided by that agency's regulations, or in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii)(A) of this section.

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

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

(2) ***Service of filed documents other than the complaint, rulings, orders, and decisions.*** All documents filed by a party other than the complaint, rulings, orders, and decisions shall be served by the filing party on all other parties. Service may be made personally, by U.S. mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), by any reliable commercial delivery service, or by facsimile or other electronic means, including but not necessarily limited to email, if service by such electronic means is consented to in writing. A party who consents to service by facsimile or email must file an acknowledgement of its consent (identifying the type of electronic means agreed to and the electronic address to be used) with the appropriate Clerk. In addition, the Presiding Officer or the Environmental Appeals Board may by order authorize or require service by facsimile, email, or other electronic means, subject to any appropriate conditions and limitations.

(c) ***Form of documents.***

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

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

(3) The original of any filed document (other than exhibits) shall be signed by the party filing or by its attorney or other representative. The signature constitutes a representation by the signer that he has read the document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

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

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

(d) *Confidentiality of business information.*

(1) A person who wishes to assert a business confidentiality claim with regard to any information contained in any document to be filed in a proceeding under these Consolidated Rules of Practice shall assert such a claim in accordance with 40 CFR part 2 at the time that the document is filed. A document filed without a claim of business confidentiality shall be available to the public for inspection and copying.

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

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

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

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

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

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

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

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

[82 FR 2234, Jan. 9, 2017]

§ 22.7 Computation and extension of time.

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

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

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

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

§ 22.8 *Ex parte* discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other

parties shall be given an opportunity to reply to such memorandum or communication. The requirements of this section shall not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to § 22.18(b)(3).

§ 22.9 Examination of documents filed.

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

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

Subpart B—Parties and Appearances

§ 22.10 Appearances.

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

§ 22.11 Intervention and non-party briefs.

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

(b) *Non-party briefs.* Any person who is not a party to a proceeding may move for leave to file a non-party brief. The motion shall identify the interest of the applicant and shall explain the relevance of the brief to the proceeding. All requirements of these Consolidated Rules of Practice shall apply to the motion as if the movant were a party. If the motion is granted, the Presiding Officer or Environmental Appeals Board shall issue an order setting the time for filing such brief. Any party to the proceeding may file a response to a non-party brief within 15 days after service of the non-party brief.

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings. Proceedings subject to subpart I of this part may be consolidated only

upon the approval of all parties. Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part shall not apply to the consolidated proceeding.

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

Subpart C—Prehearing Procedures

§ 22.13 Commencement of a proceeding.

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

(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding 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.

(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.

(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.

(a) *General.* Motions shall be served as provided by § 22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate. All motions, except those made orally on the record during a hearing, shall:

(1) Be in writing;

(2) State the grounds therefor, with particularity;

(3) Set forth the relief sought; and

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

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

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

(c) ***Decision.*** The Regional Judicial Officer (or in a proceeding commenced at EPA Headquarters, an Administrative Law Judge) shall rule on all motions filed or made before an answer to the complaint is filed. Except as provided in §§ 22.29(c) and 22.51, an Administrative Law Judge shall rule on all motions filed or made after an answer is filed and before an initial decision becomes final or has been appealed. The Environmental Appeals Board shall rule as provided in § 22.29(c) and on all motions filed or made after an appeal of the initial decision is filed, except as provided pursuant to § 22.28.

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

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

§ 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.

Subpart D—Hearing Procedures

§ 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.

(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.

(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.

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

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

§ 22.25 Filing the transcript.

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

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.

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

§ 22.27 Initial Decision.

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

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

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

(1) A party moves to reopen the hearing;

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

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

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

(d) *Exhaustion of administrative remedies.* Where a respondent fails to appeal an initial decision to the Environmental Appeals Board pursuant to § 22.30 and that initial decision becomes a final order pursuant to paragraph (c) of this section, respondent waives its rights to judicial review. An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board's issuance of a final order.

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

(a) *Motion to reopen a hearing —*

(1) *Filing and content.* A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall: State briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Headquarters or Regional Hearing Clerk, as appropriate. A copy of the motion shall be filed with the Clerk of the Board in the manner prescribed by § 22.5(a)(1).

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

(b) *Motion to set aside default order —*

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

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

[82 FR 2235, Jan. 9, 2017]

Subpart F—Appeals and Administrative Review

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

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

(a) *Notice of appeal and appeal brief —*

(1) *Filing an appeal —*

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

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

(iii) ***Content.*** The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with appropriate page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with specific citation or other appropriate reference to the record (*e.g.,* by including the document name and page number)), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If

any appellant includes attachments to its notice of appeal or appellate brief, the notice of appeal or appellate brief shall contain a table that provides the title of each appended document and assigns a label identifying where it may be found in the record.

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

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

(3) ***Length*** —

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

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

(b) ***Review initiated by the Environmental Appeals Board.*** Whenever the Environmental Appeals Board determines to review an initial decision on its own initiative, it shall issue an order notifying the parties and the Presiding Officer of its intent to review that decision. The Clerk of the Board shall serve the order upon the Regional Hearing Clerk, the Presiding Officer, and the parties within 45 days after the initial

decision was served upon the parties. In that order or in a later order, the Environmental Appeals Board shall identify any issues to be briefed by the parties and establish a time schedule for filing and service of briefs.

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

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, at its discretion in response to a request or on its own initiative, order oral argument on any or all issues in a proceeding. To request oral argument, a party must include in its substantive brief a statement explaining why oral argument is necessary. The Environmental Appeals Board may, by order, establish additional procedures governing any oral argument before the Environmental Appeals Board.

(e) *Motions on appeal —*

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

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

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

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

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

Subpart G—Final Order

§ 22.31 Final order.

(a) *Effect of final order.* A final order constitutes the final Agency action in a proceeding. The final order shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. The final order shall resolve 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.

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.

Subpart H—Supplemental Rules

§ 22.33 [Reserved]

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d), and 7547(d)), and a determination of nonconforming

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

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

[81 FR 73971, Oct. 25, 2016]

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

(a) ***Scope.*** This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136l(a)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) ***Venue.*** The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties. For a person whose residence is outside the United States and outside any territory or possession of the United States, the prehearing conference and the hearing shall be held at the EPA office listed at 40 CFR 1.7 that is closest to either the person's primary place of business within the United States, or the primary place of business of the person's U.S. agent, unless otherwise agreed by all parties.

§ 22.36 [Reserved]

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

(a) ***Scope.*** This section shall apply, in conjunction with §§ 22.1 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.

§ 22.40 [Reserved]

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 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.

(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.

(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.

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

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

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

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

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

[65 FR 30904, May 15, 2000]

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings for the assessment of any civil penalty under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6)(B)(ii)), and under section 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300h-2(c)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Public notice* —

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

(2) *Type and content of public notice.* The complainant shall provide public notice of the complaint (or the proposed consent agreement if § 22.13(b) is applicable) by a method reasonably calculated to provide notice, and shall also provide notice directly to any person who requests such notice. The notice shall include:

(i) The docket number of the proceeding;

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

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

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

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

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

(1) *Participation in proceeding.*

(i) Any person wishing to participate in the proceedings must notify the Regional Hearing Clerk in writing within the public notice period under paragraph (b)(1) of this section. The person must provide his name, complete mailing address, and state that he wishes to participate in the proceeding.

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

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

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

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

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

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

(3) *Quick resolution and settlement.* No proceeding subject to the public notice and comment provisions of paragraphs (b) and (c) of this section may be resolved or settled under § 22.18, or commenced under § 22.13(b), until 10 days after the close of the comment period provided in paragraph (c)(1) of this section.

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

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

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

(iii) Within 15 days of receipt of a petition, the complainant may, with notice to the Regional Administrator or Environmental Appeals Board and to the commenter, withdraw the consent agreement and proposed final order to consider the matters raised in the petition. If the complainant does not give notice of withdrawal within 15 days of receipt of the petition, the Regional Administrator or Environmental Appeals Board shall assign a Petition Officer to

consider and rule on the petition. The Petition Officer shall be another Presiding Officer, not otherwise involved in the case. Notice of this assignment shall be sent to the parties, and to the Presiding Officer.

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

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

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

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

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

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

(vii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial. The Petition Officer shall:

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

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

(C) Provide public notice of the order.

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

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

§§ 22.46-22.49 [Reserved]

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

§ 22.50 Scope of this subpart.

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

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

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

(b) ***Relationship to other provisions.*** Sections 22.1 through 22.45 apply to proceedings under this subpart, except for the following provisions which do not apply: §§ 22.11, 22.16(c), 22.21(a), and 22.29. Where inconsistencies exist between this subpart and subparts A through G of this part, this subpart shall apply. Where inconsistencies exist between this subpart and subpart H of this part, subpart H shall apply.

§ 22.51 Presiding Officer.

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

§ 22.52 Information exchange and discovery.

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

Exhibit - RX02

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	
	)	
Bluestone Coke, LLC	)	
3500 35th Avenue North	)	PROCEEDING UNDER SECTION
Birmingham, Alabama 35207	)	3008(a) and (h) OF THE RESOURCE
	)	CONSERVATION AND RECOVERY
Respondent.	)	ACT, 42 U.S.C. § 6928(a) and (h)
	)	
v.	)	
	)	
EPA ID. No. ALD 000 828 848	)	DOCKET NO: RCRA-04-2023-2106

ANSWER BY RESPONDENT TO COMPLAINT, COMPLIANCE ORDER, AND OPPORTUNITY TO REQUEST A HEARING

COMES NOW, Respondent, Bluestone Coke, LLC, by counsel, and in its Answer to the United States Environmental Protection Agency's Complaint (the "Complaint") seeking injunctive relief and the imposition of civil penalties pursuant to Section 3008(a) and (h) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a) and (h), for violations of an Administrative Order on Consent, Docket No. RCRA-04-2016-4250, issued to Bluestone Coke, LLC (formerly known as (f/k/a) ERP Compliant Coke, LLC) on August 11, 2016, pursuant to Section 3008(h)(1) of RCRA, 42 U.S.C. § 6928(h)(1), states as follows:

I. NATURE OF THE ACTION

1. Answering Paragraph 1 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

II. THE PARTIES

2. Answering Paragraph 2 of the Complaint, Respondent admits the allegations contained therein.

3. Answering Paragraph 3 of the Complaint, Respondent denies the allegations contained therein. Respondent admits that it is a limited liability company formed in Delaware.

III. JURISDICTION

4. Answering Paragraph 4 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

5. Answering Paragraph 5 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

6. Answering Paragraph 6 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

7. Answering Paragraph 7 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

8. Answering Paragraph 8 of the Complaint, Respondent is without sufficient information or knowledge upon which to form a belief as to the truth or falsity of the allegations contained therein and therefore deny the same.

9. Answering Paragraph 9 of the Complaint, Respondent is without sufficient information or knowledge upon which to form a belief as to the truth or falsity of the allegations contained therein and therefore deny the same.

IV. STATUTORY AND REGULATORY BACKGROUND

10. Answering Paragraph 10 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

11. Answering Paragraph 11 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

12. Answering Paragraph 12 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

13. Answering Paragraph 13 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

14. Answering Paragraph 14 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

15. Answering Paragraph 15 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

16. Answering Paragraph 16 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

17. Answering Paragraph 17 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

18. Answering Paragraph 18 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

19. Answering Paragraph 19 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

20. Answering Paragraph 20 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

21. Answering Paragraph 21 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

22. Answering Paragraph 22 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

23. Answering Paragraph 23 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

24. Answering Paragraph 24 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

25. Answering Paragraph 25 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

26. Answering Paragraph 26 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

27. Answering Paragraph 27 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

V. STATEMENT OF FACTS

28. Answering Paragraph 28 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

29. Answering Paragraph 29 of the Complaint, Respondent admits that it owns and operates the facility located at 3500 35th Avenue North in Birmingham, Alabama. Defendants deny the remaining allegations contained therein.

30. Answering Paragraph 30 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

31. Answering Paragraph 31 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

32. Answering Paragraph 32 of the Complaint, Respondent denies the allegations contained therein.

33. Answering Paragraph 33 of the Complaint, Respondent denies the allegations contained therein.

34. Answering Paragraph 34 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

35. Answering Paragraph 35 of the Complaint, Respondent is without sufficient information or knowledge upon which to form a belief as to the truth or falsity of the allegations contained therein and therefore deny the same.

36. Answering Paragraph 36 of the Complaint, Respondent is without sufficient information or knowledge upon which to form a belief as to the truth or falsity of the allegations contained therein and therefore deny the same.

37. Answering Paragraph 37 of the Complaint, Respondent is without sufficient information or knowledge upon which to form a belief as to the truth or falsity of the allegations contained therein and therefore deny the same.

38. Answering Paragraph 38 of the Complaint, Respondent is without sufficient information or knowledge upon which to form a belief as to the truth or falsity of the allegations contained therein and therefore deny the same.

39. Answering Paragraph 39 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

40. Answering Paragraph 40 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

41. Answering Paragraph 41 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

42. Answering Paragraph 42 of the Complaint, Respondent is without sufficient information or knowledge upon which to form a belief as to the truth or falsity of the allegations contained therein and therefore deny the same.

43. Answering Paragraph 43 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

44. Answering Paragraph 44 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

45. Answering Paragraph 45 of the Complaint, Respondent admits the allegations contained therein.

46. Answering Paragraph 46 of the Complaint, Respondent admits the allegations contained therein.

47. Answering Paragraph 47 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

48. Answering Paragraph 48 of the Complaint, Respondent admits the allegations contained therein.

49. Answering Paragraph 49 of the Complaint, Respondent admits the allegations contained therein.

50. Answering Paragraph 50 of the Complaint, Respondent admits the allegations contained therein.

51. Answering Paragraph 51 of the Complaint, Respondent admits the allegations contained therein.

52. Answering Paragraph 52 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

53. Answering Paragraph 53 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

54. Answering Paragraph 54 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

55. Answering Paragraph 55 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

56. Answering Paragraph 56 of the Complaint, Respondent admits the allegations contained therein.

57. Answering Paragraph 57 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

58. Answering Paragraph 58 of the Complaint, Respondent admits the allegations contained therein.

59. Answering Paragraph 59 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Further, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial. Respondent denies the remaining allegations contained therein.

60. Answering Paragraph 60 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

61. Answering Paragraph 61 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Further, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial. Respondent denies the remaining allegations contained therein.

62. Answering Paragraph 62 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

63. Answering Paragraph 63 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

64. Answering Paragraph 64 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

65. Answering Paragraph 65 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

66. Answering Paragraph 66 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

67. Answering Paragraph 67 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Further, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial. Respondent denies the remaining allegations contained therein.

68. Answering Paragraph 68 of the Complaint, Respondent denies the allegations contained therein.

69. Answering Paragraph 69 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

70. Answering Paragraph 70 of the Complaint, Respondent admits the allegations contained therein.

71. Answering Paragraph 71 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Further, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial. Respondent denies the remaining allegations contained therein.

72. Answering Paragraph 72 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Further, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial. Respondent denies the remaining allegations contained therein.

73. Answering Paragraph 73 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Further, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial. Respondent denies the remaining allegations contained therein.

74. Answering Paragraph 74 of the Complaint, Respondent admits the allegations contained therein.

75. Answering Paragraph 75 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

76. Answering Paragraph 76 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

77. Answering Paragraph 77 of the Complaint, Respondent admits the allegations contained therein.

78. Answering Paragraph 78 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

79. Answering Paragraph 79 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Further, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial. Respondent denies the remaining allegations contained therein.

VI. COUNT1: FAILURE TO DEMONSTRATE FINANCIAL ASSURANCE

80. Answering Paragraph 80 of the Complaint, Respondent denies each and every material allegation of the Complaint not previously and/or specifically admitted herein and demands strict proof thereof. Further, Respondent denies the allegations set forth in the unnumbered paragraphs of the Complaint.

81. Answering Paragraph 81 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

82. Answering Paragraph 82 of the Complaint, Respondent denies the allegations contained therein.

83. Answering Paragraph 83 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

84. Answering Paragraph 84 of the Complaint, Respondent denies the allegations contained therein.

85. Answering Paragraph 85 of the Complaint, Respondent denies the allegations contained therein.

VII. COUNT 2: FAILURE TO UPDATE COST ESTIMATES

86. Answering Paragraph 86 of the Complaint, Respondent denies each and every material allegation of the Complaint not previously and/or specifically admitted herein and demands strict proof thereof. Further, Respondent denies the allegations set forth in the unnumbered paragraphs of the Complaint.

87. Answering Paragraph 87 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

88. Answering Paragraph 88 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Respondent denies the remaining allegations contained therein.

89. Answering Paragraph 89 of the Complaint, Respondent denies the allegations contained therein.

90. Answering Paragraph 90 of the Complaint, Respondent denies the allegations contained therein.

91. Answering Paragraph 91 of the Complaint, Respondent denies the allegations contained therein.

VIII. COMPLIANCE ORDER

92. Answering Paragraph 92 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Further, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial. Respondent denies the remaining allegations contained therein.

IX. PROPOSED CIVIL PENALTY

93. Answering Paragraph 93 of the Complaint, Respondent states that the document, being in writing, speaks for itself. Further, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial. Respondent denies the remaining allegations contained therein.

94. Answering Paragraph 94 of the Complaint, Respondent denies the allegations contained therein.

X. IMMINENT AND SUBSTANTIAL ENDANGERMENT

95. Answering Paragraph 95 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial. Respondent denies the remaining allegations contained therein.

XI. OPPORTUNITY TO REQUEST A HEARING

96. Answering Paragraph 96 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

97. Answering Paragraph 97 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

98. Answering Paragraph 98 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

99. Answering Paragraph 99 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

100. Answering Paragraph 100 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

101. Answering Paragraph 101 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

102. Answering Paragraph 102 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

XII. APPEAL RIGHTS AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

103. Answering Paragraph 103 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

104. Answering Paragraph 104 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

105. Answering Paragraph 105 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

XIII. INFORMAL SETTLEMENT CONFERENCE

106. Answering Paragraph 106 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial. **Respondent is open to an informal settlement conference.**

107. Answering Paragraph 107 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

108. Answering Paragraph 108 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

XIV. EFFECTIVE DATE

109. Answering Paragraph 109 of the Complaint, Respondent states that the allegations contained therein are not of a factual nature, but are statements of legal conclusions, and are not appropriate for admission or denial.

Respondent denies the allegations set forth in any unnumbered paragraphs of the Complaint or any sections praying for relief.

AFFIRMATIVE DEFENSES

In response to the Complaint, Bluestone raises the following affirmative defenses:

110. Respondent denies each and every material allegation of the Complaint not previously and/or specifically admitted herein and demands strict proof thereof.

111. Respondent denies any violations of any agreement, contractual, or otherwise, that is allegedly entered into, and demands strict proof thereof.

112. Respondent contends that the Complaint separately and severally fails to state a claim or cause of action against the Respondent upon which relief may be granted.

113. Any claim for punitive damages made in the Complaint is barred under either Federal Law or State Law against the Respondent and should be stricken.

114. Respondent pleads the defense of laches and estoppel as a bar to the Complaint.

115. Respondent pleads collateral estoppel or issue preclusion as a bar to the Complaint.

116. Respondent pleads lack of cooperation as a bar to the Complaint. Respondent provided an insurance policy providing adequate financial assurance that was summarily rejected.

117. Respondent pleads the willful concealment of facts as a bar to the Complaint.

118. Respondent pleads force majeure and events beyond the Respondent's control as a bar to the Complaint. Beginning in June 2018, Bluestone's primary senior secured lender was Greensill Capital (UK) Limited ("Greensill"). In March of 2021, Greensill collapsed financially overnight resulting in Greensill filing for bankruptcy protection in multiple international jurisdictions. Bluestone sued Greensill to protect its interests (Bluestone Resources, Inc., et al. v. Greensill Capital (UK) Limited, et al. 21-cv-02253 USDC SDNY). Bluestone's lawsuit claims breach of contract, breach of implied covenant of good faith and fair dealing, fraud, breach of duty of care, breach of fiduciary duty, unjust enrichment, as well as certain claims against individuals involved with Greensill.

Greensill's bankruptcy has left Bluestone in a distressed financial position. Bluestone no longer has access to a working capital credit facility, which was the intent of the original Greensill agreement. Bluestone's cash and capital strain is further exacerbated because Bluestone is now required to pay back Credit Suisse, who purchased the outstanding Greensill loans.

Further, the Jefferson County (Alabama) Board of Health has rejected any permit renewals. Bluestone has challenged that action by filing a response and requesting a hearing, and that matter remains pending.

119. The Respondents plead that the Respondent's counsel has not yet had an opportunity to complete a full investigation into all of the facts and legal issues involved in this case. The withdrawal by amendment or by pretrial order and after all legal and factual discovery has been concluded: improper venue, insufficiency of process, insufficiency of service of process, failure to join a party under Rule 19 of the Federal Rules of Civil Procedure, lack of jurisdiction over the subject matter or person, accord and satisfaction, arbitration and award, matters claimed are required to be submitted to arbitration, assumption or risk, contributory negligence, discharge in bankruptcy, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, superseding and/or intervening efficient cause, lack of causal relation, lack of notice, failure to mitigate damages, claim of offset based on previous payments made pursuant to contract or otherwise, subsequent negligence, last clear chance, sudden emergency, subsequent contributory negligence, lack of duty owed, unqualified or qualified immunity, mechanical failure, open and obvious danger, failure to state a legal claim, lack or legal capacity to be sued.

120. Respondents hereby give notice that they intend to rely upon any other defenses that may become available or appear during the discovery proceedings in this case and hereby reserve the right to amend their Answer to assert any such defenses.

Respectfully submitted,

/s/ James V. Seal (SEA034)

OF COUNSEL:
Ron H. Hatfield, Jr., Esq.
James V. Seal, Esq.
Bluestone Resources, Inc.
302 South Jefferson Street
Roanoke, VA 24011
Phone: (540) 759-2621
Fax: (540) 301-1370
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2024, a copy of the Answer by Respondent was sent via electronic mail, delivery receipt requested, to the following:

Shannon L. Richardson
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 4
(404) 562-8929
Email: R4_Regional_Hearing_Clerk@epa.gov

Joan Redleaf Durbin
Senior Attorney
U.S. Environmental Protection Agency
61 Forsyth Street, SW
13th Floor, ORC
Atlanta, Georgia 30303
(404) 562-9544
Email: redleaf-durbin.joan@epa.gov

Respectfully submitted,

/s/ James V. Seal (SEA034)

Title 40 —Protection of Environment
Chapter I —Environmental Protection Agency
Subchapter A —General

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

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

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

Subpart A—General

§ 22.1 Scope of this part.

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

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

(2) The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d) and 7547(d)), and a determination of nonconforming engines, vehicles or equipment under sections 207(c) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7541(c) and 7547(d));

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

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

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

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

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

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

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

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

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

(b) The supplemental rules set forth in subparts H and I of this part establish special procedures for proceedings identified in paragraph (a) of this section where the Act allows or requires procedures different from the procedures in subparts A through G of this part. Where inconsistencies exist between subparts A through G of this part and subpart H or I of this part, subparts H or I of this part shall apply.

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

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

§ 22.2 Use of number and gender.

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

§ 22.3 Definitions.

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

Act means the particular statute authorizing the proceeding at issue.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105.

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

Agency means the United States Environmental Protection Agency.

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

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

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

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

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

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

Consolidated Rules of Practice means the regulations in this part.

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

Final order means:

(1) An order issued by the Environmental Appeals Board or the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order, disposing of the matter in controversy between the parties;

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

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

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

Hearing Clerk means the Hearing Clerk, Mail Code 1900, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Initial decision means the decision issued by the Presiding Officer pursuant to §§ 22.17(c), 22.20(b) or 22.27 resolving all outstanding issues in the proceeding.

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

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

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

Presiding Officer means an individual who presides in an administrative adjudication until an initial decision becomes final or is appealed. The Presiding Officer shall be an Administrative Law Judge, except where §§ 22.4(b), 22.16(c) or 22.51 allow a Regional Judicial Officer to serve as Presiding Officer.

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

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

Regional Hearing Clerk means an individual duly authorized to serve as hearing clerk for a given region, who shall be neutral in every proceeding. Correspondence with the Regional Hearing Clerk shall be addressed to the Regional Hearing Clerk at the address specified in the complaint. For a case initiated at EPA Headquarters, the term Regional Hearing Clerk means the Hearing Clerk.

Regional Judicial Officer means a person designated by the Regional Administrator under § 22.4(b).

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

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

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

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

(a) *Environmental Appeals Board.*

(1) The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice, and approves settlement of proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters. The Environmental Appeals Board may refer any case or motion to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and references to the Environmental Appeals Board in these Consolidated Rules of Practice shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate § 22.8. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or motions filed in matters that the Environmental Appeals Board has referred to the Administrator.

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

(b) *Regional Judicial Officer.* Each Regional Administrator shall delegate to one or more Regional Judicial Officers authority to act as Presiding Officer in proceedings under subpart I of this part, and to act as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice to which subpart I of this part does not apply. The Regional Administrator may also delegate to one or more Regional Judicial Officers the authority to approve settlement of proceedings pursuant to § 22.18(b)(3). These delegations will not prevent a Regional Judicial Officer from referring any motion or

case to the Regional Administrator. A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or another Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer. A Regional Judicial Officer shall not knowingly preside over a case involving any party concerning whom the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.

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

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

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

(3) Administer oaths and affirmations and take affidavits;

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

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

(6) Admit or exclude evidence;

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

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

(9) Issue subpoenas authorized by the Act; and

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

(d) ***Disqualification, withdrawal and reassignment.***

(1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may not perform functions provided for in these Consolidated Rules of Practice regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion to the Administrator, Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer or the Administrative Law Judge request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional Administrator, Regional Judicial Officer or Administrative Law Judge is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator. There shall be no interlocutory appeal of the ruling on a motion for disqualification. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.

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

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

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

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

(a) *Filing of documents.*

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

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

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

(b) *Service of documents.* Unless the proceeding is before the Environmental Appeals Board, a copy of each document filed in the proceeding shall be served on the Presiding Officer and on each party. In a proceeding before the Environmental Appeals Board, a copy of each document filed in the proceeding shall be served on each party.

(1) *Service of complaint.*

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

(ii)

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

(B) Where respondent is an agency of the United States complainant shall serve that agency as provided by that agency's regulations, or in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii)(A) of this section.

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

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

(2) ***Service of filed documents other than the complaint, rulings, orders, and decisions.*** All documents filed by a party other than the complaint, rulings, orders, and decisions shall be served by the filing party on all other parties. Service may be made personally, by U.S. mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), by any reliable commercial delivery service, or by facsimile or other electronic means, including but not necessarily limited to email, if service by such electronic means is consented to in writing. A party who consents to service by facsimile or email must file an acknowledgement of its consent (identifying the type of electronic means agreed to and the electronic address to be used) with the appropriate Clerk. In addition, the Presiding Officer or the Environmental Appeals Board may by order authorize or require service by facsimile, email, or other electronic means, subject to any appropriate conditions and limitations.

(c) ***Form of documents.***

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

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

(3) The original of any filed document (other than exhibits) shall be signed by the party filing or by its attorney or other representative. The signature constitutes a representation by the signer that he has read the document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

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

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

(d) ***Confidentiality of business information.***

(1) A person who wishes to assert a business confidentiality claim with regard to any information contained in any document to be filed in a proceeding under these Consolidated Rules of Practice shall assert such a claim in accordance with 40 CFR part 2 at the time that the document is filed. A document filed without a claim of business confidentiality shall be available to the public for inspection and copying.

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

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

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

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

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

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

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

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

[82 FR 2234, Jan. 9, 2017]

§ 22.7 Computation and extension of time.

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

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

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

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

§ 22.8 *Ex parte* discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other

parties shall be given an opportunity to reply to such memorandum or communication. The requirements of this section shall not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to § 22.18(b)(3).

§ 22.9 Examination of documents filed.

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

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

Subpart B—Parties and Appearances

§ 22.10 Appearances.

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

§ 22.11 Intervention and non-party briefs.

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

(b) ***Non-party briefs.*** Any person who is not a party to a proceeding may move for leave to file a non-party brief. The motion shall identify the interest of the applicant and shall explain the relevance of the brief to the proceeding. All requirements of these Consolidated Rules of Practice shall apply to the motion as if the movant were a party. If the motion is granted, the Presiding Officer or Environmental Appeals Board shall issue an order setting the time for filing such brief. Any party to the proceeding may file a response to a non-party brief within 15 days after service of the non-party brief.

§ 22.12 Consolidation and severance.

(a) ***Consolidation.*** The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings. Proceedings subject to subpart I of this part may be consolidated only

upon the approval of all parties. Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part shall not apply to the consolidated proceeding.

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

Subpart C—Prehearing Procedures

§ 22.13 Commencement of a proceeding.

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

(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding 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.

(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.

(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.

(a) *General.* Motions shall be served as provided by § 22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate. All motions, except those made orally on the record during a hearing, shall:

(1) Be in writing;

(2) State the grounds therefor, with particularity;

(3) Set forth the relief sought; and

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

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

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

(c) ***Decision.*** The Regional Judicial Officer (or in a proceeding commenced at EPA Headquarters, an Administrative Law Judge) shall rule on all motions filed or made before an answer to the complaint is filed. Except as provided in §§ 22.29(c) and 22.51, an Administrative Law Judge shall rule on all motions filed or made after an answer is filed and before an initial decision becomes final or has been appealed. The Environmental Appeals Board shall rule as provided in § 22.29(c) and on all motions filed or made after an appeal of the initial decision is filed, except as provided pursuant to § 22.28.

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

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

§ 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.

Subpart D—Hearing Procedures

§ 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.

(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.

(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.

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

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

§ 22.25 Filing the transcript.

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

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.

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

§ 22.27 Initial Decision.

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

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

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

(1) A party moves to reopen the hearing;

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

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

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

(d) ***Exhaustion of administrative remedies.*** Where a respondent fails to appeal an initial decision to the Environmental Appeals Board pursuant to § 22.30 and that initial decision becomes a final order pursuant to paragraph (c) of this section, respondent waives its rights to judicial review. An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board's issuance of a final order.

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

(a) ***Motion to reopen a hearing —***

(1) ***Filing and content.*** A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall: State briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Headquarters or Regional Hearing Clerk, as appropriate. A copy of the motion shall be filed with the Clerk of the Board in the manner prescribed by § 22.5(a)(1).

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

(b) ***Motion to set aside default order —***

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

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

[82 FR 2235, Jan. 9, 2017]

Subpart F—Appeals and Administrative Review

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

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

(a) *Notice of appeal and appeal brief —*

(1) *Filing an appeal —*

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

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

(iii) ***Content.*** The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with appropriate page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with specific citation or other appropriate reference to the record (*e.g.,* by including the document name and page number)), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If

any appellant includes attachments to its notice of appeal or appellate brief, the notice of appeal or appellate brief shall contain a table that provides the title of each appended document and assigns a label identifying where it may be found in the record.

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

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

(3) ***Length*** —

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

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

(b) ***Review initiated by the Environmental Appeals Board.*** Whenever the Environmental Appeals Board determines to review an initial decision on its own initiative, it shall issue an order notifying the parties and the Presiding Officer of its intent to review that decision. The Clerk of the Board shall serve the order upon the Regional Hearing Clerk, the Presiding Officer, and the parties within 45 days after the initial

decision was served upon the parties. In that order or in a later order, the Environmental Appeals Board shall identify any issues to be briefed by the parties and establish a time schedule for filing and service of briefs.

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

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, at its discretion in response to a request or on its own initiative, order oral argument on any or all issues in a proceeding. To request oral argument, a party must include in its substantive brief a statement explaining why oral argument is necessary. The Environmental Appeals Board may, by order, establish additional procedures governing any oral argument before the Environmental Appeals Board.

(e) *Motions on appeal —*

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

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

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

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

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

Subpart G—Final Order

§ 22.31 Final order.

(a) *Effect of final order.* A final order constitutes the final Agency action in a proceeding. The final order shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. The final order shall resolve 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.

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.

Subpart H—Supplemental Rules

§ 22.33 [Reserved]

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d), and 7547(d)), and a determination of nonconforming

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

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

[81 FR 73971, Oct. 25, 2016]

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

(a) ***Scope.*** This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136l(a)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) ***Venue.*** The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties. For a person whose residence is outside the United States and outside any territory or possession of the United States, the prehearing conference and the hearing shall be held at the EPA office listed at 40 CFR 1.7 that is closest to either the person's primary place of business within the United States, or the primary place of business of the person's U.S. agent, unless otherwise agreed by all parties.

§ 22.36 [Reserved]

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

(a) ***Scope.*** This section shall apply, in conjunction with §§ 22.1 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.

§ 22.40 [Reserved]

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 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.

(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.

(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.

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

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

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

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

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

[65 FR 30904, May 15, 2000]

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings for the assessment of any civil penalty under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6)(B)(ii)), and under section 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300h-2(c)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Public notice —*

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

(2) *Type and content of public notice.* The complainant shall provide public notice of the complaint (or the proposed consent agreement if § 22.13(b) is applicable) by a method reasonably calculated to provide notice, and shall also provide notice directly to any person who requests such notice. The notice shall include:

(i) The docket number of the proceeding;

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

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

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

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

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

(1) *Participation in proceeding.*

(i) Any person wishing to participate in the proceedings must notify the Regional Hearing Clerk in writing within the public notice period under paragraph (b)(1) of this section. The person must provide his name, complete mailing address, and state that he wishes to participate in the proceeding.

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

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

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

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

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

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

(3) *Quick resolution and settlement.* No proceeding subject to the public notice and comment provisions of paragraphs (b) and (c) of this section may be resolved or settled under § 22.18, or commenced under § 22.13(b), until 10 days after the close of the comment period provided in paragraph (c)(1) of this section.

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

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

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

(iii) Within 15 days of receipt of a petition, the complainant may, with notice to the Regional Administrator or Environmental Appeals Board and to the commenter, withdraw the consent agreement and proposed final order to consider the matters raised in the petition. If the complainant does not give notice of withdrawal within 15 days of receipt of the petition, the Regional Administrator or Environmental Appeals Board shall assign a Petition Officer to

consider and rule on the petition. The Petition Officer shall be another Presiding Officer, not otherwise involved in the case. Notice of this assignment shall be sent to the parties, and to the Presiding Officer.

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

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

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

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

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

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

(vii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial. The Petition Officer shall:

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

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

(C) Provide public notice of the order.

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

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

§§ 22.46-22.49 [Reserved]

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

§ 22.50 Scope of this subpart.

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

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

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

(b) ***Relationship to other provisions.*** Sections 22.1 through 22.45 apply to proceedings under this subpart, except for the following provisions which do not apply: §§ 22.11, 22.16(c), 22.21(a), and 22.29. Where inconsistencies exist between this subpart and subparts A through G of this part, this subpart shall apply. Where inconsistencies exist between this subpart and subpart H of this part, subpart H shall apply.

§ 22.51 Presiding Officer.

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

§ 22.52 Information exchange and discovery.

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

Exhibit - RX04

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF: Bluestone Coke, LLC 3500 35th Avenue North Birmingham, Alabama 35207 Respondent. Proceeding under Section 3008(a) and (h) of the Solid Waste Disposal Act, as amended by, inter alia, the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a) and (h)	Docket No. RCRA-04-2023-2106 JOINT PRELIMINARY STATEMENT

Pursuant to the Presiding Officer's Prehearing Order of July 11, 2024 (the Order), Complainant, the United States Environmental Protection Agency, Region 4 (EPA), and Respondent, Bluestone Coke, LLC, by and through the undersigned, jointly submit this Preliminary Statement.

1. The parties request that the hearing be held in person.
2. The parties have conferred and have agreed to recommend Birmingham, Alabama as a reasonable and convenient location for the hearing, as it is proximate to the location where Respondent conducts business.
3. For service of orders, decisions, and other documents, Complainant requests that the following email addresses be used: Redleaf-Durbin.Joan@epa.gov; and Forrest.Kate@epa.gov.
4. For service of orders, decisions, and other documents, Respondent requests that the following email addresses be used: James.Seal@bluestone-coal.com; and Ron.Hatfield@bluestone-coal.com.

Dated: August 2, 2024

Respectfully Submitted,

JOAN DURBIN

Digitally signed by JOAN DURBIN
Date: 2024.08.02 08:45:36 -04'00'

Joan Redleaf Durbin
Senior Attorney
RCRA/FIFRA/TSCA Law Office
U.S. Environmental Protection Agency, Region 4

and

James V. Seal
Counsel for Bluestone Coke, LLC

CERTIFICATE OF SERVICE

The undersigned certifies that on August 2, 2024, I electronically filed the foregoing **JOINT PRELIMINARY STATEMENT** with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System and sent it by electronic mail to James V. Seal and Ron Hatfield, attorneys for Respondent, at James.Seal@bluestone-coal.com and Ron.Hatfield@bluestone-coal.com.

Date: August 2, 2024

JOAN DURBIN

Digitally signed by JOAN DURBIN
Date: 2024.08.02 08:46:08 -04'00'

Joan Redleaf Durbin
Senior Attorney
RCRA/FIFRA/TSCA Law Office
U.S. Environmental Protection Agency, Region 4

Exhibit - RX05

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF: Bluestone Coke, LLC 3500 35th Avenue North Birmingham, Alabama 35207 Respondent. Proceeding under Section 3008(a) and (h) of the Solid Waste Disposal Act, as amended by, inter alia, the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a) and (h)	Docket No. RCRA-04-2023-2106 JOINT STATUS REPORT

Pursuant to the Presiding Officer's Prehearing Order of July 11, 2024, Complainant, the United States Environmental Protection Agency, Region 4 (EPA), and Respondent, Bluestone Coke, LLC, by and through the undersigned, jointly submit this Status Report following a settlement conference the parties jointly held on Thursday, July 25, 2024. The parties have not reached an agreement to settle this matter at this time, though settlement negotiations are ongoing. In the interim, the parties will also continue to prepare for a hearing.

Dated: August 2, 2024

Respectfully Submitted,

JOAN DURBIN

Digitally signed by JOAN DURBIN
Date: 2024.08.02 08:47:35 -04'00'

Joan Redleaf Durbin
Senior Attorney
RCRA/FIFRA/TSCA Law Office
U.S. Environmental Protection Agency, Region 4

and

James V. Seal
Counsel for Bluestone Coke, LLC

CERTIFICATE OF SERVICE

The undersigned certifies that on August 2, 2024, I electronically filed the foregoing **JOINT STATUS REPORT** with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System and sent it by electronic mail to James V. Seal and Ron Hatfield, attorneys for Respondent, at James.Seal@bluestone-coal.com and Ron.Hatfield@bluestone-coal.com.

Date: August 2, 2024

JOAN DURBIN
Digitally signed by JOAN DURBIN
Date: 2024.08.02 08:48:35 -04'00'

Joan Redleaf Durbin
Senior Attorney
RCRA/FIFRA/TSCA Law Office
U.S. Environmental Protection Agency, Region 4

Exhibit - RX06

MILLER JOHNSON Attorneys

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JEFFREY G. MUTH
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August 5, 2024

VIA SECURE FILE TRANSFER

Corey Hendrix
Financial Assurance Specialist
U.S. EPA Region 4
61 Forsyth Street SW
Atlanta, GA 30303
Hendrix.corey@epa.gov

Re: *Bluestone Resources, Inc. and Bluestone Coke, LLC's document production*

Dear Corey:

Enclosed please find Bluestone Resources, Inc. and Bluestone Coke, LLC's document production bates labeled **BRI 000001 – BRI 002036**. The documents in this production are intended to substantiate Bluestone Resources, Inc.'s and Bluestone Coke, LLC's (collectively "Bluestone") inability to pay for financial assurance. This document production contains a redline compilation of the Forbearance Agreement, which incorporates all changes contained in the five amendments thereto. While we thought that this was the most effective means of delivering this information, we are willing to produce execution copies of the Forbearance Agreement and all of its amendments, if required. Please let us know if you would like to see all of the execution copies.

This document production contains Confidential Business Information ("CBI") and a confidentiality claim is being made for the enclosed documents as required by regulations. A copy of the Financial Data Questionnaire will be provided separately from this production.

Please feel free to contact me with any questions. Thank you.

Sincerely,

MILLER JOHNSON

By

Jeffrey G. Muth

Enclosures

Exhibit - RX07

MILLER JOHNSON Attorneys

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August 7, 2024

VIA SECURE FILE TRANSFER

Corey Hendrix
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Hendrix.corey@epa.gov

Re: *Bluestone Resources, Inc. and Bluestone Coke, LLC's second document production*

Dear Corey:

Enclosed please find Bluestone Resources, Inc. and Bluestone Coke, LLC's second document production bates labeled **BRI 002037 – BRI 002065.** The documents in this production are intended to substantiate Bluestone Resources, Inc.'s and Bluestone Coke, LLC's (collectively "Bluestone") inability to pay for financial assurance. This document production contains the Financial Data Questionnaire and attachments. We will supplement this production with a debt service schedule and an asset disposition schedule as soon as those documents are available.

This document production contains Confidential Business Information ("CBI") and a confidentiality claim is being made for the enclosed documents as required by regulations.

Please feel free to contact me with any questions. Thank you.

Sincerely,

MILLER JOHNSON

By

Jeffrey G. Muth

Enclosures

Exhibit - RX08

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August 21, 2024

VIA SECURE FILE TRANSFER

Corey Hendrix
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Hendrix.corey@epa.gov

Re: *Bluestone Resources, Inc. and Bluestone Coke, LLC's third document production*

Dear Corey:

Enclosed please find Bluestone Resources, Inc. and Bluestone Coke, LLC's third document production bates labeled **BRI 002066 – BRI 002072.** The documents in this production are intended to substantiate Bluestone Resources, Inc.'s and Bluestone Coke, LLC's (collectively "Bluestone") inability to pay for financial assurance. This document production contains the 2024 financial statements for Bluestone Resources and Bluestone Coke, LLC. The 2023 financial statement for Bluestone Resources was previously produced as **BRI 000144 – BRI 000147**.

This document production contains Confidential Business Information ("CBI") and a confidentiality claim is being made for the enclosed documents as required by regulations.

Please feel free to contact me with any questions. Thank you.

Sincerely,

MILLER JOHNSON

By

Jeffrey G. Muth

Enclosures