Attachment K

federal register

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Part V

Environmental Protection Agency

40 CFR Part 22

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

from the Chemical Manufacturers Association and the American Petroleum Institute ("CMA/API"). The original public comment period closed on April 27, 1998. On May 6, 1998 (63 FR 25006), EPA published a second notice reopening the public comment period for an additional 60 days. During this reopened public comment period, EPA received one set of supplementary comments from CEEC.

All of the public comments submitted in response may be reviewed at the Enforcement and Compliance Docket and Information Center, room 4033 of the Ariel Rios Federal Building, 1200 Pennsylvania Avenue, N.W., Washington, DC. Persons interested in reviewing the comments must make advance arrangements to do so by calling 202–564–2614. A reasonable fee may be charged by EPA for copying docket materials. The public comments may also be viewed on the internet at http://www.epa.gov/oeca/forepart22.html.

Today's final rule includes most of the revisions identified in the proposed rule, with certain additional changes (both to the proposed revisions and to other provisions of the existing rule) responding to public comments. EPA's response to the public comments appears below.

II. Response to Public Comments

A. Significant Comments Supporting Proposed Revisions

Dow stated that "[m]ost of the CROP provisions appear to reflect an appropriate balancing of interests" and that it has a "favorable impression of part 22 as a whole." CMA/API support EPA's efforts to simplify and clarify the CROP. CEEC states that it supports "many of the types of changes EPA has proposed, as they will increase efficiency and reduce complexity in the administrative process." The following are specific comments supporting particular provisions of the proposed rule.

Commenters generally support the consolidation of the various rules into a single set of CROP procedures for APA and non-APA proceedings. CMA/API supports the Agency's decision to use the CROP instead of the proposed part 28 procedures for Class I proceedings under the Clean Water Act and the Safe Drinking Water Act (56 FR 29996 (July 1, 1991)). Dow and UARG support the use of CROP procedures in lieu of the procedures originally proposed for use under the Clean Air Act Field Citation Program.

Dow states that it supports the "change" in § 22.4(d)(1) [1] that would make appeals from a denial of a motion to disqualify a Presiding Officer go to the Environmental Appeals Board ("EAB") "rather than the Administrator." EPA notes that this revision of § 22.4(d)(1) is not intended to change the substance of the existing rule but merely to eliminate any implication that the Administrator must personally rule on appeals from the denial of disqualification requests made to Presiding Officers. *See In re Woodcrest Manufacturing, Inc.*, EPCRA Appeal No. 97–2, slip op. at 11–12 (EAB, July 23, 1998) (stating that the term "Administrator" is defined at 40 CFR 22.4(d)(1) to include the Administrator's delegate, and therefore "the Administrator is not required to act personally on disqualification issues, but may instead delegate this authority to other individuals within the EPA").

Dow supports the proposed change to § 22.5(c)(5), giving the Presiding Officer and the EAB, rather than the hearing clerks, authority to rule on the adequacy of documents filed. Dow strongly supports the inclusion of language in § 22.5(d) stating that the Agency's rules governing treatment of Confidential Business Information (40 CFR part 2) apply in CROP proceedings.

Dow supports proposed changes to §§ 22.5 and 22.6 allowing service of documents by reliable commercial delivery services other than the U.S. Mail, and supports the decision to expand the "mail box rule" of § 22.7(c) to provide that service is complete when the document is placed in the custody of a reliable commercial delivery service.

CMA/API support the provision in the proposed § 22.14(a)(6) requiring that the complaint give notice whether subpart I, non-APA procedures apply to the proceeding.

CMA/API and Dow support the proposed revision to § 22.15(a) expanding to 30 days the time allowed to file an answer.

CMA/API and Dow support the provisions in the proposed rule extending the time period for filing a response to a motion from 10 days to 15 days. Additionally, CMA/API supports not placing page limits on motion papers.

Dow supports the revisions to § 22.17(a) & (c) that give the Presiding Officers greater discretion in determining the appropriate relief in the default orders, because this "flexibility will let the Presiding Officer ensure that any relief ordered is supported by the administrative record." CMA/API "support the provision requiring the Presiding Officer, when issuing a default order, to determine that the relief sought in the complaint is consistent with the applicable statute."

CEEC supports the Agency's explicit recognition of Alternative Dispute Resolution in the proposed § 22.18(d). Dow supports the provisions of the proposed § 22.18(d)(2) that permit the Presiding Officer to grant extensions of time for the parties to engage in alternative dispute resolution procedures.

CMA/API support the proposed § 22.19 allowing amendment of prehearing exchanges without restriction, and support the § 22.19(f) requirement that parties promptly supplement or correct information known to be incomplete, inaccurate or outdated, without requiring the parties to constantly check the accuracy of their information exchanges. CEEC supports the proposed revisions to §§ 22.19 and 22.22 that would allow use of information that has not been timely provided to the opposing party, upon a showing of "good cause" for the failure to timely provide that information. CEEC also supports the proposed limitation that "other discovery" pursuant to § 22.19(e) should be available only after the prehearing exchange required under § 22.19(a).

The CMA/API comments support the proposed change in § 22.27(b) "requiring the Presiding Officer in all cases to explain how the civil penalty imposed corresponds to the statutory penalty criteria, rather than just the Agency's penalty policies." Dow notes its support for the provision in § 22.27(b) requiring that the Presiding Officer articulate how the amount of penalty conforms to the criteria set forth in the law under which the proceeding has been commenced. Dow supports the proposed revision of § 22.27(c) that would make an initial decision inoperative pending review by the EAB, because it "will avoid premature recourse to the Federal courts" and avoid harm to respondents whose appeals might be successful. Dow also supports the provision in the proposed § 22.28(b) under which a motion to reopen a hearing would expressly stay the deadlines for appeal or EAB review of the initial decision.

Both CMA/API and Dow support the new provision in § 22.30(a) allowing a party who has initially declined to

[1] To conform the CROP to the preferred style of the U.S. Government Printing Office, EPA has converted § 22.01 to § 22.1, § 22.02 to § 22.2, etc., in this final rule. For simplicity, this preamble will use the new numbering system throughout, even when referring to sections of the proposed rule or the 1980 CROP.

streamlining rule and 40 CFR part 124, subpart E remains in effect, EPA has removed from § 22.1 (a)(4) and (a)(6) the proposed references to permit revocation, suspension and termination. EPA anticipates that these references will be restored when the Round Two permit streamlining rule is finalized.

EPA has deleted the word "conducted" from paragraphs (a)(1), (a)(3) and (a)(5). This word is unnecessary, and the deletions make these paragraphs more consistent with the rest of § 22.1(a). In § 22.1(a)(4)(i), EPA has replaced the word "and" in the first parenthetical list of citations to the U.S. Code, with the word "or" for consistency.

In the proposed § 22.1(b), the word "establish" appeared twice in the first sentence. EPA has deleted the redundant word. EPA has also revised the last sentence of 22.1(b) for clarity.

2. Powers and Duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; Disqualification, Withdrawal and Reassignment. (40 CFR 22.4)

a. Summary of Proposed Rule. Proposed revisions to § 22.4(a) clarify the role of the Environmental Appeals Board, to which the Administrator has delegated the authority to rule on appeals. The proposed rule clarifies that the Environmental Appeals Board rules on appeals from decisions, rulings and orders of a Presiding Officer in proceedings under the CROP, acts as Presiding Officer until an answer is filed in cases initiated at EPA Headquarters, and approves settlement of such cases. The proposed rule provides that appeals and motions must be directed to the Environmental Appeals Board except those in matters referred by the Environmental Appeals Board to the Administrator, and motions for disqualification under paragraph (d).

Proposed revisions to § 22.4(b) describe the function of the Regional Judicial Officer, requiring each Regional Administrator to designate one or more Regional Judicial Officers to act as Presiding Officers in proceedings under subpart I, and to act as Presiding Officers in APA CROP proceedings until an answer is filed. The proposed rule provides that the Regional Administrator may delegate to a Regional Judicial Officer the authority to approve settlement of proceedings, ratify consent agreements and issue consent orders.

EPA proposed deleting from § 22.4(b) certain limitations on the Regional Judicial Officers. One proposed deletion is the current prohibition on employment of a Regional Judicial Officer by the Region's Enforcement Division or the Regional Division directly associated with the type of violation at issue in the proceeding. The other is the prohibition, derived from section 554(d) of the Administrative Procedure Act, against a Regional Judicial Officer having "performed prosecutorial or investigative functions in connection . . . with any factually related hearing." The proposed rule would add new language precluding an individual from serving as Regional Judicial Officer in any case in which he or she has any "interest in the outcome." The proposed rule retains the provisions that prohibit an individual from serving as Regional Judicial Officer in the same case in which he or she performed prosecutorial or investigative functions, and that require that Regional Judicial Officers be attorneys employed by a Federal agency.

EPA proposed editorial revisions to § 22.4(c), describing the role of the Presiding Officer, that do not introduce any substantive change.

The proposed § 22.4(d) establishes new procedures for seeking disqualification of the Administrator, a Regional Administrator, a member of the EAB, a Regional Judicial Officer ("RJO"), or an Administrative Law Judge ("ALJ"), from performing functions they are authorized to perform under the CROP. Under the existing rules, any party may seek the disqualification of a Regional Judicial Officer by motion to the Regional Administrator; or may seek the disqualification of any of the other individuals by motion to the Administrator. Under the proposed rules, any party must first file a motion with the particular individual requesting that he or she disqualify himself or herself from the proceeding. If the party has moved to disqualify a Regional Administrator, a Regional Judicial Officer, an ALJ, or a member of the EAB, and the motion is denied, the party may appeal the denial of the motion administratively. The proposed rule does not provide for administrative appeal from the Administrator's denial of a motion to disqualify herself.

The proposed § 22.4(d) provides that an interlocutory appeal may be taken when an ALJ denies a motion that he disqualify himself or herself from a proceeding. However, EPA asked for comments on whether to prohibit such interlocutory appeals.

b. Significant Comments and EPA Responses

22.4(a). Dow suggests clarifying the rule by adding the word "initial" before the word "decisions" in the description of the Environmental Appeals Board's role in ruling on decisions, rulings and orders of a Presiding Officer. EPA accepts the suggested change.

22.4(b). CEEC states that it opposes expansion of the role of RJOs through the CROP. The preamble to the proposed rule stated that EPA had no current plans to use the subpart I procedures for any cases other than those arising under Clean Water Act ("CWA") sections 309(g)(2)(A) and 311(b)(6)(B)(i) (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)), and Safe Drinking Water Act ("SDWA") sections 1414(g)(3)(B) and 1423(c) (42 U.S.C. 300g–3(g)(3)(B) and 300h–2(c)). *See* 63 FR at 9479. To codify that point, EPA has revised the proposed § 22.50 so that it applies only to these cases. With this revision, today's rule clearly does not represent any practical expansion of the RJOs' role. Since the 1980's, RJOs have presided over cases under CWA sections 309(g)(2)(A) and 311(b)(6)(B)(i), and SDWA sections 1414(g)(3)(B) and 1423(c), under the procedures proposed (but not finalized) as part 28 and under other Agency guidance (*e.g. Guidance on UIC Administrative Order Procedures*, November 28, 1986). Now they preside over the same kinds of cases using the CROP.

Of the six commenters on the proposed rule, five (UWAG, UARG, CEEC, CMA/API, and Dow) expressed concern that the proposed rule fails to protect constitutional due process rights and assure the independence and impartiality of Regional Judicial Officers. UARG and UWAG oppose use of any EPA attorneys as Presiding Officers, arguing that Agency loyalty will create bias or the appearance of bias. CEEC, CMA/API, Dow and (by implication) UARG and UWAG oppose the use of EPA enforcement attorneys as Presiding Officers. These commenters argue that allowing enforcement personnel to be Presiding Officers creates actual or apparent bias by commingling the investigative, prosecutorial and adjudicative functions. Particular concerns include EPA enforcement attorneys presiding over cases brought by their colleagues, and over cases with issues or defendants in common with cases the Presiding Officer has litigated. Dow, UARG and UWAG urge the Agency to use Administrative Law Judges for adjudication of all administrative enforcement proceedings, arguing that ALJs are more qualified and are insulated against institutional bias.

In response to these concerns, EPA has made several changes to § 22.4(b). First, EPA has added a requirement that a "Regional Judicial Officer shall not prosecute enforcement cases and shall

Whether adjudication by EPA attorneys under subpart I provides adequate protection for respondents' due process rights must be evaluated according to the three part standard established in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976):

"[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 334–35.

The private interests in a proceeding under subpart I of the CROP are the impact on respondent of a civil penalty and on respondent's reputation from a finding of liability, and perhaps in the expense and burden of the hearing itself. Although these interests are important, they are less important than the private interest at stake in *Mathews* v. *Eldridge*, where the governmental agency summarily discontinued an individual's social security disability benefits while the benefit termination hearing was pending. The private interests at stake in CROP proceedings do not rise to this level. Moreover, the interests at stake certainly are not so significant as individual interests in liberty or bodily integrity.

The risk of an erroneous deprivation of respondents' private interests through adjudications by EPA attorneys is low, and certainly lower than in *Mathews* v. *Eldridge*, where the disability benefits were terminated before any hearing was afforded. In a CROP subpart I proceeding, the respondent first has an opportunity for a hearing before an RJO (including the opportunity to present evidence and to cross examine the Agency's witnesses), and has opportunities for administrative review before the penalty is assessed (i.e., appeal of the initial decision to the EAB). The risk of an erroneous deprivation of a respondent's interests should correspond closely to the frequency with which decisions by EPA attorneys serving as Presiding Officer are reversed on appeal by either the EAB or a federal court, and as described above, this rate has been extremely low.

Balanced against the private interests at stake and the risk of their impairment is the government's interest. The government's primary interest in having EPA attorneys preside over certain enforcement cases is in making efficient use of Agency resources. The costs for an ALJ to travel from Washington, D.C., to the hearing location is greater than the cost for an EPA attorney to travel from the Regional office to the hearing location. In addition, ALJs are paid more than the EPA attorneys who serve as Presiding Officers. The other government interest is in having the flexibility to increase the number of Presiding Officers to meet the administrative case load. In the recent past, the number of ALJs was clearly inadequate to handle the number of cases. Although the number of ALJs is today more commensurate with the number of cases, future imbalances might be alleviated by temporarily expanding or contracting the number of EPA attorneys who may serve as Presiding Officer.

To summarize the results of this *Mathews* v. *Eldridge* three-step balancing test, there appears to be a relatively small risk of impairment of private interests that are of a moderate level of importance. This small risk of impairing moderately important interests must be balanced against the government's interests in making best use of its resources. Although it is not possible to weigh these factors with mathematical precision, it is clear that the use of EPA attorneys as Presiding Officers, subject to the provisions adopted in this rule and with the right to appeal to the EAB, is not a violation of respondents' rights to due process of law.

CMA/API recommend that, if EPA allows Agency personnel to serve as Regional Judicial Officers, they should be members in good standing with a bar. EPA notes that under the Federal personnel rules all attorney positions require bar membership, so this need not be addressed in § 22.4(b). CMA/API also argues that Regional Judicial Officers should have substantial litigation experience including adjudication. The position descriptions for Regional Judicial Officers require that they be senior attorneys with substantial litigation experience, and EPA believes that its internal procedures and controls are adequate to assure that Regional Judicial Officers have substantial litigation experience. EPA intends to continue its practice of sending each of its Regional Judicial Officers to the National Judicial College for training in presiding over administrative hearings. This level of experience and training is sufficient to prepare Agency attorneys to preside over the relatively straight-forward cases expected under subpart I.

Some commenters (CMA/API, UWAG, UARG) were concerned that the physical proximity, friendships or colleague relationships of the Regional Judicial Officers with Agency prosecuting attorneys would create an appearance of partiality, where they may share work and social activities, training and secretarial support, and where Regional Judicial Officers may overhear statements made by prosecutors. EPA and its RJOs make efforts to avoid such contacts where feasible, and the contacts that remain are unlikely to result in an actual bias. It does not appear that any solution short of complete physical isolation of Regional Judicial Officers from the enforcement offices could completely eliminate this concern. Such separation would also pose significant logistical difficulties for EPA's Regional offices. Accordingly, this comment is not adopted in the final rule. EPA Regional Offices will continue to take prudent measures to physically separate Regional Judicial Officers from personnel responsible for enforcement case development and prosecution to the extent feasible.

CMA/API suggested that a Regional Judicial Officer should not adjudicate any case involving the same counsel as another case in which he or she performed prosecutorial or investigative functions. EPA disagrees. Counsel serve merely as representatives of their clients, and bias cannot be presumed to attach merely to a representative.

CEEC and Dow suggested that the final sentence of the proposed § 22.4(b), which stated that RJOs may not have "any interest in the outcome of any case", is unclear and should incorporate explanatory language from the preamble to the proposed rule indicating that it includes "a financial interest, personal interest, or career interest in the outcome of the action". 63 FR at 9467. EPA notes that any interpretation of this clause would have to conform to the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635, which are intended to supersede all agency ethics standards (except those approved by the Office of Governmental Ethics and promulgated as supplemental ethics regulations pursuant to 5 CFR 2635.105). In order to avoid creating a standard which might be interpreted differently than these government-wide ethics standards, EPA has removed this clause from the final rule.

A general principle of the government-wide ethics regulations, particularly 5 CFR 2635.101, is that all federal employees must perform their duties impartially. If an RJO held any interest or bias which would compromise his or her ability to preside

Agency official who could appropriately resolve such an appeal. Moreover, any need for such a requirement is remote, for the occasions when the Administrator acts or serves as the deciding official under the CROP are extremely rare. In practice, the EAB performs the role of final decision maker pursuant to its delegation from the Administrator under the regulations. For the most part, the Administrator's role is residual and limited to cases specifically referred to her by the EAB. The EAB has not made such a referral since its creation in 1992. A slightly different role is reserved for the Administrator under proposed § 22.31(f) (§ 22.31(e) of this final rule), which provides that, if the EAB were to issue a final order to a Federal agency, the agency may request a conference with the Administrator. This opportunity is not available to other recipients of EAB orders. If a conference occurs as provided in the provision, a decision by the Administrator may become the final decision. Nonetheless, EPA does not expect that many such requests will be made pursuant to this provision. If the Administrator were to deny a motion to disqualify herself from participating in a proceeding, the appropriate recourse would be to federal court, upon issuance of the final agency action at the end of the administrative proceeding.

Under both the existing rule and the proposed rule (except for subpart I cases), an interlocutory appeal under § 22.29 is available where a Presiding Officer denies a motion for disqualification. EPA requested comment on whether to prohibit interlocutory appeals to the EAB following the denial of a disqualification motion, consistent with federal court practice.

In response to EPA's request for comment, Dow and CEEC recommend that interlocutory appeals of motions for disqualification be allowed because "there is a far greater likelihood of bias under CROP proceedings than in Federal courts," especially where the presiding officer is not an ALJ. Dow adds, therefore, that although it might be acceptable to prohibit an interlocutory appeal from the denial of a motion to disqualify an ALJ, because "ALJs are insulated against actual bias," it is not appropriate to prohibit an interlocutory appeal from the denial of a motion for disqualification where the presiding officer is not an ALJ. CEEC argues that prohibiting interlocutory appeals would contribute to delay because the unavailability of an interlocutory appeals process would increase the number of proceedings that would have to be overturned on appeal.

EPA has considered these comments, but has decided to add a provision to the rules prohibiting interlocutory appeals from the denial of disqualification motions. EPA believes a prohibition against interlocutory appeals will not significantly affect the impartiality of the administrative adjudicative process and at the same time will prevent unnecessary delays. Based on the Agency's experience to date, motions to disqualify decision makers have been very infrequent. Therefore, the Agency expects that the circumstances will be extremely rare in which either the Agency or private litigants will have the burden of a retrial.

CEEC proposes that the regulatory bases for disqualifying a decision maker be expanded to include "the appearance of impropriety." Courts have held that appearance of impropriety, without more, does not warrant disqualification under due process standards. *Del Vecchio* v. *Illinois Department of Corrections*, 31 F.3d 1363, 1371–72 (7th Cir. 1994). Courts have also declined to extend the judicial system's strict separation of functions standard to multi-function agencies. See e.g., *Simpson* v. *OTS*, 29 F.3d 1418, 1424 (9th Cir. 1994); EDF v. EPA, 510 F.2d at 1305. Likewise, the more stringent "appearance" standard in 28 U.S.C. 455(a), that requires a Federal judge to disqualify himself whenever his impartiality "might reasonably be questioned", does not apply to agency adjudicators. See, e.g., *Marine Shale Processors, Inc.* v. *EPA*, 81 F.3d 1371, 1386 (5th Cir. 1996). Although EPA intends that RJOs should avoid the appearance of impropriety, EPA does not believe that the CROP should create a disqualification standard based on appearance of impropriety.

The criteria for disqualification in a CROP proceeding are whether decision makers have "a financial interest or [a] relationship with a party or with the subject matter which would make it inappropriate for them to act". Whether a financial interest or a relationship is inappropriate is determined by reference to the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635. Decision makers who fail to conform to these government-wide ethics standards are subject to disqualification.

c. Final Rule. EPA has reconsidered the proposed change to the title of § 22.4, and has decided to retain the original title "Powers and duties of the Environmental Appeals Board * * *."

EPA has adopted the language proposed under § 22.4(a), with the addition of the word "initial" before the word "decisions" in the first sentence, as recommended by a commenter. This paragraph appears as § 22.4(a)(1) in today's final rule. As noted above in the response to comments on § 22.4(c), a commenter recommended that Presiding Officers be given additional authority to impose sanctions. Although § 22.4(c) and other sections of the CROP provide adequate authority to impose procedural sanctions, EPA notes that § 22.4(c) applies only to the Presiding Officer, and not the EAB. In order that the CROP should expressly authorize the EAB to employ equivalent procedural sanctions, EPA has added a new paragraph to § 22.4(a). This new paragraph (a)(2) makes explicit the EAB's authority to impose procedural sanctions for failures to conform to CROP requirements and to orders of the EAB, an authority that the Agency has always considered implicit:

> (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.

EPA has also made a minor editorial revision to the last sentence of what is now § 22.4(a)(1), for reasons of grammar and clarity. EPA has changed the last clause from "motions * * * where the Environmental Appeals Board has referred a matter to the Administrator" to "motions filed in matters that the Environmental Appeals Board has referred to the Administrator."

As discussed in the response to comments above, EPA has made several changes to § 22.4(b) in response to public comments. EPA has added a new sentence to § 22.4(b): "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." EPA has also included in the final rule a provision precluding a Regional Judicial Officer from knowingly presiding over a case involving any party concerning which the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the initiation of the case. EPA has deleted from the final

determine the docket number. EPA agrees that the proposed rule leaves this unclear. EPA has stricken the parenthetical clause "(after the filing of the complaint)" in order to assure that the docket number shall appear on the complaint.

Dow and CEEC observe that under § 22.5(c)(4) a party who fails to furnish or update its name, address, and telephone number, and those of its attorney or representative, if any, completely waives its right to notice and service. The commenters argue that this sanction is too severe for harmless errors. EPA has amended this provision so that where a party fails to update information concerning its representative and/or service address, service to the outdated representative or address shall satisfy the requirements of § 22.5(b)(2) and § 22.6. In this manner, the consequences of any failure to update this information will be commensurate with the severity of the error.

In its comments on §§ 22.17(a) and 22.34(c), Dow notes that default is too harsh a sanction for minor errors in service or filing. The proposed § 22.5(c)(5) would allow the EAB or the Presiding Officer to exclude from the record any document that does not comply with § 22.5(c). This would apparently preclude exclusion for service errors as significant as those in § 22.5(c) (e.g., failure to serve the opposing party, failure to include a certificate of service per § 22.5(a)(3), failure to file the original document per § 22.5(a)(1)). Therefore, the final rule expands this sanction to include failures to conform to paragraphs (a), (b) and (d), as well as (c).

The Agency solicited comments on whether electronic filing and service should be allowed, and if so, under what conditions, but received no comments. After further consideration, EPA has decided that the CROP should permit the Presiding Officer and the EAB, in consultation with the parties and the affected hearing clerk, to authorize facsimile or electronic service and/or filing on a case-by-case basis. Accordingly, language is added to §§ 22.5(a)(1) and 22.5(b)(2) allowing the Presiding Officer or the EAB to authorize facsimile or electronic service and/or filing, subject to any appropriate conditions and limitations.

c. Final Rule In response to public comments, EPA has adopted a modified version of the proposed § 22.5(a), (b), and (c). EPA has revised this and other sections to use the more general term "document" in place of "pleadings and documents", and to use "complaint" or "answer" where reference to one or the other is specifically intended. EPA has edited § 22.5(b)(1) to read "by certified mail with return receipt requested". EPA deletes the phrase "officer or" from § 22.5(b)(1)(ii)(B), and revises the proposed § 22.5(b)(1)(ii)(B) as follows:

> "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."

EPA has stricken from § 22.5(c)(2) the parenthetical clause "(after the filing of the complaint)". EPA has revised § 22.5(c)(4) as follows:

> "(4) The first document filed by any person shall contain the name, address, and telephone number of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Regional Hearing Clerk, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information or any changes thereto, service to the party's last known address shall satisfy the requirements of § 22.5(b)(2) and § 22.6."

EPA has revised the proposed § 22.5(c)(5) to allow the EAB or the Presiding Officer to exclude from the record any document that does not comply with any requirement of § 22.5.

In addition to the changes suggested by the commenters, EPA has made several other minor changes to § 22.5. EPA has amended § 22.5(a)(1) to allow the Presiding Officer and the EAB the discretion to allow facsimile or electronic filing under such circumstances and limitations as they deem appropriate. EPA also has added to § 22.5(b)(2) language allowing the Presiding Officer or the EAB to authorize facsimile or electronic service, subject to such conditions and limitations as they deem appropriate. EPA has added a reference to the EAB to § 22.5(b): "A copy of each document filed in the proceeding shall be served on the Presiding Officer or the Environmental Appeals Board, and on each party."

EPA has determined that additional clarifications are appropriate for § 22.5(b)(2). EPA notes that the U.S. Postal Service considers overnight express and priority mail to be forms of first class mail. EPA has revised § 22.5(b)(2) to allow service "by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), or by any reliable commercial delivery service. This change necessitates a corresponding change in § 22.7(c), because 5 day grace period for responding to motions sent by first class mail is unnecessary for documents served by overnight or same-day delivery.

Finally, EPA has revised the CROP to present numbers consistently, adopting the preferred style of the U.S. Government Printing Office. Numbers of 10 or more are expressed in figures and not spelled out. Accordingly, EPA has revised § 22.5(c) to require a table of contents and a table of authorities for all briefs and legal memoranda "greater than 20 pages in length".

4. Confidentiality of Business Information (40 CFR 22.5(d))

a. Summary of Proposed Rule. The proposed § 22.5(d) addresses treatment of information claimed as Confidential Business Information ("CBI") in documents filed in CROP proceedings. The proposed paragraph (d)(1) would provide that any business confidentiality claim shall be made in the manner prescribed by 40 CFR part 2 at the time that the document is filed. It warns that a document filed without a claim of business confidentiality will be available to the public for inspection and copying pursuant to § 22.9.

Paragraph (d)(2) would require the submission of a redacted, non-confidential version in addition to the full document containing the information claimed confidential, and describes the process for preparing these documents. Paragraph (d)(3) describes the procedures for serving documents containing claimed-confidential information and makes clear that only a redacted version of any document may be served on a party, amici, or other representative thereof not authorized to receive the confidential information. Paragraph (d)(4) provides that only the redacted version of a document with claimed-confidential information will become part of the public record of the proceeding, and further provides that an EPA officer or employee may disclose information claimed confidential only as provided by 40 CFR part 2.

b. Significant Comments and EPA Response. Dow and CEEC express concern that under the proposed rule a failure to include a CBI claim at the time a document is submitted forecloses any future protection of the document. They argue that even where a company has inadvertently placed information in the public record, there is still value to in preventing further disclosure. They also point out that the Agency's CBI regulations at 40 CFR 2.203(c) provide that the Agency "will make such efforts as are administratively practicable to

proceedings between potential adjudicators and Agency enforcement personnel. Dow also suggests that where Agency enforcement attorneys may potentially serve as Presiding Officers, any communications regarding contemplated or reasonably foreseeable enforcement proceedings should be recorded, kept on file, and served on respondent as soon as that attorney is designated Presiding Officer.

EPA agrees that EPA attorneys who may serve as Presiding Officers should avoid communications regarding contemplated or reasonably foreseeable enforcement proceedings over which they might preside. However, a complete prohibition is neither feasible nor necessary.

In some instances, it is appropriate for Agency enforcement personnel to have prefiling discussions concerning specific enforcement cases with Agency attorneys who may be called upon act as Presiding Officers. When considering whether to assign a new case to a particular Agency enforcement attorney, it may be necessary to inquire of that attorney whether a prospective case may present a conflict with any cases in which the attorney is acting as Presiding Officer. So long as those discussions are carefully limited to transmitting the identity of the prospective respondent and a bare statement of the statutory or regulatory provisions allegedly violated, and to exploring whether there is any potential conflict of interest, but do not address the merits of the potential action, such discussions could not influence the decisions of the prospective adjudicator, and should not be considered prohibited ex parte communications.

Sound management of the Agency's enforcement program also periodically requires some discussion between complainants and adjudicators concerning anticipated work loads. For example, EPA periodically offers compliance audit programs (see, e.g., Registration and Agreement for TSCA Section 8(e) Compliance Audit Program, 56 FR 4128 (Feb. 1, 1991)) where large numbers potential cases are simultaneously settled on essentially identical terms, and it is appropriate in such cases for the complainant to discuss process issues with the persons who would be responsible for approving the consent agreements and issuing final orders. Discussions of how many consent agreements might be submitted for approval, when they might be submitted, whether or to what extent the consent agreements vary, are all permissible procedural matters that are not prohibited ex parte communications.

Compliance audit programs encourage violators to identify their violations and disclose them to EPA in exchange for a settlement and release of liability on favorable terms. Obtaining advance approval of the generic consent agreements could reassure those members of the regulated community who are wary of disclosing violations that the Agency will in fact conclude the cases according to the terms offered. Although this would result in substantive discussion of the terms of settlement between prospective complainants and adjudicators, this is permissible under the peculiar circumstances of a compliance audit program. It is permissible because compliance audit programs are entirely voluntary. Each compliance audit program is an offer by the Agency to the regulated community at large, and EPA typically engages in these efforts precisely because it does not know who is in violation and it wants to bring a large and ill-defined sector of the industry into compliance. No regulatee is obligated to identify itself as a violator or to participate in the program; each chooses to do so only if it considers the terms offered by the Agency to be in its best interest. Accordingly, where complainants wish to confer with Agency officials responsible for approving consent agreements and issuing final orders concerning potential compliance audit programs, they may do so without violating § 22.8.

Dow's suggested limitations also pose significant implementation problems. Parties may disagree about when an investigation becomes a "contemplated or reasonably foreseeable enforcement proceeding" and about what communications concern such a proceeding. For the foregoing reasons, EPA has not added any prohibition against communications concerning cases before the filing of the complaint. Similarly, EPA does not believe that it is necessary to require by rule that potential adjudicators retain a written record of all communications regarding potential cases. The prohibition in § 22.4(d)(1) against individuals serving as Presiding Officer in regard to "any matter in which they have any relationship with a party or with the subject matter which would make it inappropriate for them to act" provides adequate protection against any bias that might arise through communications prior to the filing of a complaint.

Dow also comments that where an adjudicator obtains advice from other EPA personnel, any such advice should be served on the respondent. The focus of Dow's concern is that EPA personnel such as technical experts, rule writers, and attorneys might be advising adjudicators on the merits of a proceeding. EPA shares Dow's opinion that such ex parte advice is generally unnecessary and inappropriate, and believes that it is in fact extremely uncommon. EPA agrees with the commenter that adjudicators should not be receiving such advice without all parties having the opportunity to review and respond to it. The CROP provides suitable procedures for adjudicators to solicit such advice (e.g., by calling for an expert to testify pursuant to § 22.19(e)(4)) and for EPA personnel to volunteer such advice (through amicus briefs subject to § 22.11(b)) without risk of ex parte communication.

There are, however, circumstances where it is appropriate for adjudicators to obtain from other EPA personnel advice that is not served on the parties. Administrative Law Judges periodically consult with each other, as do the Agency's RJOs. Adjudicators routinely receive advice from the attorneys and law clerks on the staff of the Environmental Appeals Board and the Office of Administrative Law Judges, and on occasion from hearing clerks and from Agency ethics officials. Accordingly, EPA declines to require that all advice to adjudicators from EPA personnel be served on the parties.

c. Final Rule. EPA is adopting § 22.8 as proposed, with minor changes. EPA notes that § 22.8 refers in three places to both Regional Judicial Officers and Presiding Officers. In order to avoid redundancy and potential confusion, EPA has stricken the words "the Regional Judicial Officer." Other minor editorial changes in the first sentence are the substitution of the word "proceeding" for "case", so as to consistently use the word "proceeding" when referring to a particular administrative adjudication, and substitution of "any decision" for "the decision" to clarify ex parte communication is prohibited in regard to small matters as well as large ones. These editorial changes do not alter the substance of the CROP.

The preamble to the proposed rule indicated that the prohibitions on ex parte communications would apply to persons who approve consent agreements and issue final orders. 63 FR at 9468 ("For purposes of this provision [§ 22.8], the Agency would consider the approval of consent agreements and issuance of consent orders to be adjudicatory functions."). In some instances, Regional Administrators have delegated the authority to review settlements and issue final orders to

proceeding shall be conducted in conformance with section 554 of the APA.

EPA also proposed editorial revisions, primarily to consolidate the provisions applicable to complaints for assessment of civil penalties with the essentially parallel provisions for revocation, termination or suspension of permits, and to explicitly provide for the issuance of compliance and corrective action orders.

b. Significant Comments and EPA Response

Four of the commenters, CMA/API, CEEC, UWAG and USAF, opposed the proposed notice pleading option.

Implicit in these comments is a concern that respondents will not be able to fairly gauge the amount of their potential penalty liability based on the information in the complaint. EPA agrees that complaints should provide more information than is required under the proposed rule. The proposed § 22.14(a)(4)(ii) arguably would allow issuance of complaints which do not clearly identify the number of violations charged, for example, where a statute authorizes EPA to assess a separate penalty for each day a violation continues. In order to ensure that respondents understand from the complaint how many violations are charged, EPA has revised § 22.14(a)(4)(ii) to require that the complaint specify "the number of violations (where applicable, days of violation) for which a penalty is sought".

CMA/API objected to the notice pleading option and recommended that it be rejected, noting that allowing complaints to issue without stating a sum certain would make it "too easy" for EPA to proceed with an administrative penalty action without gathering sufficient information to make an informed decision, and that the Agency might file meritless complaints that would nonetheless have a "stigmatizing impact" on respondents. EPA notes that the proposed § 22.14 would still require complainant to state the factual basis for alleging the violation, and to specify each provision of a statute, regulation, permit or order that respondent is alleged to have violated. The proposed change would only allow EPA, at its discretion, to postpone stating the extent of the relief sought. Owing to the retention of provisions that require complainant to specifically allege respondent's violation, the risk that EPA might file meritless complaints is not increased by the proposed change.

CMA/API objects that notice pleading will allow EPA to use the administrative complaint as a form of discovery to obtain information from the respondent, and argues that EPA's existing information gathering tools are adequate for that purpose. EPA does not view the administrative complaint as an investigation or discovery tool, but rather, the product of an investigation through which EPA has collected evidence reasonably supporting the conclusion that the respondent has violated the law. However, in some cases the litigation process is the only mechanism by which EPA can obtain the financial information necessary to determine what penalty is appropriate for those violations (see, e.g., FIFRA section 8(b), 7 U.S.C. 136f(b), and Toxic Substances Control Act ("TSCA") section 11(b), 15 U.S.C. 2610(b), which expressly prohibit inspections seeking financial information).

The USAF argues that the proposed change potentially shifts to respondents the burden of demonstrating that something less than the maximum penalty is appropriate. EPA disagrees, as the proposed § 22.24(a) states that complainant bears both "the burdens of presentation and persuasion * * * that the relief sought is appropriate", while respondents only bear "the burden of presenting * * * any response or evidence with respect to the appropriate relief." Notice pleading is common practice in the state and federal courts, and in those courts notice pleading does not put the burden of persuasion on the respondent, is not inherently unfair, and does not violate a defendant's due process rights.

USAF objects that notice pleading is unnecessary to achieve the Agency's stated goal of "provid[ing] the Agency with added flexibility in issuing a complaint under circumstances where only the violator possesses information crucial to the proper determination of the penalty * * *." USAF suggests that a better approach would be to require a specific penalty proposal in the complaint, but allow the complainant to amend the proposed penalty based on information it timely obtains after the commencement of a suit.

EPA agrees that the approach USAF identified is appropriate in many cases. However, where EPA does not have adequate information to confidently recommend a specific penalty, EPA would be misleading the respondent were it to propose an arbitrary penalty which does not reflect significant facts of the case. An unreasonable penalty demand may also make EPA liable for respondent's attorneys' fees under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. 504. The Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub.L. 104–121, expanded the EAJA to allow recovery of attorney's fees where an initial penalty demand is later shown to be unreasonable. Notice pleading is an appropriate and responsible choice in circumstances where liability is clear, but where EPA is not able to determine with confidence the reasonableness of a specific penalty amount before filing the case.

If EPA were not to provide the option of notice pleading, the SBREFA amendments would make it possible for polluters to escape high penalties if they can effectively hide from EPA their financial status or the economic benefits derived from their noncompliance with environmental regulation. Some statutes require EPA to consider a respondent's ability to pay the proposed penalty or its economic benefit of noncompliance in assessing a penalty (e.g., FIFRA section 14(a)(4), TSCA section 16(a)(2)(B), CWA section 309(g)(3), Clean Air Act ("CAA") section 113(e)(1)), and EPA generally considers these factors relevant in penalty assessment under other statutes as well. However, authority for EPA to gather such information is not always clear, and under some statutes it has been expressly withheld (see, e.g., FIFRA section 8(b), 7 U.S.C. 136f(b), TSCA section 11(b), 15 U.S.C. 2610(b)). The SBREFA amendments to the EAJA make the Agency wary of seeking large penalties against individuals or privately held corporations (who do not generally make public disclosures of their financial condition) absent reliable financial information. Because EPA does not have the resources to inspect any but the largest facilities more than once every few years, inspections typically reveal violations that are several years old. The 5-year federal statute of limitations may limit the Agency's ability to sanction violators for older violations, so a respondent need only hide its financial status for a short time in order to forestall EPA from seeking penalties commensurate with a serious violation. Notice pleading increases the deterrent effect of EPA's enforcement program, and levels the regulatory playing field for publicly held and privately held corporations.

CEEC noted in its comments that the February 25, 1998, FR Notice of Proposed Rule Making did not analyze the proposed notice pleading option in light of the SBREFA amendments to the EAJA. The proposed rule, as well as today's final rule, is fully consistent with the EAJA as amended by SBREFA. The EAJA does not prohibit notice

pay in order to avoid making an unreasonable penalty demand.

EPA's introduction of the notice pleading option into CROP proceedings does not signal any intention to alter the Agency's longstanding policies and practices favoring expeditious settlements. Over the past 20 years, more than 98 per cent of all administrative cases have been settled without trials. Today's final rule evidences EPA's continuing commitment to non-adversarial resolution with new provisions such as commencement of pre-negotiated cases with a final order pursuant to § 22.13(b), the quick resolution of § 22.18(a), and procedures supporting alternative dispute resolution at § 22.18(d). Although notice pleading could possibly delay settlement, it is expected that the need to make efficient use of enforcement resources will restrain EPA's use of notice pleading if, in actual practice, it significantly reduces the frequency of settlements or the pace at which settlements are reached.

c. Final Rule. EPA has adopted § 22.14 as proposed, with several changes. As noted above, EPA has revised § 22.14(a)(4)(ii) to require that where complainant chooses not to specify a proposed penalty in the complaint, the complaint must state "the number of violations (where applicable, days of violation) for which a penalty is sought".

EPA also has made several minor changes at its own initiative. The proposed § 22.14(a)(6) required complainant to specify in the complaint whether subpart I "applies to such hearing." EPA has revised this paragraph to clarify that where subpart I applies, it applies to the entire proceeding, and not just the evidentiary hearing phase.

EPA has added two new requirements as to content of the complaint. Section 22.14(a) now requires in paragraph (7) that the complaint include the address of the Regional Hearing Clerk, and in paragraph (8) requires instructions for paying penalties, if applicable. EPA has observed that the names and addresses of the lock box banks change often, and that it would be difficult to keep the proposed Appendix B up to date. EPA also notes that Appendix A is redundant with 40 CFR 1.7, and moreover, notes that these addresses are of less value to respondent than the specific address of the Regional Hearing Clerk. EPA has decided to expand § 22.14(a) to require that the relevant information appear in the complaint, and to delete both appendices.

In recognition of the fact that most complaints allege more than one violation, EPA has amended § 22.14(a)(3) to require that the complaint state the factual basis "for each violation alleged."

For the convenience of respondents receiving complaints which do not specify a proposed penalty, EPA has amended § 22.14(a)(4)(ii) to clarify that the complaint shall include "a recitation of", rather than a mere "citation to", the applicable statutory penalty authority.

EPA has revised § 22.14(a)(4)(iii) and (a)(5), as well as other sections of the CROP, to replace the unwieldy phrase "revocation, termination or suspension of all or part of a permit" with a new term "Permit Action." EPA has moved the "revocation, termination or suspension" language into the definition of "Permit Action" at § 22.3(a), which makes the remainder of the CROP easier to read, and will facilitate any future efforts to bring other permit actions within the scope of the CROP.

EPA has changed the title of this section from "Content and amendment of the complaint" to the more general "Complaint". Finally, to conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.14(c) to state the time allowed for responding to an amended complaint with the numeral "20".

10. Answer to the Complaint (40 CFR 22.15)

a. Summary of Proposed Rule. EPA proposed to amend § 22.15(a) to clarify requirements for filing and serving the answer to a complaint, and to extend the time allowed for the filing of an answer from 20 days to 30 days. EPA proposed to add to paragraph (b) a new requirement that the answer state the basis for opposing any proposed penalty, compliance or corrective action order, or permit revocation, termination or suspension. EPA proposed editorial changes to paragraph (c), and proposed no changes to paragraphs (d) or (e).

b. Significant Comments and EPA Response. USAF notes that where complainant has elected not to specify a penalty in the complaint, respondent cannot comply with the proposed requirement in § 22.15(b) that the answer state respondent's basis for opposing the proposed relief. In response, the final rule now requires that the answer shall state "the basis for opposing any proposed relief * * *"

CEEC urges that EPA amend § 22.15(e) to allow respondent to amend its answer as a matter of right, arguing that respondent is unlikely to have all the necessary information at the time the answer is due. Allowing amendment of the answer as a matter of right would not encourage diligence in answering the complaint, and could disrupt the orderly progress of proceedings. Accordingly, EPA declines to adopt CEEC's suggestion.

The existing CROP allows amendments of the answer at the presiding officer's discretion, and motions to amend pleadings are generally granted. See, e.g., In re Port of Oakland and Great Lakes Dredge and Dock Co., 4 E.A.D. 170, 205 (EAB 1992) ("the Board adheres to the generally accepted legal principle that administrative pleadings are liberally construed and easily amended") (citations omitted). Moreover, in paragraph (a) EPA already has expanded by 50% the time allowed for assembling information and preparing an answer. Although leave to amend pleadings is liberally granted, allowing amendments to the answer as a matter of right would make the CROP significantly less efficient. The purpose of the answer is to clarify what is contested and what is not contested at an early stage of the proceeding. Allowing amendment of the answer as a matter of right would not encourage due diligence in framing the issues, and could unfairly prejudice complainant if, for example, respondent were to substantially alter its defenses shortly before, or even after, the evidentiary hearing. Accordingly, CEEC's recommendation is rejected, except in circumstances where the complaint has been amended.

c. Final Rule. For the foregoing reasons, EPA has adopted § 22.15 of the CROP as proposed, with the exception of certain changes. As discussed above, the language of § 22.15(b) is amended to require that the answer state "the basis for opposing any proposed relief * * *", and the proposed § 22.15(e) is amended to allow amendment as of right whenever the complaint is amended.

Section 22.15(c) of both the proposed rule and the 1980 CROP states that "[a] hearing ... shall be held if requested by respondent in its answer." As used in this context, the word "hearing" refers to an adjudicatory proceeding, and encompasses a determination on motion papers alone. See In re Green Thumb Nursery, Inc., 6 E.A.D. 782, 790 & n.14 (EAB 1997) (holding that there is no right to an oral evidentiary hearing). Elsewhere in both the proposed rule and the 1980 CROP, "hearing" refers specifically to the oral evidentiary hearing phase of a proceeding. In today's final rule, EPA has endeavored to use the term "hearing" to refer specifically to the oral evidentiary hearing. In order to avoid the implication that a request for a hearing

a subsequent motion if liability is established. This approach spares the parties from burdensome litigation over an issue that may be moot.

CEEC's statement mirrors a statement in the preamble to the proposed rule (63 FR at 9469). EPA acknowledges that this statement, while generally accurate, is overly broad in that it incorrectly implies that every motion for default must specify a penalty. In order to avoid unnecessary burdens on the litigants, EPA intends that the CROP should continue to allow parties to make motions that merely ask the Presiding Officer to determine whether a default has occurred, without specifying a penalty in that particular motion. Pursuant to the second sentence of paragraph (b), complainant will still be obliged to specify a penalty if it moves for the assessment of a penalty against a defaulting party. However, this may be a second motion that follows a finding that default judgment against respondent is warranted.

In order to eliminate any confusion resulting from the overly broad statement in the preamble or ambiguity in the regulation itself, EPA has added an additional clarifying sentence to § 22.17(b): "The motion may seek resolution of all or part of the proceeding."

Dow supports the revision of § 22.17(c) that gives the Presiding Officers greater discretion in determining the appropriate relief in the default orders because this "flexibility will let the Presiding Officer ensure that any relief ordered is supported by the administrative record." Dow's comment is essentially reiterated by CMA and API: both organizations "support the provision requiring the Presiding Officer, when issuing a default order, to determine that the relief sought in the complaint is consistent with the applicable statute."

Even though there were no adverse comments regarding this provision, the preceding discussion of paragraphs (a) and (b) suggests some useful revisions of paragraph (c). First, corresponding to § 22.17(b)'s statement that a default "motion may seek resolution of any or all parts of the proceeding", § 22.17(c) is revised to no longer require that a default order must be an initial decision, unless it resolves "all issues and claims in the proceeding." This will allow Presiding Officers to find a party liable in default, without necessarily determining the appropriate relief in the same order.

Second, EPA has also relaxed the proposed requirement that "the relief proposed in the complaint or the motion for default shall be ordered unless the record clearly demonstrates that the requested relief is inconsistent with the Act." Under this proposed language, if a proposed penalty were inconsistent with the record (e.g., owing to a mathematical error), though not to such a degree as to be clearly inconsistent with the statutory penalty authority, the Presiding Officer would apparently be required to assess the proposed penalty. In order to prevent injustice, EPA has amended this language to allow the Presiding Officer to impose other relief where "the requested relief is clearly inconsistent with the record or the Act".

c. Final Rule. EPA is adopting § 22.17 as proposed, but with several modifications. As discussed above, EPA has added one sentence to § 22.17(b). EPA has also noted that the rest of the proposed § 22.17(b) repeats parts of § 22.16(a). Section 22.16 applies to all motions, except as otherwise provided, so restatement is not necessary in § 22.17(b). Moreover, the failure to include all of § 22.16(a) in § 22.17(b) introduces potential confusion. Accordingly, EPA has deleted from the final rule those parts of the proposed § 22.17(b) that are redundant with the general requirements for motions at § 22.16.

The proposed § 22.17(a) provided that a default by respondent would constitute a waiver of respondent's "right to a hearing" on the factual allegations in the complaint. Throughout today's final rule, for clarity and consistency, EPA has endeavored to use the term "hearing" only to refer to oral evidentiary hearings. As there is no right to an oral evidentiary hearing (see, e.g., In re Green Thumb Nursery, Inc., 6 E.A.D. 782 (1997)), EPA has revised § 22.17(a) to state that default by respondent constitutes a waiver of respondent's "right to contest" the factual allegations in the complaint. EPA has replaced the undefined word "action" in § 22.17(a) with the word "proceeding," which is defined in today's final rule as discussed below.

EPA has revised § 22.17(c) as follows: (1) EPA has added the clause "as to all or part of the proceeding," to the first sentence, before "unless the record shows"; (2) EPA has revised the second sentence to say "If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice."; (3) EPA has expanded the next to last sentence in order to allow the Presiding Officer to impose relief other than that requested by complainant if it is clearly inconsistent with the record of the proceeding. In addition, EPA has split the second sentence of the proposed § 22.17(c) into two sentences. This editorial revision is not intended to effect a substantive change.

For consistency with changes elsewhere in the CROP, EPA has revised § 22.17(d) to refer to the effective date of a "Permit Action" rather than the effective date of a permit revocation or suspension. To conform to the preferred style of the U.S. Government Printing Office, EPA has also revised § 22.17(d) to state the time allowed for paying default penalties with the numeral "30".

12. Quick Resolution (40 CFR 22.18(a))

a. Summary of Proposed Rule. In cases where the complaint proposes a specific penalty amount (and seeks no other relief), the proposed § 22.18(a)(1) would provide that the respondent can resolve the case at any time by simply paying the proposed penalty in full. The only restriction on when the respondent can take advantage of the quick resolution provision is in cases involving the public comment provisions of § 22.45. In these cases, the respondent must wait until 10 days after the period for public comment has closed before submitting the penalty payment.

Where the complaint includes a specific proposed penalty, the proposed § 22.18(a)(2) would allow respondent to resolve an action without filing an answer by paying the penalty within 30 days of receipt of the complaint. By paying the proposed penalty within that 30 day time frame, the action is resolved before the answer is due and hence there is no need for respondent to file an answer.

If the respondent wishes to resolve the matter by paying the proposed penalty in full but needs additional time in which to do so, § 22.18(a)(2) would allow the respondent to file a written statement with the Regional Hearing Clerk within 30 days of receiving the complaint in which it agrees to pay the penalty within 60 days of receipt of the complaint.

b. Significant Comments and EPA Response. Dow noted that in actions subject to the public comment provisions, the 30 day public comment period may require respondent to file an answer even though it wants to resolve the action, because the last sentence of § 22.18(a)(1) provides that a respondent cannot utilize the quick resolution provision until 10 days after the close of the public comment period. This commenter suggested amending the last sentence of § 22.18(a)(1) to explicitly provide that the respondent does not have to file an answer if it wishes to settle the action by paying the full penalty. Instead, EPA believes that the

13. Settlement and Scope of Resolution or Settlement (40 CFR 22.18(b)&(c))

a. Summary of Proposed Rule. The proposed § 22.18(b) would clarify the existing settlement process. Paragraph (b)(2) would specify that consent agreements contain an express waiver of the respondent's right to a hearing and appeal of the final order, and establishes additional content requirements for consent agreements in cases where the complainant proposes to simultaneously commence and conclude a case pursuant to § 22.13(b) through filing of a consent agreement and final order negotiated before a complaint is issued.

Paragraph (b)(3) would be revised to expressly provide that an administrative action is settled only when the Regional Judicial Officer or Regional Administrator, or, in cases commenced at EPA Headquarters, the Environmental Appeals Board, approves a consent agreement and issues a final order.

Paragraph (c) would provide that the effect of settlements and full payment of proposed penalties is limited to those facts and violations specifically alleged in the complaint, and reserves the Agency's right to pursue injunctive relief or criminal sanctions.

b. Significant Comments and EPA Response. Dow urges that § 22.18(b)(2) should expressly provide for partial or contingent settlements. Dow's particular concern is that paragraph (b)(2) should not require respondent to waive its right to hearing or to appeal matters that are raised in the complaint but not included in the consent agreement or the final order. Dow's comments do not take issue with the waiver of rights to hearing or appeal in settlements of the entire proceeding.

Paragraphs (a), (b) and (c) of § 22.18 define the process by which the parties may resolve an entire proceeding, and so, consent agreements pursuant to § 22.18(b)(2) and final orders under § 22.18(b)(3) can be neither partial nor contingent. Nevertheless, EPA disagrees with Dow's conclusion that the proposed rule precludes partial or contingent settlements. Where the parties wish to settle some of the counts in a complaint, they may file stipulations as to a respondent's liability, and/or to the appropriate relief, for those counts. Where the parties seek a more final resolution, they may move pursuant to § 22.12(b) to sever the case "with respect to any or all parties or issues." Upon severance, the parties may settle the uncontested portions and litigate the contested portions. Contingent settlements (e.g., where the parties agree that if a contested issue is resolved in a certain manner, then the parties agree to settle on predetermined terms) are possible under the proposed rule, however, the documents committing the parties to the contingency agreement would not themselves constitute "consent agreements" pursuant to § 22.18(b)(2). Such contingent settlements could be accomplished, for example, through formal stipulations as to the appropriateness of certain relief in the event that liability is established, or agreements to sign a specific "consent agreement" when the agreed conditions are met. As the problems Dow describes can easily be avoided, EPA believes that the language in the proposed rule is desirable in that it gives respondents unambiguous notice that consent agreements waive respondents' rights to a hearing and all rights of appeal, including appeal to the federal courts as well as appeal to the EAB under §§ 22.30 and 22.32.

CMA/API object to language proposed for § 22.18(c) that would limit the scope of relief available in settlements to those "violations and facts" alleged in the complaint. CMA/API feel this provision prevents the parties from taking advantage of the economies that result from resolving in a single settlement additional violations that may come to light during the proceeding. EPA agrees that it is, in many cases, desirable to resolve in a single proceeding additional violations that become apparent as a case progresses. However, such expansions of a proceeding should be accomplished through motions to amend the complaint, pursuant to § 22.14(c). Although even a joint or uncontested motion to amend the complaint is somewhat more burdensome that expanding the case through a consent agreement alone, this burden is outweighed by the interest of assuring a clear public record of the Agency's administrative enforcement proceedings.

This is particularly important where statutes require public notice of a proposal to assess penalties for specific violations. Such statutes envision that interested members of the public will have had notice of all violations cited in the complaint and all violations resolved by consent agreement, in order to properly avail themselves of their statutory rights as to those actions.

CEEC also objects to the proposed language limiting settlements to "the facts and violations alleged in the complaint", on the grounds that it is improper for the Agency to assess in a subsequent proceeding additional penalties for other violations arising out of the same circumstances identified in the initial proceeding. As noted above, EPA is well aware that resolving as many violations as possible within a single proceeding generally demands less resources than pursuing multiple cases involving similar facts or issues, and EPA generally can be counted on to take advantage of such cost-saving opportunities. There are, however, circumstances where this may be inadvisable or impossible. For example, where one violation is straightforward and undisputed, neither party would gain from delaying resolution of that case in order to address within the same proceeding another violation sharing certain facts with the first, but concerning a different statute, an unsettled area of the law, and presenting substantial evidentiary disputes. In other circumstances, where new facts establishing other violations come to light after the close of a case, it would be impossible to resolve these newly discovered violations through the closed case. EPA therefore disagrees with CEEC's contention that it is necessarily improper for EPA to seek penalties in a subsequent proceeding for violations related to the initial proceeding.

Section 22.14(a) requires that a complaint specify each statutory provision, regulation, permit or order that respondent is alleged to have violated, and a concise statement of the factual basis for alleging the violation. The complaint thereby describes the violations at issue in the case, in terms of the specific legal requirements and their specific factual circumstances; anything else is outside the scope of the proceeding. This description of the violations that comprise the case must also describe the scope of any settlement. Any violations that are outside the scope of the complaint must necessarily be outside the scope of any possible settlement.

The language of § 22.18(c) to which CEEC objects merely states that payment of a penalty "shall only resolve respondent's liability * * * for the violations and facts alleged in the complaint." This provision defines the scope of settlement in its most obvious and straightforward sense.

c. Final Rule. EPA is adopting § 22.18(b) and (c) as proposed, with minor editorial changes. The proposed § 22.18(b)(2) provided that in a consent agreement, respondent must waive "any right to a hearing". For the reasons noted in the discussion of § 22.18(a)(3) above, EPA has revised this to require that respondent waive "any right to contest the factual allegations in the complaint". EPA has also replaced the term "consent order" with the term "final order" or "proposed final order" in paragraph (b) and elsewhere (§§ 22.3

deterrence, and then be forced to defend its guesswork in the penalty litigation. EPA has concluded that complainants should not have to specify a penalty demand until after prehearing exchange.

EPA continues to believe that there is merit to giving respondents a specific penalty demand at the earliest practical stage of a proceeding, and has therefore not adopted the approach used in the federal courts, where specific penalty demands generally are not made until the end of the proceeding. Today's final rule requires complainant to specify a proposed penalty no later than 15 days after respondent has filed its prehearing exchange. The final rule requires each party to include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty, as well as exhibits and documents it intends to use at the hearing, names of witnesses and summaries of their anticipated testimony. Owing to the general nature of these prehearing exchange requirements, further discovery may still be appropriate, and complainants may need to amend their proposed penalties, but the prehearing information exchange nonetheless will provide complainants with a substantial basis for formulating a specific penalty demand.

CEEC and Dow oppose automatic prehearing exchange, stating that during productive settlement discussions such attention could be better spent on settlement. Dow proposes one of the following options: (1) making the prehearing exchange totally dependent on an order from the Presiding Officer, or (2) making the prehearing exchange automatic, but expressly allowing the Presiding Officer to issue a temporary stay or to extend the deadline. CMA/API recommend a default time period of 90 days prehearing exchanges as a starting point, which the parties would be allowed to modify by mutual agreement.

Today's final rule does not require the automatic filing of prehearing exchanges. Although such a requirement may expedite resolution of many cases, EPA believes that it would be a distraction and an unnecessary burden in that greater number of cases that progress readily toward settlement. Furthermore, the Presiding Officer may require additional information from the parties as part of his or her prehearing scheduling order than is provided in § 22.19(a). Therefore, the prehearing exchanges will not be required until ordered by the Presiding Officer.

Regarding the proposed § 22.19(b), Dow notes that EPA failed to delete the phrase "before him", as discussed in the preamble to the proposed rules. EPA agrees that this editorial change would help clarify that § 22.19(b) no longer requires that the parties personally appear before the Presiding Officer, but allows the Presiding Officer to conduct telephonic prehearing conferences.

CEEC proposes that EPA should be required, as part of its prehearing exchange, to provide a respondent with all information relevant to whether the respondent had fair notice of the regulatory requirement(s). Many different offices in EPA conduct compliance assistance, provide speakers, and otherwise publicize regulatory requirements, and documenting all such efforts in every case would present an unreasonable and unnecessary burden on complainant, particularly because fair notice of the law is rarely an issue. Moreover, it is unlikely that EPA would have evidence showing that respondent does not know something. Accordingly, EPA rejects this proposal.

CEEC also proposes that EPA should also be required to disclose all information it uses, or chooses to ignore, in determining the penalty it seeks for each alleged violation. The proposed § 22.19(a) would require complainant to state the basis for the penalty in its prehearing exchange, as well as to provide narrative summaries of witnesses' expected testimony, and copies of all documents and exhibits that it intends to introduce into evidence at the hearing. These requirements would assure that complainant discloses all information it uses in determining the appropriate penalty. It would not, however, require disclosure of all information that EPA "chooses to ignore." EPA believes that little or no reliable, relevant information is ever knowingly ignored in determining proposed penalties. Moreover, such exculpatory evidence and evidence of concerning a respondent's inability to pay the proposed penalty is almost always in respondent's hands, and not in complainant's. Accordingly, it would be exceedingly rare for the requirement proposed by CEEC to provide a respondent with new information. This potential benefit is greatly outweighed by the burden on the complainant to identify, document, and exchange all the information that it has not considered in determining the proposed penalty.

EPA agrees with CEEC's recommendation that § 22.19(a) should be amended to make the complainant's and respondent's burdens more equal. In the proposed § 22.19(a), complainant would be required to state the basis for the proposed penalty, while respondent would have to provide "all factual information it considers relevant to the assessment of a penalty". For cases where complainant has specified a proposed penalty before prehearing exchange, § 22.19(a)(3) of today's final rule now requires that "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." For those cases where EPA has not specified a proposed penalty, § 22.19(a)(4) imposes on each party the identical burden of providing "all factual information it considers relevant to the assessment of a penalty."

c. Final Rule. For the foregoing reasons, EPA is adopting § 22.19(a) with the two substantive changes noted above. In response to CEEC's comment, EPA has amended the proposed § 22.19(a) to provide a more equitable burden concerning providing information concerning the proposed penalty. EPA has also revised § 22.19(a) to allow complainant to specify a proposed penalty 15 days after prehearing exchange, rather than in its prehearing exchange as proposed.

The parties information exchange burdens necessarily differ depending on whether complainant has specified a proposed penalty before the prehearing exchange, but the proposed rule did not fully address these differences. In order to make the prehearing information exchange process address these differences, EPA has significantly reorganized and revised § 22.19(a). Paragraph (a)(1) contains the provisions describing the nature and effect of the prehearing information exchange. The only significant differences between the provisions of paragraph (a)(1) and their counterparts in the proposed rule are that paragraph (a)(1) expressly requires that prehearing exchange be "filed" (§ 22.5(b) provides for service on the Presiding Officer and opposing parties), and clarifies that an order of the Presiding Officer initiates prehearing exchange.

Paragraph (a)(2) describes the contents of prehearing information exchange, other than those that depend upon whether complainant has specified a proposed penalty. These requirements are unchanged.

As discussed in the response to comments above, paragraph (a)(3) provides that where complainant has already specified a proposed penalty, complainant shall include in its prehearing information exchange an explanation of how the proposed

first hand information about whether or not they have conducted their activities in violation of the law, and about the circumstances surrounding any violations. The evidence upon which EPA bases its enforcement action is generally acquired from the respondent through an inspection or information collection request that is well known to respondent, or through respondent's own reporting. The proposed § 22.14(a) requires EPA to articulate the regulatory and factual basis of its case in the complaint. The proposed § 22.19(a) requires EPA in prehearing exchange to identify all witnesses it intends to call at hearing, provide summaries of their expected testimony, provide copies of all exhibits and documents to be introduced as evidence, and specify the basis of the proposed penalty. In this context, it cannot reasonably be argued that the limitations on other discovery imposed through § 22.19(e) would prevent respondents' full and meaningful participation in the hearing.

Dow asserts that it is not appropriate for § 22.19(e)(2) to preclude discovery of penalty calculations based on "settlement policies," because this would leave respondent without information necessary to respond to the proposed penalty. Dow observes that EPA does not have separate written policies for settlement and for pleading penalties, and Dow asserts that EPA uses its "settlement" policies for both purposes. Dow argues that § 22.19(e)(2) should allow discovery of any calculations used to derive a proposed penalty for pleading purposes or otherwise pursued in the proceeding.

EPA had intended that the proposed § 22.19(e)(2) should make clear that a party's settlement positions and information regarding their development are not discoverable. There is merit to Dow's contention that EPA should not be able to shield from discovery the basis for a proposed penalty simply by basing it on a document formally titled a "settlement policy." The preamble to the proposed rule describes this paragraph in a manner that appears to avoid this problem, "the proposed revision would prohibit discovery of a party's settlement positions and information regarding their development specifically including penalty calculations for purposes of settlement based on Agency settlement policies." 63 Fed. Reg. at 9473. Accordingly, EPA has replaced the parenthetical clause from the proposed paragraph (e)(2), "(such as penalty calculations based upon Agency settlement policies)", with more restrictive language taken the preamble, "(such as penalty calculations for purposes of settlement based on Agency settlement policies)".

CMA/API express their understanding and support of limitations on discovery and use of settlement positions, but indicate concern that § 22.19(e)(2) might signal an EPA intention to abandon its practice of sharing penalty and economic benefit calculations in settlement negotiations. This revision of CROP draws on two very different antecedents, as it merges the different approaches of the part 22 and the proposed part 28 procedures. In those programs that have historically relied on the 1980 version of the CROP, the Agency has specified a penalty demand in the complaint and has provided a copy of the applicable penalty policy and penalty calculation worksheets typically at initial settlement conferences, but never later than prehearing exchange. In contrast, in its CWA and SDWA class I administrative enforcement programs under the proposed part 28 rules, EPA did not generally argue the basis of a penalty or specify a penalty demand until post hearing briefs, in the manner of enforcement proceedings in the Federal courts. For those programs where the practice has been to specify a penalty in the complaint, EPA does not intend any dramatic change from current practice regarding disclosure of penalty and economic benefit calculations in settlement negotiations. For those programs that evolved in the Federal courts and under the proposed part 28 procedures, specifying a penalty and the basis for that penalty at prehearing exchange will be a major change, but it is certainly a change that will be to respondents' advantage.

Dow argues that the word "reasonably" should be inserted into § 22.29(e)(3)(i) so as to allow depositions on oral questions in circumstances where the information "cannot reasonably be obtained by alternative methods of discovery." EPA agrees that the suggested change should result in more efficient proceedings, and has therefore adopted this recommendation.

The proposed § 22.19(e)(5) also elicited several comments. Some commenters seem to misinterpret the Agency's proposal as if it were offering FOIA and EPA's other information collection authorities as substitutes for discovery opportunities taken away in § 22.19(e)(1). As noted above, the changes to § 22.19(e)(1) will only produce an incremental restriction of discovery, and would preclude only inappropriate discovery. Accordingly, substitutes for discovery are neither needed nor appropriate, and suggestions that FOIA rights be expanded are rejected. EPA proposed § 22.19(e)(5) simply to make clear that FOIA requests, inspections, statutorily provided information collection requests, and administrative subpoenas issued by an authorized Agency official other than the Presiding Officer do not constitute discovery and are not restricted by the CROP. The proposed revision does not change the CROP, because these activities have never been subject to a Presiding Officer's control.[2]

EPA acknowledges that the statutory information collection tools available to the Agency are substantial, however, EPA does not believe that this undermines the fairness of the CROP proceedings. The central factual issue of a CROP proceeding is whether respondent's conduct has been consistent with the law, and respondent's ability to gather information about its own conduct is always greater than EPA's, statutory information collection authorities notwithstanding. In any event, it is uncommon for EPA to initiate inspections, information collection requests, or administrative subpoenas (other than those issued by the Presiding Officer) to gather information to support cases that have already commenced.

EPA notes that the clause "EPA's authority under the Act" may have contributed to some commenters' view of paragraph (e)(5) as endorsing the use of information collection authorities outside of those in § 22.19 to "otherwise obtain information" support ongoing cases. EPA's primary motivation in proposing § 22.19(e)(5) is that its authority to conduct investigations

[2] See, e.g., In Re: Dominick's Finer Foods, Inc., Docket No. CERCLA/EPCRA–007–95 (February 15, 1996) (holding that a pending action in which the parties are subject to the discovery rules of § 22.19(f) "is by no means a basis for restricting EPA's information gathering rights" under CERCLA § 104(e)). Cases holding that EPA may not be enjoined from exercising its investigative authority under the Solid Waste Disposal Act solely because of the pendency of a related administrative action: Del Val Ink and Color, Inc., RCRA II–91–0104 (January 12, 1993), at 6–7; Florida Dept. Of Transportation, RCRA 92–16–R (October 29, 1993), at 3–6; and Coors Brewing Co., RCRA–VIII–90–09 (January 4, 1991), at 11–15. Comparable federal court decisions: *Linde Thomson Langworthy Kohn & Van Dyke* v. *RTC*, 5 F.3d 1508 1518 (D.C. Cir. 1993) (Statute authorizing RTC investigations does not contemplate the termination of investigative authority upon commencement of civil proceedings.); *National-Standard Company* v. *Adamkus*, 881 F.2d 352, 363 (7th Cir. 1989)("The mere pendency of a related civil action does not automatically preclude EPA's use of other authorized law enforcement techniques. * * *"); and In Re Stanley Plating Co., 637 F.Supp. 71, 72–73 (D.Conn. 1986) (Nothing in RCRA suggesting that civil action restricts EPA to investigative techniques in accordance with discovery rules).

information was provided as soon as it had control of it or there was good cause for not providing the information. Paragraph (a)(2) proposes to clarify how and when confidential business information ("CBI") may be used as evidence in accordance with, and specifically referencing EPA's general confidentiality requirements in 40 CFR Part 2. In conforming with Part 2 requirements, a proposed significant change would authorize the Presiding Officer and EAB to consider CBI information outside the presence of the public or a party as necessary to preserve the confidentiality of business information.

b. Significant Comments and EPA Response. Dow opposes the automatic exclusion of information that is not exchanged in a timely manner unless good cause is shown, as proposed in § 22.22(a)(1). Dow presents hypothetical situations where it believes a respondent would be unable to get exculpatory or mitigating information that comes to its attention admitted into evidence, if EPA "deliberately chooses to withhold" such information "instead of exchanging it in a timely manner." In such situations, Dow reasons that there would be no "good cause" for EPA's failure to exchange the information. As a result, Dow advocates the proposed exclusionary provision be revised to state that the "information will be excluded from evidence *only upon objection* by the innocent party (i.e., the party who did not fail to exchange the information in a timely manner)."

Dow's fears are unfounded. If party A withholds information until just before the hearing, and party B seeks to have that information admitted into evidence, then party A's failure to disclose would constitute "good cause" for the innocent party B's inability to produce the information 15 days prior to the hearing. If the party was required to disclose the information in prehearing exchange or other discovery, § 22.19(g) gives the Presiding Officer some authority to sanction the party who withheld the information. Section 22.19(f) prohibits knowing concealment of deficiencies in information that has previously been exchanged. It imposes an affirmative duty to promptly supplement or correct information provided previously in a prehearing exchange, a response to a request for information, or a response to a discovery order when a party learns that the information is "incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party. * * *" Id. An opposing party's failure to supplement as required under § 22.19(f) would provide "good cause" for admission of evidence. In addition, § 22.4(c)(10) empowers the Presiding Officer do all acts and measures needed for a fair adjudication of the proceedings.

The preamble to the proposed rule noted that the CROP is aimed at the practice of full and complete exchange of information in order to expedite hearings and avoid unnecessary and costly motion practice. *E.g.*, 63 FR at 9472, 9473. The Agency believes that the exclusionary provision facilitates this end and provides a mechanism to enforce the failure of a party to engage in such full disclosure. For parties that act in bad-faith, the CROP, as discussed above, provides adequate safeguards to address these situations and ensure a fair adjudication.

Regarding § 22.22(a)(2), CEEC supports the Agency's proposal to allow the Presiding Officer to review CBI evidence outside the presence of a party if it is necessary to preserve the confidentiality of the business information. In contrast, Dow believes that viewing CBI evidence outside the presence of a party can impede the non-attending party's ability to effectively participate in the hearing and the fairness of the hearing. Dow requests that the Agency include a provision for disclosure of CBI to all parties and to neutral experts, as needed, with safeguards to prevent against using the information outside the scope of the hearing.

The Agency acknowledges the legitimacy of Dow's concerns, however, today's rule and 40 CFR part 2 provide adequate mechanisms to accomplish most of Dow's suggestions. Notwithstanding today's revision of § 22.22(a)(2), EPA retains the authority to disclose CBI in a CROP proceeding where appropriate, pursuant to several statute-specific provisions of part 2 (*see, e.g.*, 40 CFR 2.301(g), 2.302(g), 2.304(g), 2.305(g), 2.306(i), 2.310(g)). Disclosure to a neutral expert could be accomplished through these authorities, or through the statute-specific provisions of part 2 that authorize disclosure to persons performing work under contract to EPA (*see, e.g.*, 40 CFR 2.301(h), 2.302(h), 2.304(h), 2.305(h), 2.306(j), 2.307(h), 2.310(h)). The Agency does not, however, have the authority to enforce secrecy agreements between respondent and an intervener, nor does it have the authority to impose sanctions (other than procedural sanctions such as default) for violations of protective orders that might be issued under the authority of § 22.4(a)(2) or (c). Therefore, it may be advisable for owners of CBI to make such agreements enforceable as contracts.

As expressed in the preamble to the proposed rule, the Agency believes that allowing the independent Presiding Officers the "discretion to review confidential evidence outside the presence of a party * * * strike[s] an appropriate balance between the right of confrontation and the statutory mandates to protect confidential business information." 63 FR at 9474. Contrary to the Dow's suggestion, the Presiding Officer is competent to handle these infrequent situations, including the concern about CBI evidence being unduly relied upon to the detriment of the non-present party. The Presiding Officers handle cases daily involving the Agency's technical regulations and corresponding business information. As an impartial trier of fact, trained to assure that all cases are fairly adjudicated, the Presiding Officer can take into account the failure of a party to be present and to rebut any CBI evidence. Additionally, the Presiding Officer can pose questions to the absent party about any non-CBI issues that exist once the hearing resumes in full. Moreover, as this commenter acknowledges, the CROP provides that a party will have access to a redacted version of the CBI documents. Thus, a right to confrontation and to present its defense will not be unfairly impeded.

c. Final Rule. EPA is adopting § 22.22 as proposed, with four minor changes. In addition to excluding information required to be exchanged under § 22.19(a) or (f) that has not been provided to the opposing party at least 15 days before the hearing date, § 22.22(a)(1) should also exclude information that has not been timely provided pursuant to a § 22.19(e) discovery order. This is a technical change, in as much as § 22.19(g)(2) already permits the exclusion of information not provided pursuant to a discovery order, and that it is clearly the intent of the proposed rule to exclude information that has not been provided to opposing parties in a timely manner. EPA has therefore added to § 22.22(a)(1) a reference to § 22.19(e) discovery orders.

To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.22(a) to state the duration of this exclusion period with the numeral "15".

EPA has made an editorial change to § 22.22(b), which requires witnesses to testify "orally, under oath or affirmation, except as otherwise provided in these Consolidated Rules of Practice or by the Presiding Officer." EPA has replaced the phrase "in these Consolidated Rules of Practice" with the more specific language "in paragraphs

to the extent of echoing Dow's comment, stating that it is especially inappropriate "where the issue to be addressed is a constitutional challenge, a challenge to an Agency interpretation, or a challenge to the Agency's authority."

As EPA has already discussed issues specific to requiring appeal to the EAB as a prerequisite to judicial review "where the issue to be addressed is a constitutional challenge, a challenge to an Agency interpretation, or a challenge to the Agency's authority", this response will address the larger issue raised by CEEC, whether respondents should be required to appeal any decisions of a Presiding Officer to the EAB as a prerequisite to judicial review.

The EAB is responsible for assuring consistency in Agency adjudications by all of the ALJs and RJOs. The appeal process of the CROP gives the Agency an opportunity to correct erroneous decisions before they are appealed to the federal courts. The EAB assures that final decisions represent with the position of the Agency as a whole, rather than just the position of one Region, one enforcement office, or one Presiding Officer. EPA considers this a necessary and important function, and rejects CEEC's suggestion that this internal appeal and review process be abandoned. In addition to meeting EPA's institutional needs, this process also offers enormous advantages to respondents who are dissatisfied with an initial decision, in that appeals to the EAB are much quicker and much less expensive than appeals to a federal court.

CEEC's comment may be based on a misreading of the proposed rule as requiring respondent to make an interlocutory appeal to the EAB every time there is an adverse decision: "In its Preliminary Comments, CEEC noted its concerns with the proposal requiring appeal to the EAB after every "initial" decision or order of the Presiding Officer before seeking judicial review."

To the extent that this comment is intended to apply to any ruling or order other than an initial decision (as the latter term is defined in § 22.3), it is based on a misreading of the proposed rule. The proposed rule would only require that initial decisions (as specifically defined in § 22.3) be appealed to the EAB as a prerequisite to judicial review. EPA did not propose to require interlocutory appeal of rulings and orders other than initial decisions as a prerequisite to judicial review.

CEEC also objects to the process by which EPA has proposed the revisions relating to exhaustion of remedies. Terming the inclusion of the exhaustion requirement a "major revision" to the CROP, CEEC says that "Given the magnitude of this proposed change, EPA should have brought this proposal to the attention of the regulated community in the summary of its proposed rule-change, and explained it thoroughly."

First, the February 25, 1998, **Federal Register** notice of proposed rule making provided adequate notice of EPA's intention to address the exhaustion doctrine in its rules of administrative procedure. The one-sentence summary that begins the notice of proposed rule making accurately describes the subject of the notice, though it does not attempt to summarize all of the issues raised in the proposal. The body of the notice and the proposed regulations clearly identified and discussed this issue in detail. *See* 63 FR 9474–75, 9489. The proposed rule allowed 60 days for the public to comment on the entire proposal. In addition, in response to CEEC's concern, EPA published a second notice on May 6, 1998, reopening the public comment period for an additional 60 days.

CEEC's contention that the initial proposal did not give adequate notice of the magnitude of the proposed changes is not persuasive. The original notice of proposed rule making attracted the attention of a broad spectrum of the regulated community, and elicited comments from major trade associations representing the chemical manufacturing industry, the petrochemical industry and the utility industry, and individual comments from the U.S. Air Force and one major chemical company, in addition to the companies represented by CEEC. These comments were generally detailed and well considered. Only two of the comments addressed § 22.27(c), and only CEEC considered this an extraordinary revision. CEEC's contention that the initial proposal did not allow enough time to consider and comment on the proposed changes is also undermined by the fact that CEEC's supplemental comments were the only comments received during reopened comment period, as well as by the fact that those supplemental comments did not raise any significant issues that were not raised during the original public comment period.

Second, EPA disagrees with CEEC's characterization of the magnitude of the proposed changes. EPA considers appeals of an initial decision to the EAB as a prerequisite to judicial review under the CROP as previously codified, and that, during such appeal, the initial decision is inoperative. The regulated community also appears to share this understanding, as respondents consistently seek EAB review before appealing to the federal courts. The proposed explicit inclusion of the exhaustion doctrine simply clarifies the status quo, and thus does not represent something that would significantly alter or impact a respondent's rights or position under the CROP.

Although the proposed revision of § 22.27(c) was designed to make it explicit that an initial decision must be appealed to the EAB as a prerequisite for judicial review, Dow points out that § 22.27(c) does not actually say anything about the need for administrative appeal before judicial review. An explicit statement appears in § 22.31(e)(1) of the proposed rule, however, EPA acknowledges that it would be more helpful if the provision advising a respondent of the consequences of failing to appeal an initial decision to the EAB were included in the section discussing initial decisions, rather than the section concerned with final orders. Accordingly, language from § 22.31(e)(1) of the proposed rule now appears in a new § 22.27(d).

c. Final Rule. In response to comment, EPA has moved the words "if appropriate" from the end of the second sentence in § 22.27(a) to follow the phrase "as well as reasons therefor, and", in order to clarify that not all initial decisions will assess a penalty.

Language from § 22.27(c) and § 22.31(e)(1) relating to exhaustion of administrative remedies has been combined in a new § 22.27(d). The remainder of § 22.27(c) has also been subdivided into four paragraphs for easier reading.

EPA has made an additional substantive change to § 22.27(a) on its own initiative. The existing and proposed rules specify that the Regional Hearing Clerk shall forward the entire record of the proceeding to EPA Headquarters as soon as an initial decision is issued, regardless of whether the case is appealed to the EAB. For administrative efficiency, this requirement has been deleted. Regional Hearing Clerks will retain the record of the proceeding unless the EAB requests it. This change should have no effect on respondents' interests.

EPA has made minor editorial changes to § 22.27(a) as well: EPA has deleted the word "reply" from the first sentence to make it more general, and has replaced the phrase "permit revocation and suspension" with "Permit Action", as discussed in connection with revisions to § 22.3(a) and § 22.14(a)(4)(iii)..

In the fourth and fifth sentences of paragraph (b), the proposed rule uses the phrase "penalty recommended to be

c. Final Rule. EPA has adopted § 22.30 as proposed, with several modifications. As discussed above, EPA has revised the title of § 22.30(b) to read "Review initiated by the Environmental Appeals Board", and has revised § 22.30(a) to require that copies of all documents filed with, or by, the EAB shall also be served on the Regional Hearing Clerk. EPA has made several other minor revisions on its own initiative:

As discussed above in connection with the revisions to § 22.11, EPA has replaced the term "amicus curie" in § 22.30(a)(1) and (a)(2) with the term "non-party participant."

In order that the Presiding Officer may be aware of the status of his or her decision, EPA has also revised paragraph (a)(1) to require that a copy of the notice of appeal be served on the Presiding Officer, and revised paragraph (b) to require that the EAB serve on the Presiding Officer a copy of its notice of intent to review a decision.

EPA has also replaced the expression "Clerk of the Environmental Appeals Board" with "Clerk of the Board," using the term defined at § 22.3(a) for consistency.

Because response briefs are to be filed with the Clerk of the Board, the words "and serve" are unnecessary and potentially confusing as they appear in the proposed § 22.30(a)(2), and have therefore been deleted from today's final rule.

The proposed § 22.30(c) included a new provision: "The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision." In order to reflect the well established principle that the question of subject matter jurisdiction cannot be waived and may be raised at any stage of a proceeding, EPA has revised this provision by adding the clause "and to issues concerning subject matter jurisdiction."

The proposed § 22.30(f) may incorrectly suggest that a final order is the only possible outcome from an EAB decision on appeal of an initial decision. However, it is not uncommon for the EAB to remand a case. EPA has revised paragraph (f) by adding the following sentence: "The Environmental Appeals Board may remand the case to the Presiding Officer for further action."

EPA has replaced the phrase "any permit revocation, termination or suspension" in § 22.30(f) with "Permit Action", as discussed in connection with revisions to § 22.3(a) and § 22.14(a)(4)(iii). To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.30 to state all time periods with numerals only.

22. Final Order (40 CFR 22.31)

a. Summary of Proposed Rule. Section 22.31 is concerned with final orders, and the proposed section consists of six sub-paragraphs. Paragraph (a) would specify the effect of the final order. It states that a final order constitutes final Agency action and specifies that a final order neither affects the right of the United States to seek criminal or civil relief for any violation of law nor waives a respondent's obligations to comply with applicable law. Paragraph (b) would establish the effective date of a final order. Paragraph (c) would set forth procedures for paying any civil penalties assessed in a final order. Paragraph (d) would establish that any corrective action or compliance order, or any permit revocation, termination or suspension becomes effective and enforceable as of the effective date of a final order unless otherwise specified in the final order. The proposed paragraph (e) is concerned with exhaustion of administrative remedies, and would specify that where a respondent fails to appeal an initial decision or enters into a consent agreement, the right of subsequent judicial review is waived. The proposed paragraph (f) discusses final orders issued to Federal agencies. This provision would specify that where the head of an affected agency seeks the intervention of the EPA Administrator, the decision by the Administrator will be the final order; this provision would also specify that a motion for reconsideration does not affect the 30-day time period for the effective date of final orders against Federal agencies.

b. Significant Comments and EPA Responses. The proposed inclusion in § 22.31(e) of a provision explicitly addressing exhaustion of administrative remedies as a prerequisite to judicial review is viewed by CEEC as a "major" revision of the CROP. CEEC argues that:

> "Given the magnitude of this proposed change, EPA should have brought this proposal to the attention of the regulated community in the summary of its proposed rule-change, and explained it thoroughly."

As discussed in EPA's response to comments on § 22.27(c), above, EPA disagrees with CEEC's characterization of the magnitude of this change, and maintains that the proposed rule gave adequate notice of the proposed change.

As discussed in EPA's response to comments on § 22.27(c), above, EPA agrees with Dow's comment that the requirement that an administrative appeal is a predicate for subsequent judicial review should appear in § 22.27. Therefore, the language that appeared in the proposed § 22.31(e)(1) has been deleted and moved to § 22.27(c). The proposed § 22.31(e)(2), which would specify that "[a] respondent which elects to resolve a proceeding pursuant to § 22.18 waives its rights to judicial review", is redundant with § 22.18(a)(3) and (b)(2) and can be deleted without substantive change. The proposed § 22.31(f) has been redesignated as § 22.31(e) in today's final rule.

The proposed § 22.31(f) describes the manner in which the head of another Federal agency may bring disputes over a final order directly to the EPA Administrator, and provides that the EAB's decision shall not be effective pending the Administrator's review. Essentially the same provision already appears in the supplemental rule governing Solid Waste Disposal Act cases, § 22.37(g). The proposed rule would move this provision from that supplemental rule into the main body of the CROP, in order that this process should be available in any CROP case brought against a Federal agency.

The USAF opposes moving this provision from the supplemental rule governing Solid Waste Disposal Act cases into the main text of the CROP. USAF argues that instead of a generally applicable provision, such procedures should be confined to the statute-specific supplemental rules. USAF argues that EPA should be required to amend the CROP each time Congressional action expands EPA's authority to enforce against another Federal agency, in order to provide a forum for resolving constitutional and jurisdictional issues.

The proposed change does not expand EPA's jurisdiction to assess civil penalties against a Federal facility, nor does it expand the scope of the CROP as it pertains to Federal facilities. EPA can assess penalties against Federal facilities for violations of the Safe Drinking Water Act (42 U.S.C. 300j–6), the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. 6961), and the Clean Air Act (42 U.S.C. 7413(d), 7524(c) and 7545(d)(1)) through a CROP proceeding regardless of whether the proposed language is adopted. Should other authorities for assessing penalties against Federal facilities become available in the future, this will be true for those authorities as well. The only effect of the change proposed in § 22.31(f) is to provide a mutually understood process for staying a final order while the head of the respondent Federal Agency confers with the EPA Administrator.

resolution procedure at § 22.18(a)(2)), the Presiding Officer shall issue a default order assessing the penalty proposed in the complaint.

b. Significant Comments and EPA Response. Dow commented that respondents should be able to waive the written notice required pursuant to § 22.34(b), because this is a procedural protection provided merely for respondents' benefit. EPA agrees that the second sentence of § 22.34(b) appears to require issuance of a complaint in every case. In order to allow the parties to take full advantage of the efficiencies of § 22.13(b) where prefiling negotiations produce a settlement, EPA has amended this provision to specify that a complaint is sufficient to satisfy this notice requirement, but without requiring that a complaint necessarily must be served. The second sentence of § 22.34(b) now reads: "Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies this notice requirement."

c. Final Rule. EPA is adopting § 22.34(a) as proposed, and has adopted the proposed § 22.34(b) with the exception of modifying the second sentence to read "Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies this notice requirement." EPA has deleted the proposed § 22.34(c), pending adoption of a final rule governing CAA field citations. Any changes necessary to accommodate field citations will be made when the proposed Field Citation rule is finalized.

25. Scope of Subpart I (40 CFR 22.50)

a. Summary of Proposed Rule. Section 22.50 defines the scope of subpart I and its relationship to other provisions of Part 22. The proposed paragraph (a) would restrict the scope of subpart I to adjudicatory proceedings that are initiated by a complaint stating that subpart I shall apply. The proposed paragraph (a) would clarify that subpart I does not apply to any proceeding where the statute requires a hearing subject to section 554 of the Administrative Procedure Act (APA).

Paragraph (b) lists the provisions of subparts A through G which do not apply to subpart I proceedings. Almost all provisions of subparts A through G apply to a subpart I proceeding. Paragraph (b) also addresses the potential for conflicting provisions in the preceding sections of the CROP, providing that where any provisions of subparts A though G conflict with any provision of subpart I, the latter supersedes the former.

The preamble to the proposed rule stated that EPA does not intend to alter its present practice of providing the full APA process in cases pursuant to section 109(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (42 U.S.C. 9609(a)) or section 325(b)(1), (c), and (d) of the Emergency Planning and Community Right-To-Know Act ("EPCRA") (42 U.S.C. 11045(b)(1), (c), and (d)), but invited comment as to the types of CERCLA and EPCRA penalty cases for which non-APA procedures would be appropriate, if the Agency decides in the future to assess EPCRA and CERCLA penalties through non-APA proceedings.

b. Significant comments and EPA response. Most commenters (Dow, CEEC, UWAG, UARG) oppose any proposed expansion of the role of RJOs under subpart I. The preamble to the proposed rule stated that EPA did not expect to use non-APA procedures except in the kinds of cases where they have historically been used for the foreseeable future. As discussed in the response to comments on § 22.4(b), EPA has revised § 22.50(a) to expressly limit the applicability of subpart I to cases under CWA sections 309(g)(2)(A) and 311(b)(6)(B)(i) (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)), and SDWA sections 1414(g)(3)(B) and 1423(c)(42 U.S.C. 300g–3(g)(3)(B) and 300h–2(c)). This change makes clear that the scope of the RJOs' activities will remain much the same as it has been in recent years.

All who commented on the proposed subpart I (CMA/API, Dow, CEEC, UWAG, UARG) expressed concern that it would not protect constitutional due process rights. In particular, CEEC considers such a proposal a "major concern" and submits that subpart I procedures do not meet the due process standard set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Dow, UWAG and UARG believe that there is too great a chance that RJOs would have a pro-Agency bias, and suggest that EPA should eliminate subpart I and apply APA procedures universally. Dow suggests in the alternative that either party should be allowed to opt out of subpart I and have APA procedures applied upon request.

EPA has addressed this due process question in the discussion of public comments on § 22.4(b). Also as noted above in the discussion of § 22.4(b), the Agency has implemented adequate measures to ensure the impartiality of the Regional Judicial Officers. If a litigant has reason to believe that a Regional Judicial Officer is biased, then a motion for disqualification pursuant to § 22.4(d) may be submitted.

As to Dow's suggestion of providing parties the option of having APA procedures apply upon request, Congress has provided for this option only in section 1414(g)(3)(B) of the Safe Drinking Water Act. If APA procedures were provided upon respondent's request in all proceedings brought under subpart I, the regulated community, rather than EPA, would be determining the course of the Agency's enforcement program, and imbalances of Agency resources might result. Nevertheless, the Agency acknowledges that, on occasion, a complainant may not recognize until after a case has been commenced that the subpart I procedures would not be adequate, for example, where intervention, amici, subpoena, or additional discovery appear crucial to the case, or where the issues are such that the proceeding would greatly benefit from the unquestioned independence of an ALJ. In those instances, a complainant may move to withdraw the complaint without prejudice in order that the proceeding be recommenced as an APA proceeding, or either party might move that subpart I should not be applied to the proceeding.

As to paragraph (b), Dow and CEEC suggest deleting the reference to § 22.11 and allowing intervention and amici curiae. This would be inconsistent with the purpose of subpart I, that is to have simpler and more efficient proceedings. To add to subpart I more of the provisions of subparts A through G would frustrate this purpose. If a party believes that intervention or amici curiae would be of crucial importance to a particular case, then as discussed above, it may file a motion requesting withdrawal or dismissal without prejudice to allow refiling under the APA procedures.

c. Final Rule. EPA has revised § 22.50(a) to limit the applicability of subpart I to cases under CWA sections 309(g)(2)(A) and 311(b)(6)(B)(i) (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)), and SDWA sections 1414(g)(3)(B) and 1423(c) (42 U.S.C. 300g–3(g)(3)(B) and 300h–2(c)). EPA adopts § 22.50(b) as proposed, with one correction. The February 25, 1998, FR notice included a typographical error in § 22.50(b). The section number that appeared as "22011" has been corrected to read "22.1."

26. Presiding Officer (40 CFR 22.51)

a. Summary of Proposed Rule. The proposed § 22.51 presents the key modification to the CROP facilitating use of the CROP in administrative adjudications not subject to section 554 of the APA, that the Presiding Officer

delaying motions and fishing expeditions. The inquiry should be centered on the conduct of the respondent and any penalty assessment factors. Allowing additional discovery of EPA beyond the prehearing exchange would not serve those goals, but would raise the complexity and cost of proceedings that Congress intended to be as unencumbered as possible.

c. Final Rule. EPA adopts § 22.52 as proposed. EPA notes that this section does not affect the authority of the Presiding Order to require the attendance of witnesses by subpoena, if authorized by the Act, in accordance with § 22.4(c).

28. Interlocutory Orders or Rulings (40 CFR 22.53)

a. Summary of Proposed Rule. The proposed § 22.53 stated that, for proceedings subject to subpart I, "[i]nterlocutory review as set forth in § 22.29 is prohibited."

b. Significant Comments and EPA Response. Dow argues that the prohibition on interlocutory appeals in subpart I proceedings is unnecessary, because § 22.29 already imposes substantial limits on interlocutory appeals. Dow believes that interlocutory appeal is warranted in any case where the criteria of § 22.29(b) are met (i.e., "(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.")

EPA intends to use subpart I primarily for cases where EPA has substantial prior enforcement experience, which do not appear to present significant new issues of law, and where the sanctions sought are relatively modest. In these circumstances, meritless appeals are likely to greatly exceed meritorious appeals. Because the likely advantages of interlocutory appeal are outweighed by the anticipated delays that would result from meritless appeals, the final rule retains the prohibition on interlocutory appeal in subpart I cases.

c. Final Rule. In today's final rule, EPA adopts the proposed prohibition on interlocutory appeals in subpart I cases. However, EPA has concluded that the proposed § 22.53 is redundant, because § 22.50(b) states that § 22.29, which provides for interlocutory appeals, does not apply to subpart I proceedings. Although the proposed § 22.53 highlighted this provision for purposes of soliciting public comment, EPA has concluded that this redundancy is inappropriate in the final rule. Accordingly, EPA has deleted the proposed § 22.53. The prohibition against interlocutory appeals in subpart I cases is accomplished through § 22.50(b)'s exclusion of § 22.29.

29. Clean Air Act Field Citations

a. Summary of Proposed Rule. EPA proposed that revisions to the CROP would supersede and replace the rules governing non-APA hearings on field citations under section 113(d)(3) of the Clean Air Act ("CAA"). The Field Citation rules were proposed (59 FR 22776, May 3, 1994) but not yet final at the time EPA proposed the CROP revisions, and EPA expected that the Field Citation rules would be published as a final rule before the CROP revisions. The preamble to the proposed CROP stated that EPA intended to use the procedures that would appear as subpart B of the Field Citation rules until the CROP revisions were made final.

b. Significant Comments and EPA Response. CMA/API, Dow and CEEC opposed the interim use of the procedures in subpart B of the Field Citation rules pending publication of the final CROP. These commenters urged EPA to postpone publication of the Field Citation rules until after publication of the final CROP procedures

EPA agrees that commencing a field citation program using one set of procedures for a short time before switching to the CROP procedures could result in unnecessary burdens and confusion. EPA has postponed issuing a final rule governing hearing procedures for CAA field citations.

c. Final Rule. Today's final rule does not contain the provisions in the proposed rule relating to the removal from the CFR of procedures for CAA field citations. A decision on appropriate hearing procedures for field citations, inclusion in subpart I of the CROP, will be made when the Field Citation rules are finalized.

30. Other Comments Not Related to a Particular Section of the Proposed Rule

a. Significant Comments and EPA Response. CEEC suggests that the CROP should provide respondents an opportunity to review enforcement related press releases and raise objections to the Presiding Officer. CEEC notes that unfair and misleading press releases reduce incentives to reach settlement. EPA makes every effort to assure that press releases are accurate, based on the information available to the Agency at the time. A complainant may, at its discretion, allow a respondent to review a press release before issuance, but EPA does not negotiate the terms of enforcement related press releases. To include in the CROP a provision providing respondents the right to review EPA's press releases and raise objections to the Presiding Officer would create the appearance that the government's ability to communicate with the public is subject to a private party's control. EPA therefore rejects this suggestion.

b. Final Rule. EPA has made no changes to the proposed rule in response to CEEC's suggestion that the CROP should provide respondents an opportunity to review enforcement related press releases and raise objections to the Presiding Officer.

III. Miscellaneous Revisions

Through the process of analyzing the public comments, and pursuant to EPA's own internal review of the proposed rule, EPA has identified a number of typographical and drafting errors. In addition, EPA has identified parts of the proposed rule that could be stated more clearly, as mandated by Executive Order 12866 (September 30, 1993) and the President's memorandum of June 1, 1998, which require each agency to write all rules in plain language. In this final rule EPA adopts a number of changes on its own initiative, and not in response to any particular public comment. Where such revisions pertain to a section of the proposed rule that received significant public comment, the changes have already been discussed above. This section identifies the remaining revisions, which pertain to sections of the proposed rule that received no significant public comment. Public notice of proposed rule making is not required "when the agency for good cause finds * * * that notice and public procedure thereon are impractical, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(3)(B). EPA has determined that the following revisions do not significantly affect respondents' substantive or procedural rights. Accordingly, EPA has determined that providing an additional round of public notice before making these minor changes to this procedural rule would be unnecessary and contrary to the public interest.

A. Section Numbering

EPA has converted those section numbers that had contained a preceding zero (§§ 22.01, 22.02, etc.) to conform the CROP to the standard numbering of the Code of Federal Regulations set out in the regulations of the Administrative

F. Motions (40 CFR 22.16)

EPA is adopting § 22.16 as proposed, except that a reference to § 22.51 has been added to § 22.16(c) in order to avoid any apparent conflict between § 22.16(c) and § 22.51, and the implication that an ALJ must rule on motions in proceedings under subpart I. EPA has also rearranged the sentences of § 22.16(a) to improve clarity. To conform to the preferred style of the U.S. Government Printing Office, EPA has revised § 22.16(b) to state the time allowed for responses and replies with the numerals "15" and "10", respectively.

G. Record of the Prehearing Conference (40 CFR 22.19(c))

The scope of the requirement that the Presiding Officer prepare and file "for the record a written summary of the action taken" at a prehearing conference is not clear. Just as a transcript of a prehearing conference may discourage frank and open discussion, the implication that the Presiding Officer may produce a formal summary of the conference may also reduce the effectiveness of such conferences. Moreover, the CROP is not clear whether the Presiding Officer's summary is supposed to constitute a finding of law or fact, nor is it clear whether the parties have the right to object and change the summary. EPA has revised the last two sentences in order to clarify that the Presiding Officer is only responsible for ensuring that the record of the proceeding includes any stipulations and agreements reached, and rulings and orders issued, during the conference.

H. Accelerated Decision; Decision to Dismiss (40 CFR 22.20)

Section 22.20(b)(2) provides for accelerated decisions and decisions to dismiss some but not all issues or claims in a proceeding. The last sentence requires that the Presiding Officer "shall issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed." This sentence is somewhat ambiguous, in that it might be construed as requiring an interlocutory order separate from, and in addition to, any partial accelerated decision or decision to dismiss certain counts. Such an interpretation would be unwarranted, would unnecessarily complicate the CROP, and would be contrary to the customary practice of the Agency's ALJs. Rule 56(d) of the Federal Rules of Civil Procedure, from which this language is derived, does not require a separate interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed. To clarify that a single decision or order can accomplish all the requirements of § 22.20(b)(2), EPA has amended the last sentence of that paragraph to state that: "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."

I. Assignment of Presiding Officer; Scheduling a Hearing (40 CFR 22.21)

EPA has amended § 22.21(a) to clarify that the Regional Hearing Clerk forwards copies, not originals, of the complaint, answer, and other documents in the record to the Chief Administrative Law Judge upon receipt of the answer.

According to § 22.20(a), an accelerated decision is appropriate "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." Where this standard is not met, a hearing is appropriate. EPA has revised § 22.21(b) to use the same criterion as § 22.20(a): The first sentence of § 22.21(b) now states that, "The Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact." In addition to making § 22.20 and § 22.21 more clearly complementary, this change clarifies that the mere request for a hearing does not require that a hearing be held. Neither § 22.21(b) nor § 22.15(c) of the 1980 CROP required an oral evidentiary hearing merely upon respondent's request for a hearing. See, e.g., In re Green Thumb Nursery, Inc., 6 E.A.D. 782 (EAB 1997) (holding that there is no right to an oral evidentiary hearing).

EPA has also expanded the notice period before a hearing from 20 to 30 days. This will allow the parties, their attorneys, and witnesses additional time to make travel arrangements and to prepare for the hearing.

As noted in the discussion of § 22.19(e), EPA has added to § 22.21(b) an explicit statement of the Presiding Officer's authority (where provided by the Act) to require the attendance of witnesses or the production of documentary evidence by subpoena. This statement includes criteria for issuing subpoenas that appeared in the 1980 CROP (see, e.g., § 22.37(f)(1).

J. Offers of Proof (40 CFR 22.23(b))

The proposed § 22.23(b) provides for offers of proof regarding "evidence * * * excluded from the record." Although the Presiding Officer may decline to admit certain documents, exhibits or testimony into evidence, and may refuse to consider them in his or her decision, it is incorrect to describe the status of such documents as "excluded from the record." This information is indisputably part of "the record" of the proceeding for purposes of appellate review. Accordingly, EPA has revised this paragraph to state that "Whenever the Presiding Officer denies a motion for admission into evidence, the party offering the information may make an offer of proof * * *." For purposes of clarity, EPA has revised this paragraph (b) using the word "information" in place of "evidence" where the subject is information which has not been admitted into evidence.

K. Proposed Findings, Conclusions, and Order (40 CFR 22.26)

Section 22.26 provides that the Presiding Officer must allow 20 days after receipt of notice of the availability of the transcript before requiring the parties to file proposed findings of fact, conclusions of law, and a proposed order. In the response to public comments on § 22.25 above, EPA announced that it would amend that section to allow motions to conform the transcript to the actual testimony to be filed "within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is less." EPA has amended § 22.26 in order to assure that parties need not file proposed findings of fact, conclusions of law, and the proposed order before the last date for filing motions to conform the transcript to the actual testimony pursuant to § 22.26. For additional clarity, EPA has reorganized this section and has also substituted the word "filed" for the undefined term "submitted."

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.

L. Motion to Reopen a Hearing (40 CFR 22.28)

The CROP does not specify when a motion is "made", so in the interest of clarity, EPA has substituted the word "filed" for "made" in the first sentence of § 22.28(a). To conform to the

agreement and final order pursuant to § 22.13(b).

EPA has revised paragraphs (b)(1) and (c)(1) to clarify when the public comment period begins and ends.

EPA has revised § 22.45(b)(2)(ii) and (v) to clarify that comments must be submitted to the Regional Hearing Clerk.

EPA has replaced the undefined word "action" in paragraphs (b)(2)(ii), (c)(1)(i), (c)(4)(v)(C), (c)(4)(vii) and (c)(4)(viii), with the word "proceeding," which today's rule defines as discussed above.

In § 22.45(b)(2)(iv), EPA has added the word "and" after the semi-colon.

EPA has edited § 22.45(c)(1)(iii) and (iv) to refer to commenters in the singular, for consistency with the other provisions of § 22.45.

EPA has also revised § 22.45(c)(4)(ii) to more clearly and succinctly state that a commenter may petition to set aside a consent agreement and proposed final order only on the basis that material evidence was not considered.

EPA has edited the proposed § 22.45(c)(4)(vii) to correct deficiencies in grammar.

U. Appendices

The information in Appendix A of the proposed CROP ("Appendix" in the 1980 CROP) is redundant with 40 CFR 1.7. For that reason, EPA has deleted Appendix A. This deletion should have no substantive effect. Section 22.5(c)(4) requires that the complaint include complainant's address, and the revised § 22.14(a)(7) requires that the complaint contain the address of the Regional Hearing Clerk, so respondents will have ample notice of the addresses relevant to their cases.

EPA has observed that the names and addresses of the lock box banks change often, and that it would be difficult to keep the proposed Appendix B up to date. EPA has decided to delete the proposed Appendix B, and instead to require under § 22.14(a)(8) that the complaint provide information on how to pay penalties.

IV. Administrative Requirements

A. The Regulatory Flexibility Act

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

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

B. Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

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

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

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

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

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

C. Paperwork Reduction Act

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

D. Unfunded Mandates Reform Act

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

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

E. Executive Order 12875

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to

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

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));

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

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

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

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

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

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

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

(6) The assessment of any administrative civil penalty under sections 309(g) and 311(b)(6) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6));

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

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

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

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

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

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

§ 22.2 Use of number and gender.

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

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

Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.

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

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

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

(3) Administer oaths and affirmations and take affidavits;

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

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

(6) Admit or exclude evidence;

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

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

(9) Issue subpoenas authorized by the Act; and

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

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

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

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

§ 22.5 Filing, service, 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 Regional Hearing Clerk when the proceeding is before the Presiding Officer, or filed with the Clerk of the Board when the proceeding is before the Environmental Appeals Board. A document is filed when it is received by the appropriate Clerk. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic filing, 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.* A copy of each document filed in the proceeding shall be served on the Presiding Officer or the Environmental Appeals Board, and on each party.

(1) *Service of complaint.* (i) Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail 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

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.

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

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 and Motion To Reopen a Hearing

§ 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,

file with the Environmental Appeals Board an original and one copy of a response brief responding to argument raised by the appellant, together with reference to the relevant portions of the record, initial decision, or opposing brief. Appellee shall simultaneously serve one copy of the response brief upon each party , non-party participant, and the Regional Hearing Clerk. Response briefs shall be limited to the scope of the appeal brief. Further briefs may be filed only with the permission of the Environmental Appeals Board.

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

(c) *Scope of appeal or review.* The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, 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 reasonable written notice of such determination to permit preparation of adequate argument. The Environmental Appeals Board may remand the case to the Presiding Officer for further proceedings.

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

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

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

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)). 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, the person to whom the order is to be issued shall be given written notice of the proposed issuance of the order. Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies this notice requirement.

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 [Reserved]

§ 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;

applicant a written notification stating the reasons for refusal within four months of the date on which the first request for reconsideration is received by the Examining Division. When the ending date for the four-month time period falls on a weekend or a Federal holiday, the ending day of the four-month period shall be extended to the next Federal work day. Failure by the Examining Division to send the written notification within the four-month period shall not result in registration of the applicant's work.

(c) *Second reconsideration.* Upon receiving written notification of the Examining Division's decision to refuse registration in response to the first request for reconsideration, an applicant may request that the Review Board reconsider the Examining Division's refusal to register, subject to the following requirements:

(1) An applicant must request in writing that the Review Board reconsider the Examining Division's decision to refuse registration. The second request for reconsideration must include the reasons the applicant believes registration was improperly refused, including any legal arguments in support of those reasons and any supplementary information, and must address the reasons stated by the Examining Division for refusing registration upon first reconsideration. The Board will base its decision on the applicant's written submissions.

(2) The fee set forth in § 201.3(d)(4) of this chapter must accompany the second request for reconsideration.

(3) The second request for reconsideration and the applicable fee must be received in the Copyright Office no later than three months from the date that appears in the Examining Division's written notice of its decision to refuse registration after the first request for reconsideration. When the ending date for the three-month time period falls on a weekend or a Federal holiday, the ending day of the three-month period shall be extended to the next Federal work day.

(4) If the Review Board decides to register an applicant's work in response to a second request for reconsideration, it will notify the applicant in writing of the decision and the work will be registered. If the Review Board upholds the refusal to register the work, it will send the applicant a written notification stating the reasons for refusal.

(d) *Submission of reconsiderations.* (1) All mail, including any that is hand delivered, should be addressed as follows: RECONSIDERATION, Copyright R&P Division, P.O. Box 71380, Washington, DC 20024–1380. If hand delivered by a commercial, non-government courier or messenger, a request for reconsideration must be delivered between 8:30 a.m. and 4 p.m. to: Congressional Courier Acceptance Site, located at Second and D Streets, NE., Washington, DC. If hand delivered by a private party, a request for reconsideration must be delivered between 8:30 a.m. and 5 p.m. to: Room 401 of the James Madison Memorial Building, located at 101 Independence Avenue, SE., Washington, DC.

(2) The first page of the written request must contain the Copyright Office control number and clearly indicate either "FIRST RECONSIDERATION" or "SECOND RECONSIDERATION," as appropriate, on the subject line.

(e) *Suspension or wavier of time requirements.* For any particular request for reconsideration, the provisions relating to the time requirements for submitting a request under this section may be suspended or waived, in whole or in part, by the Register of Copyrights upon a showing of good cause. Such suspension or waiver shall apply only to the request at issue and shall not be relevant with respect to any other request for reconsideration from that applicant or any other applicant.

(f) *Composition of the Review Board.* The Review Board shall consist of three members; the first two members are the Register of Copyrights and the General Counsel or their respective designees. The third member will be designated by the Register.

(g) *Final agency action.* A decision by the Review Board in response to a second request for reconsideration constitutes final agency action.

PART 211—MASK WORK PROTECTION

■ 3. The authority citation for part 211 continues to read as follows:

Authority: 17 U.S.C. 702 and 908.

■ 4. Add § 211.7 to read as follows:

§ 211.7 Reconsideration procedure for refusals to register.

The requirements prescribed in § 202.5 of this chapter for reconsideration of refusals to register copyright claims are applicable to requests to reconsider refusals to register mask works under 17 U.S.C. chapter 9, unless otherwise required by this part.

PART 212—PROTECTION OF VESSEL HULL DESIGNS

■ 5. The authority citation for part 212 continues to read as follows:

Authority: 17 U.S.C. chapter 13.

■ 6. Add § 212.7 to read as follows:

§ 212.7 Reconsideration procedure for refusals to register.

The requirements prescribed in § 202.5 of this chapter for reconsideration of refusals to register copyright claims are applicable to requests to reconsider refusals to register vessel hull designs under 17 U.S.C. chapter 13, unless otherwise required by this part.

Dated: December 3, 2004.

Marybeth Peters,

Register of Copyrights.

Approved by:

James H. Billington,

Librarian of Congress.

[FR Doc. 04–28396 Filed 12–27–04; 8:45 am]

BILLING CODE 1410–30–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR PART 22

[FRL–7855–6]

Clarification of Address for Documents Filed With EPA's Environmental Appeals Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is amending the regulations that pertain to filing appeals and other documents with the Environmental Appeals Board (EAB) under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (CROP). Specifically, EPA is amending two regulations that specify the addresses where notices of appeal, accompanying briefs, and other documents must be filed, to provide that any filings made through the U.S. mail service must be addressed to the EAB's mailing address, and that any filings made by hand-delivery or courier must be made to the EAB's hand-delivery address. The amendments are intended to make the regulations consistent with current Agency practice and to provide clear guidance on the proper address to use under various circumstances.

EFFECTIVE DATE: This final rule is effective on December 28, 2004.

FOR FURTHER INFORMATION CONTACT: Eurika Durr, Clerk of the Board. Telephone number: (202) 233–0122. E-mail: *Durr.Eurika@epa.gov.*

SUPPLEMENTARY INFORMATION: This action is directed to the public in

House of the Congress and to the Comptroller General of the United States. CRA section 808 provides that the issuing agency may make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. EPA has made such a good cause finding, including the reasons therefor, and has established the date of publication as the effective date. As stated previously, EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States, prior to publication of the rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 22

Environmental protection, Administrative practice and procedure, Courts.

Dated: December 20, 2004.

Richard McKeown,

Chief of Staff.

■ 40 CFR Part 22 is amended as follows:

■ 1. The authority citation for part 22 continues to read as follows:

Authority: 7 U.S.C. 136(l); 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.

■ 2. Section 22.5 is amended by adding a sentence after the second sentence in paragraph (a)(1) to read as follows:

§ 22.5 Filing, service, and form of all filed documents, business confidentiality claims.

(a) * * *

(1) * * * Documents filed in proceedings before the Environmental Appeals Board shall either be sent by U.S. mail (except by U.S. Express Mail) to the official mailing address of the Clerk of the Board set forth at § 22.3 or delivered by hand or courier (including deliveries by U.S. Postal Express or by a commercial delivery service) to Suite 600, 1341 G Street, NW., Washington, DC 20005. * * *

* * * * *

■ 3. Section 22.30 is amended by removing the first two sentences of paragraph (a)(1) and adding three new sentences in their place to read as follows:

§ 22.30 Appeal from or review of initial decision.

(a) * * *

(1) Within 30 days after the initial decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. Appeals sent by U.S. mail (except by U.S. Postal Express Mail) shall be addressed to the Environmental Appeals Board at its official mailing address: Clerk of the Board (Mail Code 1103B), United States Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Appeals delivered by hand or courier (including deliveries by U.S. Postal Express Mail or by a commercial delivery service) shall be delivered to Suite 600, 1341 G Street, NW., Washington, DC 20005. * * *

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[FR Doc. 04–28359 Filed 12–27–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R03–OAR–2004–DC–0003; FRL–7853–9]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; Excess Volatile Organic Compound and Nitrogen Oxides Emissions Fee Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the District of Columbia (District) State Implementation Plan (SIP) for ozone. The rule requires major stationary sources of volatile organic compounds (VOC) and nitrogen oxides (NO_X) in the District, which is part of the Metropolitan Washington DC Severe Ozone Nonattainment Area, to pay a fee to the District if the area fails to attain the one-hour national ambient air quality standard for ozone by November 15, 2005. The fee must be paid beginning in 2006, and in each calendar year thereafter, until the area is redesignated to attainment for the pollutant ozone. The District of Columbia submitted this rule on April 16, 2004, pursuant to the requirements of Section 110 of the Clean Air Act.

DATES: This rule is effective on February 28, 2005, without further notice, unless EPA receives adverse written comment by January 27, 2005. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID Number R03–OAR–2004–DC–0003 by one of the following methods:

A. Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

B. Agency Web site: *http://www.docket.epa.gov/rmepub/RME*, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

C. E-mail: *morris.makeba@epa.gov*.

D. Mail: R03–OAR–2004–DC–0003, Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

E. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to RME ID No. R03–OAR–2004–DC–0003. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.docket.epa.gov/rmepub/*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov or e-mail. The EPA RME and the Federal regulations.gov Web sites are an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your