

FILED

2012 SEP 20 PM 2:05

U.S. EPA. REGION IX  
REGIONAL HEARING CLERK

1 NANCY MARVEL  
2 Regional Counsel  
3 United States Environmental Protection Agency, Region 9

4 RICH CAMPBELL  
5 Assistant Regional Counsel  
6 United States Environmental Protection Agency, Region 9  
7 75 Hawthorne Street  
8 San Francisco, California 94105  
9 (415) 972-3870

10 Attorneys for Complainant

11 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
12 **REGION 9**

13 IN THE MATTER OF: ) DOCKET NO. UIC-09-2012-0003  
14 )

15 Shaka's Pahoia, LLC, Vernon Lindsay, and  
16 Noenoe Lindsay,

17 Pahoia, Hawaii,

18 Respondents.

19 **PROPOSED ADMINISTRATIVE ORDER**  
20 **FOR PENALTIES AND COMPLIANCE**  
21 **(Administrative Complaint)**

22 Proceedings under Section 1423(c) of the Safe  
23 Drinking Water Act, 42 U.S.C. § 300h-2(c).

24 **I. AUTHORITY**

25 1. The United States Environmental Protection Agency (EPA) issues this Proposed  
Administrative Order for Penalties and Compliance pursuant to the authority vested in the  
Administrator of EPA and properly delegated to the EPA Region 9 Director of the Water  
Division under Section 1423(c) of the Safe Drinking Water Act (Act), 42 U.S.C. § 300h-2(c).

The rules for this proceeding are the "Consolidated Rules of Practice Governing the  
Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of



1 Permits” (Rules of Practice), 40 Code of Federal Regulation (C.F.R.) Part 22, a copy of which is  
2 enclosed. *See, specifically* 40 C.F.R. § 22.1(a)(9). Pursuant to the Rules of Practice, 40 C.F.R. §  
3 22.13(a), this Proposed Order conforms to the prehearing procedures at 40 C.F.R. § 22.14  
4 governing administrative complaints and is herinafter referred to also as the “Complaint.” EPA  
5 alleges as follows:

## 6 **II. JURISDICTION**

7 2. The Regional Judicial Officer for EPA Region 9 is the Presiding Officer with  
8 jurisdiction over this action pursuant to the Rules of Practice, 40 C.F.R. Part 22, Subpart I, §§  
9 22.50(a)(2) and 22.51.

## 10 **III. STATUORY AND REGULATORY BACKGROUND**

11 3. To prevent underground injection which endangers drinking water sources, EPA has  
12 promulgated regulations pursuant to Part C of the Act, 42 U.S.C. §§ 300h – 300h-8, which  
13 establish minimum requirements for Underground Injection Control (UIC) programs. These UIC  
14 regulations are set forth in 40 C.F.R. Part 144.

15 4. The UIC regulations define “underground injection” to mean the subsurface emplacement  
16 of fluids by well injection. 42 U.S.C. § 300 h(d)(1), 40 C.F.R. § 144.3. “Well injection” is  
17 defined by 40 C.F.R. § 144.3 to mean the subsurface emplacement of fluids through a well. A  
18 “drywell” is a type of well, other than an improved sinkhole or subsurface fluid distribution  
19 system, completed above the water table so that its bottom and sides are typically dry except  
20 when receiving fluids. 40 C.F.R. § 144.3. A “cesspool” is a type of drywell that receives  
21 untreated sanitary waste containing human excreta, and which sometimes has an open bottom  
22 and/or perforated sides. 40 C.F.R. § 144.3. “Sanitary waste” is defined at 40 C.F.R. § 144.3 to  
23 include: “wastes collected from toilets, showers, wash basins, sinks used for cleaning domestic  
24 areas, sinks used for food preparation, clothes washing operations, and sinks or washing  
25 machines where food and beverage serving dishes, glasses and utensils are cleaned”.



1       5. The UIC regulations define “large capacity cesspools” to mean cesspools that receive  
2 sanitary waste from “multiple dwelling, community or regional cesspools, or other devices.” 40  
3 C.F.R. § 144.81(2). Large capacity cesspools do not include single family residential cesspools  
4 or non-residential cesspools which receive solely sanitary waste and have the capacity to serve  
5 fewer than 20 persons per day. *Id.*

6       6. The UIC regulations at 40 C.F.R. § 144.88 required owners or operators of existing large  
7 capacity cesspools to close them no later than April 5, 2005 in accordance with the closure  
8 specifications contained in 40 C.F.R. § 144.89.

9       7. EPA administers the UIC program in the State of Hawaii pursuant to section 1422(c) of  
10 the Act, 42 U.S.C. § 300h-1(c), and 40 C.F.R. § 147, Subpart M, § 147.601.

11       8. Pursuant to section 1423(c) of the Act, 42 U.S.C. § 300h-2(c), and 40 C.F.R. § 19.4, EPA  
12 may issue an administrative order against any person who violates the Act or any requirement of  
13 an applicable UIC program, and the administrative order may:

- 14           a. assess an administrative civil penalty of not more than \$11,000 for each day of  
15           each violation occurring before January 12, 2009, and not more than \$16,000 for  
16           each day of each violation occurring after January 12, 2009, up to a maximum  
17           penalty of \$177,500, or
- 18           b. require compliance with any UIC regulation or other requirement of the UIC  
19           Program, or
- 20           c. both assess an administrative civil penalty and require compliance with any UIC  
21           regulation or other requirement of the UIC Program.

22       9. Pursuant to section 1423 of the Act, 42 U.S.C. § 300h-2(c)(4)(B), EPA must take into  
23 account the following factors in assessing any civil penalty: (1) the seriousness of the violations;  
24 (2) the economic benefit resulting from the violations; (3) the history of such violations; (4) any  
25

1 good faith efforts to comply with the applicable requirements; (5) the economic impact of the  
2 penalty on the violator; and (6) such other matters as justice may require.

3 10. Pursuant to section 1445(a)(1)(A) of the Act, EPA may require any person who is subject  
4 to the requirements of the Act to submit information relating to such person's compliance with  
5 the requirements of the Act. 42 U.S.C. § 300j-4(a)(1)(A).

#### 6 **IV. FINDINGS OF VIOLATION**

7 11. Respondent Shaka's Pahoia LLC, is a domestic LLC, incorporated in the State of Hawaii.

8 12. Respondents Vernon Lindsay and Noenoe Lindsay are individuals and also Shaka's  
9 Pahoia LLC's primary corporate officers (member-managers) according to the Business  
10 Registration Division of Hawaii's Department of Commerce and Consumer Affairs (DCCA).  
11 Vernon Lindsay is Shaka's Pahoia LLC's registered corporate agent according to DCCA records.

12 13. Respondents are each a "person" within the meaning of section 1401(12) of the Act, 42  
13 U.S.C. § 300f(12), and 40 C.F.R. § 144.3.

14 14. Since at least July 13, 2007, and at all times relevant to this action, Shaka's Pahoia LLC  
15 has owned the real property at 15-2925/29 Pahoia Village Road, Pahoia, Hawaii, Tax Map Key  
16 (TMK) Number 3-1-5-12-043 (the Property).

#### 17 **Count 1**

#### 18 **Failure to Close the Large Capacity Cesspool 19 Serving the Pahoia Village Cafe.**

20 15. Complainant realleges and incorporates by reference the allegations of paragraphs 1  
21 through 14 above.

22 16. Since at least July 13, 2007, and at all times relevant to this action, Respondent Shaka's  
23 Pahoia LLC, and its member-managers, Respondents Vernon and Noenoe Lindsey, have owned  
24 and/or operated a cesspool (Cesspool No. 1) located on the Property.  
25

1 17. On September 14, 2010, EPA inspected the Property and determined Cesspool No. 1 was  
2 receiving sanitary waste, including human excreta, from the Pahoia Village Cafe, which is a 220-  
3 person capacity restaurant, bar, and music venue located on the Property.

4 18. Cesspool No. 1 is a "large capacity cesspool" as that term is defined at 40 C.F.R.  
5 § 144.81(2), because it receives sanitary waste, including human excreta, from the Pahoia Village  
6 Café, which is a non-residential facility that has the capacity to serve more than 20 persons per  
7 day.

8 19. On November 2, 2010, EPA notified Respondent Shaka's Pahoia LLC, care of  
9 Respondent Vernon Lindsay, that the continued operation of Cesspool No. 1 was prohibited by  
10 the Act's UIC program regulations at 40 C.F.R. § 144.88.

11 20. On April 29, 2012, Respondents' engineer submitted a cesspool closure and conversion  
12 plan (Plan) to the State of Hawaii's Department of Health (DOH) to close Cesspool No. 1 and  
13 convert it to an individual wastewater system. Respondents have not yet submitted proof of  
14 closure of Cesspool No. 1.

15 21. Respondents' failure to close Cesspool No. 1 since July 13, 2007 is a continuing violation  
16 of the Act and of the UIC Program regulations at 40 C.F.R. § 144.88, which required the closure  
17 of all large capacity cesspools by April 5, 2005.

18 **Count 2**  
19 **(Failure to Close the Large Capacity Cesspool**  
20 **Serving the Apartment Complex)**

21 22. Complainant realleges and incorporates by reference the allegations of paragraphs 1  
22 through 21 above.

23 23. Since at least July 13, 2007, and at all times relevant to this action, Respondent Shaka's  
24 Pahoia LLC, and its member-managers, Respondents Vernon and Noenoe Lindsey, have owned  
25 and/or operated a second cesspool (Cesspool No. 2) located within a non-exclusive sanitary  
easement over and across a parcel of land (TMK 1-5-12-41) located adjacent to the Property,

1 which easement runs with the Property in perpetuity pursuant to a grant of easement made to the  
2 previous owner of the Property on November 14, 1983 (Hawaii Bureau of Conveyances No.  
3 17460705).

4 24. Cesspool No. 2 receives sanitary waste from a two-unit apartment building (Apartments)  
5 located adjacent to the Pahoia Village Cafe on Respondents' Property.

6 25. Cesspool No. 2 is a "large capacity cesspool" as that term is defined at 40 C.F.R.  
7 § 144.81(2), because it receives sanitary waste from the Apartments, which are multiple  
8 dwellings.

9 26. To the best of EPA's knowledge, Respondents have not closed Cesspool 2, or submitted  
10 plans to do so.

11 27. Respondents' failure to close Cesspool No. 2 since July 13, 2007 is a continuing  
12 violation of the Act and of the UIC Program regulations at 40 C.F.R. § 144.88, which required  
13 the closure of all large capacity cesspools by April 5, 2005.

14 **V. RELIEF SOUGHT: PROPOSED ORDER FOR**  
15 **PENALTIES AND COMPLIANCE**

16 28. Pursuant to Section 1423(c)(3) of the Act, 42 U.S.C. § 300h-2(c)(3), EPA requests that  
17 the Presiding Officer issue the following Proposed Order in this matter assessing both an  
18 administrative penalty and requiring compliance with the UIC Program's large capacity cesspool  
19 closure requirements.

20 A. **Proposed Administrative Civil Penalty**

21 29. Pursuant to Section 1423(c) of the Act, 42 U.S.C. § 300h-2(c), and 40 C.F.R. § 19.4,  
22 Respondents shall pay an administrative penalty of *up to* one hundred and seventy-seven  
23 thousand five hundred dollars (**\$177,500.00**), for Respondents' failure to comply with the UIC  
24 regulations at 40 C.F.R. Part 144.  
25

1       30. The proposed penalty amount is based upon the foregoing facts and findings and after  
2 taking into consideration the factors set forth in Section 1423(c)(4) of the Act: (1) the seriousness  
3 of the violations; (2) the economic benefit resulting from the violations; (3) any history of such  
4 violations; (4) any good faith efforts to comply with the applicable requirements; (5) the  
5 economic impact of the penalty on Respondents; and (6) such other matters as justice may  
6 require.

7       31. As provided in 40 C.F.R. Section 22.14(a)(4), the following is a brief explanation of  
8 the severity of Respondents' violation: Respondents violated a crucial provision of the UIC  
9 program by owning and/or operating two large capacity cesspools, Cesspools Nos. 1 and 2, since  
10 July 13, 2007, when Respondents purchased the Property, up to the present day. Thus,  
11 Respondents' have owned and/or operated Cesspools Nos. 1 and 2 well past the April 5, 2005  
12 deadline for closure of all large capacity cesspools clearly set forth in the UIC regulations at 40  
13 C.F.R. § 144.88. The Act's UIC Program regulations at 40 C.F.R. § 144.88 required closure of  
14 all large capacity cesspools by April 5, 2005 to assure the safety of the country's drinking water  
15 sources by preventing direct contamination of identified water supplies and minimizing the risk  
16 that any potential drinking water sources be contaminated. 64 Fed. Reg 66546 (Dec. 7, 1999). In  
17 promulgating the large capacity cesspool closure requirement, EPA found large capacity  
18 cesspools have a high potential to contaminate underground sources of drinking water and to  
19 threaten human health because:

- 20           a. sanitary waste entering large capacity cesspools can percolate out the bottom of  
21           the well to shallow groundwater sources of drinking water;
- 22           b. large capacity cesspools are not designed to treat sanitary waste;
- 23           c. wastewater from large capacity cesspools frequently exceed drinking water health  
24           standards for nitrates, total suspended solids, and coliform bacteria;
- 25

- 1 d. wastewater from large capacity cesspools may contain other constituents of  
2 concern such as phosphates, chlorides, grease, viruses, and chemicals used to  
3 clean cesspools (e.g., trichloroethane and methylene chloride);  
4 e. areas that rely on cesspools are in general more likely to rely on groundwater for  
5 their drinking water supplies; and  
6 f. pathogens in untreated sanitary waste released from large capacity cesspools  
7 could pose an acute health risk (i.e. a person could become ill by taking one drink  
8 from an affected drinking water supply). *Id.* at 68553.

9 32. Within 30 days of the effective date of a Final Order, Respondents shall pay the penalty  
10 in accordance with any acceptable method of payment listed in the attached "EPA Region 9  
11 Collection Information," which is incorporated by reference as part of this Complaint.

12 33. Concurrent with payment of any penalty, Respondents shall provide written notice of  
13 payment, referencing the title and docket number of this case, via certified mail, to:

14 Bryan K. Goodwin  
15 Regional Hearing Clerk  
16 Office of Regional Counsel (ORC-1)  
17 U.S. EPA, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Emmanuelle Rapicavoli  
Groundwater Office (WTR-9)  
Water Division  
U.S. EPA, Region 9  
75 Hawthorne Street  
San Francisco, Ca 94105

18 B. Compliance with the UIC Program

19 34. Pursuant to Section 1423(c)(1) of the Act, 42 U.S.C. § 300h-2(c)(1), Respondents shall:

- 20 a. Properly close Cesspools Nos. 1 and 2 in accordance with 40 C.F.R. § 144.89(a)  
21 and all other applicable requirements, including the DOH closure, conversion,  
22 and/or replacement requirements for large capacity cesspools, no later than **60**  
23 **days** after the effective date of the Final Order. If Respondents install new  
24 Individual Wastewater Systems ("IWSs"), then installation and operation of the  
25 IWSs shall comply with DOH's requirements.

1           b. Submit to EPA either: (i) a copy of each of the Backfill Closure Reports for  
2           Cesspools Nos. 1 and 2, or (ii) DOH's approval to use the IWSs. In any event,  
3           Respondents must submit to EPA a copy of the DOH approval to operate the  
4           IWSs within 10 days of receipt. Documents shall be sent to Emmanuelle  
5           Rapicavoli at EPA at the address specified in paragraph 33 above, and shall  
6           include the following signed certification made in accordance with 40 C.F.R. §  
7           144.32(b) and (d):

8           *I certify under penalty of law that this document and all attachments were*  
9           *prepared under my direction or supervision in accordance with a system*  
10           *designed to assure that qualified personnel properly gather and evaluate*  
11           *the information submitted. Based on my inquiry of the person or persons*  
12           *who manage the system, or those persons directly responsible for*  
13           *gathering the information, the information submitted is, to the best of my*  
14           *knowledge and belief, true, accurate, and complete. I am aware that there*  
15           *are significant penalties for submitting false information, including the*  
16           *possibility of fine and imprisonment for knowing violations.*

17           C.    Proposed Terms and Conditions of Proposed Order

18           35. The Proposed Order's provisions shall apply to and be binding upon Respondents, their  
19           officers, directors, agents, successors, and assigns. Respondents shall give notice and a copy of  
20           this Proposed Order to any successor-in-interest prior to transfer of ownership of the Property,  
21           Apartments, or the Pahoia Village Cafe. Such transfer, however, shall have no effect on  
22           Respondents' obligation to comply with this Proposed Order. Action or inaction of any persons,  
23           firms, contractors, employees, agents, or corporations acting under, through, or for Respondents  
24           shall not excuse Respondents' failure to perform their obligations under this Proposed Order.

25           36. This Proposed Order does not constitute a waiver, suspension, or modification of the  
          requirements of any federal, state, or local statute, regulation, or condition of any permit issued  
          thereunder, including the requirements of the Act and accompanying regulations. Issuance of this  
          Proposed Order is not an election by EPA to forgo any civil or any criminal action otherwise  
          authorized under the Act.

1 37. Notwithstanding compliance with the terms of this Proposed Order, EPA is not precluded  
2 from taking any action authorized by law including, but not limited to, the issuance of additional  
3 administrative orders, and/or the initiation of judicial actions, against Respondents. EPA  
4 expressly reserves the right to enforce this Proposed Order through appropriate proceedings.

5 38. Violation of any term of this Proposed Order, or failure or refusal to comply with this  
6 Proposed Order, may subject Respondents to additional enforcement action pursuant to section  
7 1423(b), 42 U.S.C. § 300h-2(b), and/or section 1423(c)(7), 42 U.S.C. § 300h-2(c)(7) of the Act.

8 39. Pursuant to section 1423(c)(3)(D) of the Act, 42 U.S.C. § 300h-2(c)(3)(D), a Final Order  
9 in this matter will become effective 30 days following its issuance unless an appeal to a United  
10 States District Court is taken pursuant to section 1423(c)(6) of the Act, 42 U.S.C. § 300h-2(c)(6).

11 **VII. ANSWERING THE COMPLAINT AND REQUESTING A HEARING ON**  
12 **THE PROPOSED ORDER FOR PENALTIES AND COMPLIANCE**

13 A. Answer to the Complaint

14 40. If Respondents intend to contest any material fact upon which the Complaint is based, or  
15 wishes to contend that the Proposed Order for Penalties and Compliance is inappropriate, or that  
16 Respondents are entitled to judgment as a matter of law, then the Rules of Practice at 40 C.F.R. §  
17 22.15(a) require that Respondents file an original and one copy of a written Answer with EPA  
18 Region 9's Regional Hearing Clerk within 30 days after service of this Complaint and Proposed  
19 Order at the address below:

20 Bryan K. Goodwin  
21 Regional Hearing Clerk  
22 U.S. Environmental Protection Agency, Region 9  
23 75 Hawthorne Street (mail code: ORC-1)  
24 San Francisco, CA 94105

25 41. The Rules of Practice at 40 C.F.R. § 22.15(a) also require that Respondents serve an  
additional copy of the Answer on EPA to the following person who is authorized to receive  
service related to this proceeding:

1 Rich Campbell  
2 Office of Regional Counsel  
3 U.S. Environmental Protection Agency, Region 9  
4 75 Hawthorne Street (mail code: ORC-2)  
5 San Francisco, CA 94105  
6 Phone: (415) 972-3870

7 42. In accordance with 40 C.F.R. § 22.15(b), the contents of the Answer must clearly and  
8 directly admit, deny, or explain each of the factual allegations contained in the Complaint with  
9 regard to which Respondents have any knowledge. Where Respondents have no knowledge of a  
10 particular factual allegation and so state in their Answer, the allegation is deemed denied. Under  
11 40 C.F.R. Section 22.15(d), Respondents' failure to admit, deny or explain any material factual  
12 allegation contained in this Complaint constitutes an admission of the allegation. The Answer  
13 must also, in accordance with 40 C.F.R. § 22.15(b), state: (1) The circumstances or arguments  
14 that are alleged to constitute the grounds of any defense; (2) the facts that Respondents dispute;  
15 (3) the basis for opposing the proposed relief; and (4) whether a hearing is requested.

16 **B. Request for a Hearing**

17 43. In accordance with section 1423(c)(3)(A) of the Act, 42 U.S.C. § 300h-2(c)(3)(A), EPA  
18 gives Respondents this written notice of EPA's Proposed Order for Penalties and Compliance  
19 and of the opportunity to request a hearing upon the issues raised by the Complaint and Answer,  
20 and on the appropriateness of the Proposed Order for Penalties and Compliance. As provided  
21 under 40 C.F.R. Section 22.15(c), if Respondents wish to request such a hearing, they must  
22 include the request in their Answer. Such hearing shall not be subject to Section 554 or 556 of  
23 the Administrative Procedures Act, 5 U.S.C. §§ 554 and 556, but shall provide a reasonable  
24 opportunity to be heard and to present evidence. If a hearing is requested, Subpart I of the Rules  
25 of Practice, 40 C.F.R. Part 22, governs and sets forth the procedures of such hearing.

44. Respondents' failure to affirmatively raise in the Answer facts that constitute or might

1 constitute grounds for their defense may preclude Respondents from raising such facts and/or  
2 from having such facts admitted into evidence at a hearing.

3 C. Default

4 45. To avoid the Presiding Officer's entry of a default order pursuant to 40 C.F.R. § 22.17(a)  
5 for compliance and a penalty up to \$177,500, Respondents must file a written Answer with the  
6 Regional Hearing Clerk in the manner described above.

7 46. Any penalty assessed in a default order will become due and payable by Respondents  
8 without further proceedings 30 days after the default order becomes final. 40 C.F.R. § 22.17(d).  
9 Similarly, any compliance required under a default order shall be effective and enforceable  
10 without further proceedings on the date the default order becomes final. Id. If necessary, EPA  
11 may then seek to enforce such Final Order of Default against Respondents, and seek compliance  
12 and collect the assessed penalty amount, which may be up to \$177,500, in federal court.

13 VIII. REQUESTING AN INFORMAL SETTLEMENT CONFERENCE

14 47. In accordance with 40 C.F.R. § 22.18(b), whether or not Respondents request a  
15 hearing, Respondents may request an informal settlement conference to discuss the facts of this  
16 case, the proposed penalty and compliance order, and settlement. To request such a settlement  
17 conference, please contact:

18 Rich Campbell  
19 Office of Regional Counsel  
20 U.S. Environmental Protection Agency, Region 9  
21 75 Hawthorne Street (mail code: ORC-2)  
22 San Francisco, CA 94105  
23 (415) 972-3870

24 48. A request for an informal settlement conference constitutes neither an admission nor a  
25 denial of any of the matters alleged herein. EPA does not deem a request for an informal  
settlement conference to be a request for a hearing as specified in 40 C.F.R. § 22.15(c), or as  
provided for by Section 1423(c)(3)(A) of the Act, 42 U.S.C. § 300h-2(c)(3)(A).

1 49. Settlement discussions do not affect Respondents' obligation to file a timely Answer to  
2 the Complaint. 40 C.F.R. §§ 22.15 and 22.18(b)(1). EPA will not modify its proposed penalty  
3 and compliance order simply because an informal settlement conference is held.

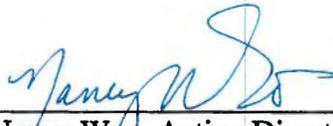
4 50. The terms and conditions of any settlement that may be reached as a result of a settlement  
5 conference will be recorded in a written Consent Agreement signed by all parties. 40 C.F.R. §  
6 22.18(b)(2). To conclude the proceeding, EPA will execute a Final Order ratifying the parties'  
7 Consent Agreement. 40 C.F.R. § 22.18(b)(3). In accepting the Consent Agreement, Respondents  
8 would waive any right to contest the allegations herein and waive any right to appeal the Final  
9 Order accompanying the Consent Agreement. 40 C.F.R. § 22.18(b)(2).

10 51. Respondents' entering into a Consent Agreement would not extinguish, waive, satisfy, or  
11 otherwise affect Respondents' obligation to comply with all applicable statutory and regulatory  
12 requirements and legal orders.

13 IX. Appearances

14 52. In accordance with 40 C.F.R. § 22.10, any party may appear in person or by counsel or  
15 other representative. A partner may appear on behalf of a partnership and an officer may appear  
16 on behalf of a corporation. Persons who appear as counsel or other representatives must conform  
17 to the standards of conduct and ethics required of practitioners before the courts of the United  
18 States.

19 Dated this 14 day of September, 2012

20   
21 \_\_\_\_\_  
22 Nancy Woo, Acting Director  
23 Water Division  
24  
25

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the forgoing COMPLAINT AND PROPOSED ADMINISTRATIVE  
3 ORDER WITH ADMINISTRATIVE CIVIL PENALTY in the matter of Shaka's Pahoia LLC,  
4 and Vernon and Noenoe Lindsay and, Docket No. UIC- 09-2012-003, was HAND-  
DELIVERED to the following persons, in the manner specified, on the date specified:

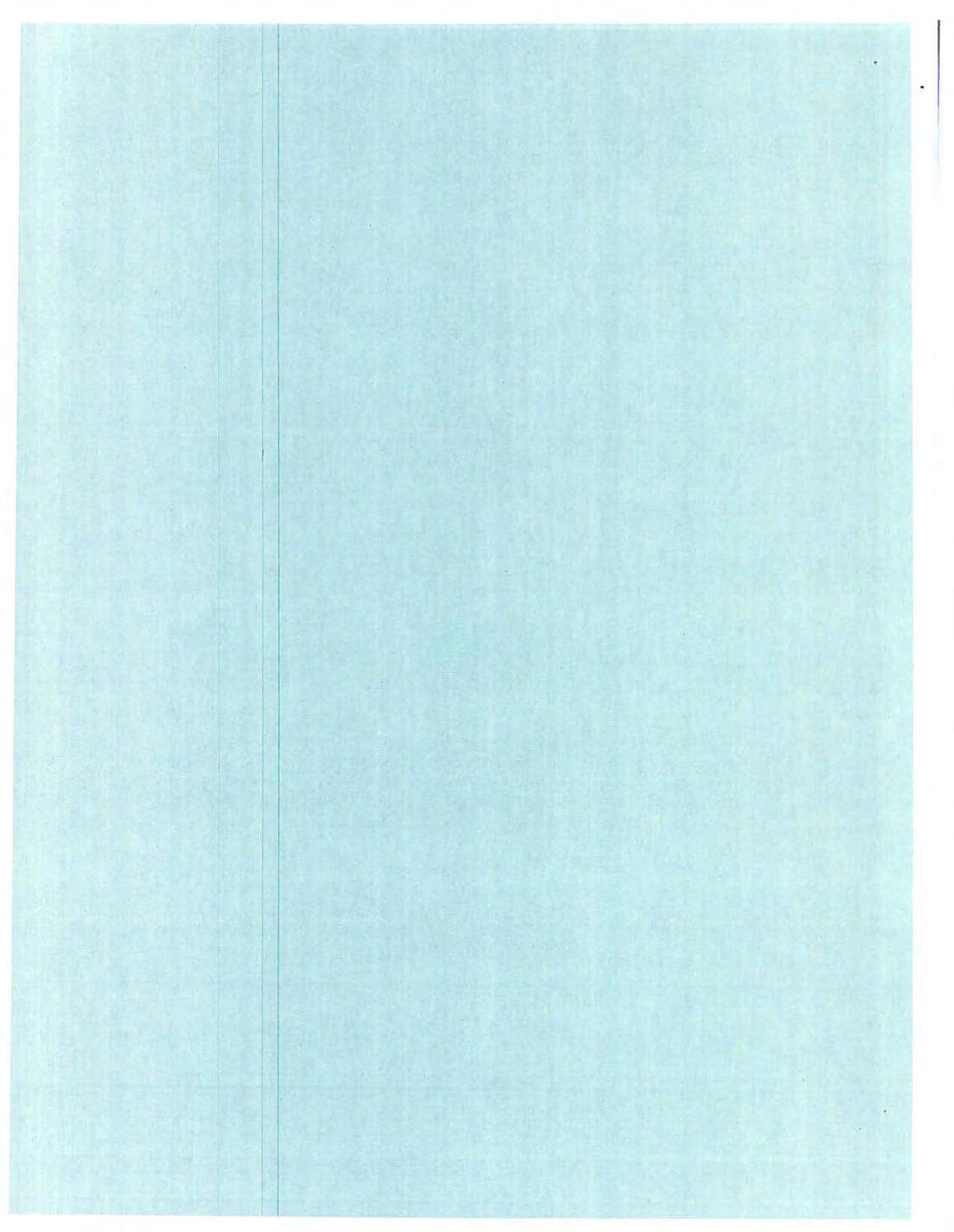
5 Original and one copy  
6 VIA HAND-DELIVERY: Regional Hearing Clerk (ORC-1)  
U.S. Environmental Protection Agency, Region 9  
7 75 Hawthorne Street  
San Francisco, CA 94105

8 Copy VIA HAND-DELIVERY  
9 (VIA PROCESS SERVER): Vernon and Noenoe Lindsay and  
Shaka's Pahoia LLC  
10 310 Muliwai Drive  
11 Wailuku, Hawaii 96793

12  
13  
14 Dated at San Francisco, California: 9-14-2012

15  
16   
17 \_\_\_\_\_  
Emmanuelle Rapicavoli  
18 Water Division  
U.S. EPA, Region 9  
19  
20  
21  
22  
23  
24  
25





## Environmental Protection Agency

## § 23.2

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

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

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

### § 22.51 Presiding Officer.

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

### § 22.52 Information exchange and discovery.

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

## PART 23—JUDICIAL REVIEW UNDER EPA—ADMINISTERED STATUTES

### Sec.

#### 23.1 Definitions.

#### 23.2 Timing of Administrator's action under Clean Water Act.

23.3 Timing of Administrator's action under Clean Air Act.

23.4 Timing of Administrator's action under Resource Conservation and Recovery Act.

23.5 Timing of Administrator's action under Toxic Substances Control Act.

23.6 Timing of Administrator's action under Federal Insecticide, Fungicide and Rodenticide Act.

23.7 Timing of Administrator's action under Safe Drinking Water Act.

23.8 Timing of Administrator's action under Uranium Mill Tailings Radiation Control Act of 1978.

23.9 Timing of Administrator's action under the Atomic Energy Act.

23.10 Timing of Administrator's action under the Federal Food, Drug, and Cosmetic Act.

23.11 Holidays.

23.12 Filing notice of judicial review.

*AUTHORITY:* Clean Water Act, 33 U.S.C. 1361(a), 1369(b); Clean Air Act, 42 U.S.C. 7601(a)(1), 7607(b); Resource, Conservation and Recovery Act, 42 U.S.C. 6912(a), 6976; Toxic Substances Control Act, 15 U.S.C. 2618; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136n(b), 136w(a); Safe Drinking Water Act, 42 U.S.C. 300j-7(a)(2), 300j-9(a); Atomic Energy Act, 42 U.S.C. 2201, 2239; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 371(a), 346a, 348; 28 U.S.C. 2112(a), 2343, 2344.

SOURCE: 50 FR 7270, Feb. 21, 1985, unless otherwise noted.

### § 23.1 Definitions.

As used in this part, the term:

(a) *Federal Register document* means a document intended for publication in the Federal Register and bearing in its heading an identification code including the letters *FRL*.

(b) *Administrator* means the Administrator or any official exercising authority delegated by the Administrator.

(c) *General Counsel* means the General Counsel of EPA or any official exercising authority delegated by the General Counsel.

[50 FR 7270, Feb. 21, 1985, as amended at 53 FR 29322, Aug. 3, 1988]

### § 23.2 Timing of Administrator's action under Clean Water Act.

Unless the Administrator otherwise explicitly provides in a particular promulgation or approval action, the time and date of the Administrator's action

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

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

(iii) Within 15 days of receipt of a petition, the complainant may, with notice to the Regional Administrator or Environmental Appeals Board and to the commenter, withdraw the consent agreement and proposed final order to consider the matters raised in the petition. If the complainant does not give notice of withdrawal within 15 days of receipt of the petition, the Regional Administrator or Environmental Appeals Board shall assign a Petition Officer to consider and rule on the petition. The Petition Officer shall be another Presiding Officer, not otherwise involved in the case. Notice of this assignment shall be sent to the parties, and to the Presiding Officer.

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

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

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

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

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

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

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

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

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

(C) Provide public notice of the order.

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

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

§§ 22.46-22.49 [Reserved]

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

##### **§ 22.50 Scope of this subpart.**

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

**§ 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.

**§ 22.42**

**40 CFR Ch. I (7-1-01 Edition)**

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

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

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

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty against a federal agency under section 1447(b) of the Safe Drinking Water Act, 42 U.S.C. 300j-6(b). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Effective date of final penalty order.* Any penalty order issued pursuant to this section and section 1447(b) of the Safe Drinking Water Act shall become effective 30 days after it has been served on the parties.

(c) *Public notice of final penalty order.* Upon the issuance of a final penalty order under this section, the Administrator shall provide public notice of the order by publication, and by providing notice to any person who requests such notice. The notice shall include:

(1) The docket number of the order;

(2) The address and phone number of the Regional Hearing Clerk from whom a copy of the order may be obtained;

(3) The location of the facility where violations were found;

(4) A description of the violations;

(5) The penalty that was assessed; and

(6) A notice that any interested person may, within 30 days of the date the order becomes final, obtain judicial review of the penalty order pursuant to section 1447(b) of the Safe Drinking Water Act, and instruction that persons seeking judicial review shall provide copies of any appeal to the persons described in 40 CFR 135.11(a).

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

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

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

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

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

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

[65 FR 30904, May 15, 2000]

**§ 22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.**

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32 and § 22.45, in administrative proceedings for the assessment of any civil penalty under section 309(g) or section 311(b)(6) of the Clean Water Act ("CWA") (33 U.S.C. 1319(g) and 1321(b)(6)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Consultation with States.* For proceedings pursuant to section 309(g), the complainant shall provide the State agency with the most direct authority over the matters at issue in the case an opportunity to consult with the complainant. Complainant shall notify the State agency within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty.

(c) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the CWA, 33 U.S.C. 1369(b)(1), shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under section 309(g) or section 311(b)(6).

**§ 22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.**

(a) *Scope.* This section shall apply, in conjunction with §§ 22.10 through 22.32, in administrative proceedings for the assessment of any civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Judicial review.* Any person who requested a hearing with respect to a Class II civil penalty under section 109(b) of CERCLA, 42 U.S.C. 9609(b), and

who is the recipient of a final order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia or for any other circuit in which such person resides or transacts business. Any person who requested a hearing with respect to a Class I civil penalty under section 109(a)(4) of CERCLA, 42 U.S.C. 9609(a)(4), and who is the recipient of a final order assessing the civil penalty may file a petition for judicial review of such order with the appropriate district court of the United States. All petitions must be filed within 30 days of the date the order making the assessment was served on the parties.

(c) *Payment of civil penalty assessed.* Payment of civil penalties assessed in the final order shall be made by forwarding a cashier's check, payable to the "EPA, Hazardous Substances Superfund," in the amount assessed, and noting the case title and docket number, to the appropriate regional Superfund Lockbox Depository.

**§ 22.40 [Reserved]**

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 207 of the Toxic Substances Control Act ("TSCA") (15 U.S.C. 2647). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Collection of civil penalty.* Any civil penalty collected under TSCA section 207 shall be used by the local educational agency for purposes of complying with Title II of TSCA. Any portion of a civil penalty remaining unspent after a local educational agency achieves compliance shall be deposited into the Asbestos Trust Fund established under section 5 of AHERA.

## § 22.32

(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.

## 40 CFR Ch. I (7-1-01 Edition)

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1361(a)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

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

### § 22.36 [Reserved]

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

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings under sections 3005(d) and (e), 3008, 9003 and 9006 of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and (e), 6928, 6991b and 6991e) ("SWDA"). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Corrective action and compliance orders.* A complaint may contain a compliance order issued under section 3008(a) or section 9006(a), or a corrective action order issued under section 3008(h) or section 9003(h)(4) of the SWDA. Any such order shall automatically become a final order unless, no later than 30 days after the order is served, the respondent requests a hearing pursuant to § 22.15.

(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 equi-

table 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.

**§ 22.30**

**40 CFR Ch. I (7-1-01 Edition)**

Appeals Board shall file a motion within 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the Environmental Appeals Board for review, and stating briefly the grounds for the appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may recommend any order or ruling for review by the Environmental Appeals Board when:

(1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and

(2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

(c) *Interlocutory review.* If the Presiding Officer has recommended review and the Environmental Appeals Board determines that interlocutory review is inappropriate, or takes no action within 30 days of the Presiding Officer's recommendation, the appeal is dismissed. When the Presiding Officer declines to recommend review of an order or ruling, it may be reviewed by the Environmental Appeals Board only upon appeal from the initial decision, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be filed within 10 days of service of an order of the Presiding Officer refusing to recommend such order or ruling for interlocutory review.

**§ 22.30 Appeal from or review of initial decision.**

(a) *Notice of appeal.* (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 (Clerk of the Board (Mail Code 1103B), United States Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Hand deliveries may be made at Suite 500, 607 14th Street, NW.). One copy of any document filed with the Clerk of the Board

shall also be served on the Regional Hearing Clerk. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants. The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal on any issue within 20 days after the date on which the first notice of appeal was served.

(2) Within 20 days of service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or non-party participant may file with the Environmental Appeals Board an original and one copy of a response brief responding to 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.

conclusions regarding all material issues of law or discretion, as well as reasons therefor, and, if appropriate, a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward copies of the initial decision to the Environmental Appeals Board and the Assistant Administrator for the Office of Enforcement and Compliance Assurance.

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

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

- (1) A party moves to reopen the hearing;
- (2) A party appeals the initial decision to the Environmental Appeals Board;
- (3) A party moves to set aside a default order that constitutes an initial decision; or
- (4) The Environmental Appeals Board elects to review the initial decision on its own initiative.

(d) *Exhaustion of administrative remedies.* Where a respondent fails to appeal an initial decision to the Environmental Appeals Board pursuant to

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

#### § 22.28 Motion to reopen a hearing.

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

(b) *Disposition of motion to reopen a hearing.* Within 15 days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties a response. A reopened hearing shall be governed by the applicable sections of these Consolidated Rules of Practice. The filing of a motion to reopen a hearing shall automatically stay the running of the time periods for an initial decision becoming final under § 22.27(c) and for appeal under § 22.30. These time periods shall begin again in full when the motion is denied or an amended initial decision is served.

### Subpart F—Appeals and Administrative Review

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

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

## § 22.23

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.

## 40 CFR Ch. I (7-1-01 Edition)

### § 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,

(b) *Notice of hearing.* The Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact. The Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing not later than 30 days prior to the date set for the hearing. The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.

(c) *Postponement of hearing.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) *Location of the hearing.* The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under § 22.19(d).

#### § 22.22 Evidence.

(a) *General.* (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible. If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

(2) In the presentation, admission, disposition, and use of oral and written evidence, EPA officers, employees and authorized representatives shall preserve the confidentiality of information claimed confidential, whether or not the claim is made by a party to the proceeding, unless disclosure is authorized pursuant to 40 CFR part 2. A busi-

ness 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

## § 22.20

(4) The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act. The Presiding Officer may issue a subpoena for discovery purposes only in accordance with paragraph (e)(1) of this section and upon an additional showing of the grounds and necessity therefor. Subpoenas shall be served in accordance with §22.5(b)(1). Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Any fees shall be paid by the party at whose request the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(5) Nothing in this paragraph (e) shall limit a party's right to request admissions or stipulations, a respondent's right to request Agency records under the Federal Freedom of Information Act, 5 U.S.C. 552, or EPA's authority under any applicable law to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information.

(f) *Supplementing prior exchanges.* A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

(g) *Failure to exchange information.* Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

(1) Infer that the information would be adverse to the party failing to provide it;

(2) Exclude the information from evidence; or

(3) Issue a default order under §22.17(c).

## 40 CFR Ch. I (7-1-01 Edition)

### § 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

### Subpart D—Hearing Procedures

#### § 22.21 Assignment of Presiding Officer; scheduling the hearing.

(a) *Assignment of Presiding Officer.* When an answer is filed, the Regional Hearing Clerk shall forward a copy of the complaint, the answer, and any other documents filed in the proceeding to the Chief Administrative Law Judge who shall serve as Presiding Officer or assign another Administrative Law Judge as Presiding Officer. The Presiding Officer shall then obtain the case file from the Chief Administrative Law Judge and notify the parties of his assignment.

## Environmental Protection Agency

## § 22.19

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

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

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

(b) *Prehearing conference.* The Presiding Officer, at any time before the hearing begins, may direct the parties and their counsel or other representatives to participate in a conference to consider:

- (1) Settlement of the case;
- (2) Simplification of issues and stipulation of facts not in dispute;
- (3) The necessity or desirability of amendments to pleadings;
- (4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;
- (5) The limitation of the number of expert or other witnesses;
- (6) The time and place for the hearing; and
- (7) Any other matters which may expedite the disposition of the proceeding.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer. The Presiding Officer shall ensure that the record of the proceeding includes

any stipulations, agreements, rulings or orders made during the conference.

(d) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, DC, unless the Presiding Officer determines that there is good cause to hold it at another location or by telephone.

(e) *Other discovery.* (1) After the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if it:

(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

(ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

(2) Settlement positions and information regarding their development (such as penalty calculations for purposes of settlement based upon Agency settlement policies) shall not be discoverable.

(3) The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this section and upon an additional finding that:

(i) The information sought cannot reasonably be obtained by alternative methods of discovery; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

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:

(1) 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

right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

(d) *Payment of penalty; effective date of compliance or corrective action orders, and Permit Actions.* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c). Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under § 22.27(c). Any Permit Action ordered in the default order shall become effective without further proceedings on the date that the default order becomes final under § 22.27(c).

**§ 22.18 Quick resolution; settlement; alternative dispute resolution.**

(a) *Quick resolution.* (1) A respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific

proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed. This paragraph (a) shall not apply to any complaint which seeks a compliance or corrective action order or Permit Action. In a proceeding subject to the public comment provisions of § 22.45, this quick resolution is not available until 10 days after the close of the comment period.

(2) Any respondent who wishes to resolve a proceeding by paying the proposed penalty instead of filing an answer, but who needs additional time to pay the penalty, may file a written statement with the Regional Hearing Clerk within 30 days after receiving the complaint stating that the respondent agrees to pay the proposed penalty in accordance with paragraph (a)(1) of this section. The written statement need not contain any response to, or admission of, the allegations in the complaint. Within 60 days after receiving the complaint, the respondent shall pay the full amount of the proposed penalty. Failure to make such payment within 60 days of receipt of the complaint may subject the respondent to default pursuant to § 22.17.

(3) Upon receipt of payment in full, the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, shall issue a final order. Payment by respondent shall constitute a waiver of respondent's rights to contest the allegations and to appeal the final order.

(b) *Settlement.* (1) The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The parties may engage in settlement discussions whether or not the respondent requests a hearing. Settlement discussions shall not affect the respondent's obligation to file a timely answer under § 22.15.

(2) *Consent agreement.* Any and all terms and conditions of a settlement shall be recorded in a written consent agreement signed by all parties or their representatives. The consent

## § 22.16

original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

(b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested.

(c) *Request for a hearing.* A hearing upon the issues raised by the complaint and answer may be held if requested by respondent in its answer. If the respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

(d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

(e) *Amendment of the answer.* The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

## § 22.16 Motions.

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

- (1) Be in writing;
- (2) State the grounds therefor, with particularity;
- (3) Set forth the relief sought; and

## 40 CFR Ch. I (7-1-01 Edition)

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

(b) *Response to motions.* A party's response to any written motion must be filed within 15 days after service of such motion. The movant's reply to any written response must be filed within 10 days after service of such response and shall be limited to issues raised in the response. The Presiding Officer or the Environmental Appeals Board may set a shorter or longer time for response or reply, or make other orders concerning the disposition of motions. The response or reply shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Any party who fails to respond within the designated period waives any objection to the granting of the motion.

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

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

## § 22.17 Default.

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. Default by complainant constitutes a waiver of complainant's

engaged in otherwise separate proceedings. Proceedings subject to subpart I of this part may be consolidated only upon the approval of all parties. Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part shall not apply to the consolidated proceeding.

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

### Subpart C—Prehearing Procedures

#### § 22.13 Commencement of a proceeding.

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

(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to § 22.18(b)(2) and (3).

#### § 22.14 Complaint.

(a) *Content of complaint.* Each complaint shall include:

(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;

(2) Specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated;

(3) A concise statement of the factual basis for each violation alleged;

(4) A description of all relief sought, including one or more of the following:

(i) The amount of the civil penalty which is proposed to be assessed, and a brief explanation of the proposed penalty;

(ii) Where a specific penalty demand is not made, the number of violations (where applicable, days of violation) for which a penalty is sought, a brief

explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint;

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

(iv) A request for a compliance or corrective action order and a statement of the terms and conditions thereof;

(5) Notice of respondent's right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of any proposed penalty, compliance or corrective action order, or Permit Action;

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

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

(8) Instructions for paying penalties, if applicable.

(b) *Rules of practice.* A copy of these Consolidated Rules of Practice shall accompany each complaint served.

(c) *Amendment of the complaint.* The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer. Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.

(d) *Withdrawal of the complaint.* The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer.

#### § 22.15 Answer to the complaint.

(a) *General.* Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an

on any decision in the proceeding, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication. The requirements of this section shall not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to § 22.18(b)(3).

**§ 22.9 Examination of documents filed.**

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

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

**Subpart B—Parties and Appearances**

**§ 22.10 Appearances.**

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

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

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

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

**§ 22.12 Consolidation and severance.**

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

## Environmental Protection Agency

## § 22.8

confidential shall be filed with the Regional Hearing Clerk:

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

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

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

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

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

All rulings, orders, decisions, and other documents issued by the Regional Administrator or Presiding Officer shall be filed with the Regional Hearing Clerk. All such documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Board. Copies of such rulings, orders, decisions or other documents shall be served personally, by first class mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), by EPA's internal mail, or any reliable commer-

cial delivery service, upon all parties by the Clerk of the Environmental Appeals Board, the Office of Administrative Law Judges or the Regional Hearing Clerk, as appropriate.

### § 22.7 Computation and extension of time.

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

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

(c) *Service by mail or commercial delivery service.* Service of the complaint is complete when the return receipt is signed. Service of all other documents is complete upon mailing or when placed in the custody of a reliable commercial delivery service. Where a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document.

### § 22.8 Ex parte discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials

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

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

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

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

(2) *Service of filed documents other than the complaint, rulings, orders, and decisions.* All filed documents other than the complaint, rulings, orders, and decisions shall be served personally, by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), or by any reliable commercial delivery service. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic service, subject to any appropriate conditions and limitations.

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

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

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

(4) The first document filed by any person shall contain the name, 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 and any changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (b)(2) of this section and § 22.6.

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

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

(2) Two versions of any document which contains information claimed

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.

to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate §22.8. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or motions filed in matters that the Environmental Appeals Board has referred to the Administrator.

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

(b) *Regional Judicial Officer.* Each Regional Administrator shall delegate to one or more Regional Judicial Officers authority to act as Presiding Officer in proceedings under subpart I of this part, and to act as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice to which subpart I of this part does not apply. The Regional Administrator may also delegate to one or more Regional Judicial Officers the authority to approve settlement of proceedings, pursuant to §22.18(b)(3). These delegations will not prevent a Regional Judicial Officer from referring any motion or case to the Regional Administrator. A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or another Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer. A Regional Judicial Officer shall not

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

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

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

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

(3) Administer oaths and affirmations and take affidavits;

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

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

(6) Admit or exclude evidence;

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

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

(9) Issue subpoenas authorized by the Act; and

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

(d) *Disqualification, withdrawal and re-assignment.* (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

## Environmental Protection Agency

## § 22.4

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

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

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

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

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

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

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

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

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

*Regional Administrator* means, for a case initiated in an EPA Regional Office, the Regional Administrator for that Region or any officer or employee

thereof to whom his authority is duly delegated.

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

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

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

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

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000]

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

(a) *Environmental Appeals Board.* (1) The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice; acts as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters; and approves settlement of proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters. The Environmental Appeals Board may refer any case or motion to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and references to the Environmental Appeals Board in these Consolidated Rules of Practice shall be interpreted as referring to the Administrator. If a case or motion is referred

(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.

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000]

#### § 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, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

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

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

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

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

*Consolidated Rules of Practice* means the regulations in this part.

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

*Final order* means:

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

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

## Environmental Protection Agency

## § 22.1

### Subpart F—Appeals and Administrative Review

- 22.29 Appeal from or review of interlocutory orders or rulings.
- 22.30 Appeal from or review of initial decision.

### Subpart G—Final Order

- 22.31 Final order.
- 22.32 Motion to reconsider a final order.

### Subpart H—Supplemental Rules

- 22.33 [Reserved]
- 22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.
- 22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.
- 22.36 [Reserved]
- 22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.
- 22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.
- 22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.
- 22.40 [Reserved]
- 22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substance Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).
- 22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.
- 22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.
- 22.44 Supplemental rules of practice governing the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act.
- 22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(i) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.
- 22.46–22.49 [Reserved]

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

- 22.50 Scope of this subpart.
- 22.51 Presiding Officer.
- 22.52 Information exchange and discovery.

**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.

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

### Subpart A—General

#### § 22.1 Scope of this part.

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

(1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136l(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) The issuance of a compliance order or the issuance of a corrective action order, the termination of a permit pursuant to section 3008(a)(3), the suspension or revocation of authority to operate pursuant to section 3005(e), or the assessment of any civil penalty under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6925(d), 6925(e), 6928, 6991e, and 6992d), except as provided in part 24 of this chapter;

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

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

## §21.13

approve or disapprove the State issued statement, in accordance with the requirements of §21.5.

(2) The Regional Administrator will periodically review State program performance. In the event of State program deficiencies the Regional Administrator will notify the State of such deficiencies.

(3) During that period that any State's program is classified as deficient, statements issued by a State shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with §21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator, after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in §21.12(a).

(g) Funds appropriated under section 106 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

### §21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

## 40 CFR Ch. I (7-1-01 Edition)

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

#### Subpart A—General

##### Sec.

- 22.1 Scope of this part.
- 22.2 Use of number and gender.
- 22.3 Definitions.
- 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.
- 22.5 Filing, service, and form of all filed documents; business confidentiality claims.
- 22.6 Filing and service of rulings, orders and decisions.
- 22.7 Computation and extension of time.
- 22.8 Ex parte discussion of proceeding.
- 22.9 Examination of documents filed.

#### Subpart B—Parties and Appearances

- 22.10 Appearances.
- 22.11 Intervention and non-party briefs.
- 22.12 Consolidation and severance.

#### Subpart C—Prehearing Procedures

- 22.13 Commencement of a proceeding.
- 22.14 Complaint.
- 22.15 Answer to the complaint.
- 22.16 Motions.
- 22.17 Default.
- 22.18 Quick resolution; settlement; alternative dispute resolution.
- 22.19 Prehearing information exchange; prehearing conference; other discovery.
- 22.20 Accelerated decision; decision to dismiss.

#### Subpart D—Hearing Procedures

- 22.21 Assignment of Presiding Officer; scheduling the hearing.
- 22.22 Evidence.
- 22.23 Objections and offers of proof.
- 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.
- 22.25 Filing the transcript.
- 22.26 Proposed findings, conclusions, and order.

#### Subpart E—Initial Decision and Motion to Reopen a Hearing

- 22.27 Initial decision.
- 22.28 Motion to reopen a hearing.